AN INTERNATIONAL TRADE TRIBUNAL — A STEP FORWARD SHORT OF SURRENDER OF SOVEREIGNTY*

SIGMUND TIMBERG†

I.

Most current proposals for international organization stress the need for international legislative assemblies, an international executive organ, and the surrender of some portion of national sovereign power to those bodies. This article concerns itself with the third element of the customary international trinity—an international judicial tribunal; with the pacificatory and justice-molding potentialities of such a body taken by itself; and with a consequent realistic application of the concept of national sovereignty. This limitation in approach is no wise to be taken as a disparagement of the world government, accompanied by needful grants of sovereign authority, which it is hoped will eventually emerge to keep the international community at peace and in the ways of justice. It represents rather an effort to anticipate acrimonious disputes by encouraging the presentation and settlement of more mildly controversial ones, to forestall occasions for large scale military aggression by smoothing over prevenient minor economic and psychological irritations, and to test the feasibility of an international law that will inch its way as an accretion of small but continuous verdicts rather than attempt instantaneous coverage of a wider terrain in the form of large principles.

In short, an institution that would preserve the peace must feature

---

*This article was written while the author was on the staff of the Foreign Economic Administration. However, it is a personal expression of views and does not represent the viewpoint either of that agency or of the Department of Justice, with which the author is currently associated.

preventive and distributive, rather than punitive, justice. Like other organs of primitive and undeveloped law, such an institution will have to be conducted largely along pragmatic and nonjural lines, e.g., it will be concerned with substituting ritualistic, formal, but peaceful conflicts for the physical violence that would otherwise overtake international society. The tribunal should not, however, degenerate into a mere mechanism for revising the status quo, based on the relative power and aggressiveness of disputant nations, and should be in a position to rely on a permanent body of law and precedents rather than on unanchored and abstract notions of justice and equity. While the basic logical premises of international peace and order are not identical with those of international justice, they do overlap and the hope of the future lies in their gradual coalescence and common acceptance. Whatever “equity” is to be applied by an international tribunal should be in close contact with settled law—a type of “accessory equity” rather than the dictates of conscience, morality, or discretion.2

An international trade tribunal that will serve to remove the numerous restrictions that have burdened international trade, prevent unfair and discriminatory competitive practices in international commerce, and give substance to the equal access to raw materials clause of the Atlantic Charter, would go far toward satisfying the criteria that have just been suggested. More specifically, such a tribunal would have some or all of the following objectives—

(a) The elimination or modification of import quotas, exchange controls, tariffs, and other restrictive governmental devices having a tendency to impair the volume and peaceful conduct of international trade.

(b) The elimination of discriminatory and unfair competitive practices in international trade.

(c) The removal of unreasonable and restrictive production and distribution policies in international trade.

2This appears to be a danger in too much stressing of “revision” as a goal, and a broad gauged International Equity Tribunal as an appropriate mechanism, of international law. Cf. Kunz, The Law of Nations, Static and Dynamic (1933) 27 Am. J. Int. L. 630; Strupp, Legal Machinery for Peaceful Change (1937) passim.

3See Strupp, op. cit. supra note 1, at 12; Orfield, Equity as a Concept of International Law (1930) 18 Ky. L. J. 116, 126 et seq. “In international law it would seem that equity may include the ideas of analogy, interpretation, reasonable modification of treaties, and reasonableness in general as to the application of both customary and treaty law.” Orfield, supra, at 128.
(d) The removal of unwarranted interferences with free access to raw materials and manufactured products, markets, industrial techniques, etc.

(e) The enforcement of international agreements applicable to the protection of industrial property.

(f) The enforcement of specific international commercial policies, e.g., equal treatment with regard to communications, freedom of the air, equal access to fisheries, etc.

The backward status of international tribunals and their lack of business is largely due to the absence of a definitive law for them to apply. There is prevalent, in international commercial and financial fields, a distrust or a dislike of particular systems of local law, as well as a strong leaning for a uniform commercial law. These feelings have led either to the improvisation of private sanctions having no recourse to any system of public legal control at all, or to a choice of law foreign and unrelated to that of any forum which might be considered to have a legitimate contact with the economic and business situation involved. That situation, in turn, results in an impairment of the sovereignty of national States that in its practical consequences goes far beyond the implications of adherence to a supra-national legislative body. Viewed from this standpoint, an international trade tribunal is a method of

---


4See Brown, Private versus Public International Law (1942) 36 Am. J. Int'l L. 448; Kellor, supra note 3, at 222. Such dislike or distrust takes the form either of regarding the legal systems of backward commercial areas such as China or Egypt as unsuiting those areas for the conduct of industrial or investment operations, or of evading the laws and public policy of jurisdictions which attempt to regulate private transactions in their own conception of what constitutes the public interest, e.g., the United States and its antitrust laws.


8Speaking of international cartels, Payson Wild has said: "... some of the more powerful cartels are little empires in themselves, and ... their decisions are often more important than those of 'sovereign, political' entities like Holland, Denmark or Portugal." Sanctions of International Commodity Agreements (1936) 30 Am. J. Int'l L. 664, 665. An illuminating analysis of the extent to which the public interest is ignored or flouted by means of private arbitration agreements is supplied by Dr. Kronstein in the article cited in the preceding footnote.
conserving national sovereignty, not of diluting it. To make this measure of conservation workable, however, involves a demolition of the artificial conceptual barriers obtaining between the "Law of Nations" and "Private International Law," as well as a realistic appreciation of the necessity and the implications of regarding individuals as being, both in a legal and functional sense, the subjects of international law.7

A short résumé of the way in which some of these issues have been treated since 1918 may perhaps afford a clearer insight into the need for such a tribunal and the nature of the powers that should be conferred on it.

II.

The notion that humanity's hopes for peaceful international organization depend largely on the promotion of free commercial intercourse has a long history. For example, in 1623 Emeric Cruce suggested the formation of a world union of states which would be dedicated to the expansion of international trade, and would keep the peace through a system of negotiation and arbitration.8 Jeremy Bentham, in 1789, urged that tariff barriers, bounties, and colonies be abolished. Reproachfully he said:

"All trade is in its essence advantageous even to that party to whom it is least so. All war is in its essence ruinous; and yet the great employments of government are to treasure up occasions for war, and to put fetters on trade."9

Another British utilitarian, John Stuart Mill, said:

"... It is commerce which is rapidly rendering war obsolete ... and it may be said without exaggeration that the great extent and rapid increase of international trade, in being the principal guarantee of the peace of the world, is the great permanent security for the uninterrupted progress of the ideas, the institutions and the character of the human race."10

There has been a fashionable tendency, particularly on the part of German philosophers, to decry both Bentham and Mill as mere exponents of the British shopkeeper mentality,11 but a war-torn world may

7 See page 394 infra.
8 SCHUMAN, INTERNATIONAL POLITICS (3d ed. 1941) 199, 202.
9 BENTHAM, PRINCIPLES OF INTERNATIONAL LAW (1843) 546-554.
10 MILL, PRINCIPLES OF POLITICAL ECONOMY (Ashley ed. 1920) 582.
11 See SOMBART, HANDLER UND HELDEN (1915) passim; ARMSTRONG, THUS SPEAKS GERMANY (1941) 153-6, 159, 160, 163-4, 168-9, 171; MARX, DAS KAPITAL (Mod. Lib. ed. 1936) 668 (whose criticism of the utilitarians, it should in all fairness be stated, was directed to their psychological and logical presuppositions, rather than to their good intentions).
well prefer even the shopkeeper's servility to the warrior prowess so highly esteemed in the German tradition. And speaking purely from the standpoint of peace, the logically hesitant approach of British utilitarianism and American pragmatism, both united in the ethical proposition that institutions must minister to the needs and happiness of men, is greatly superior to the terrifying absolutism and arrogance of German idealistic philosophy. In more recent times high tariffs and other governmental regulations of trade have been recognized as one of the principal dangers to international peace, and freedom of commercial intercourse has been asserted to be an obligation of international law.

The third of President Wilson's Fourteen Points, in January 1918, had called for the removal, so far as possible, of "all economic barriers and the establishment of an equality of trade conditions," and the American Delegation to the Paris Peace Conference originally pressed for such a provision. This broad promise, however, was whittled down to the carefully qualified language of Article 23(e) of the League of Nations Covenant. Under that provision, the League members, subject to reservations, agreed to "make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all members of the League." Attenuated as this provision was, there appear to be only two court cases bearing on its application and none in which it was enforced. In an advisory opinion handed down by the Permanent Court of International Justice, Lithuania was held not obliged to open up to Poland a sector of a railway line, even though the line in question was the only one of Lithuania's railroad lines which was of economic importance to Poland. In another case (which, it may

12 Veblen, Imperial Germany and the Industrial Revolution (1942) passim.
13 Hans Vaihinger, in 1925, said: "An unjustified optimism (if I do not go so far as Schopenhauer in calling it a 'criminal optimism') had for a long time been leading German policy astray in the direction of improvidence, rashness and arrogance. A rational pessimism might have saved us from the horrors of a world-war. World-philosophy and practical politics have a closer connection than is generally realized." The Philosophy of 'As If' (1925) xxxix.
14 Lauterpacht, The Function of Law in the International Community (1933) 304-5, 367; Ralston, International Arbitration from Athens to Locarno (1929) 125.
15 2 Miller, The Drafting of the Covenant (1928) 16.
be noted, arose under a special convention and not under Article 23 (e) ) the Belgian Government had agreed to reimburse a Belgian transport concern under its supervision for losses resulting from reductions in charges that had been ordered by the Government, but had failed to reimburse the concern’s foreign competitors for similar losses suffered by them. This failure was held not to be an inequality or discrimination incompatible with freedom of trade, on the ground that other Belgian companies not under its supervision also had not been reimbursed. This sparse and negative judicial record seems to indicate that the “legislative” developments set forth in the succeeding paragraphs were not as substantial as they might at first blush appear.

Under Article 23(e), economic, financial, and transit and communications committees were set up. The most productive work of these committees was in the field of transportation (from which air and sea navigation were excluded). With respect to international traffic in transit, a Barcelona Convention of 1921 provided that no distinction should be made which was based on the nationality of the persons or vessels concerned, the place of origin, departure, or destination of the vessel, or the ownership of the goods or vessels; and that no arbitrary dues were to be levied. In the case of navigable waterways, no distinctions were to be made between the property of nationals of riparian and non-riparian States; no exclusive rights of navigation were to be granted; dues had to be reasonable and were to cover only the expenses of maintaining and improving the navigability of the waterway. Another convention, which came into force in 1924 and was widely ratified, attempted to simplify and eliminate excessive, arbitrary or unjust customs formalities, and facilitate the passage of goods and travellers’ luggage through customs. In the convention concerning international railroads, the subscribing States agreed to afford reasonable facilities to all and to refrain from discrimination; uniform tariffs were to apply to passengers and baggage; private rebates were forbidden, etc. Several countries entered into conventions dealing with veterinary questions.

---


18 The organization for communications and transit held three general conferences, at Barcelona in 1921, and at Geneva in 1923 and 1927. It consists of seven permanent subcommittees. For a quick survey of its accomplishments, see the chapter by Hostie, Communications and Transit in WORLD ORGANIZATION ( a symposium of the Institute on World Organization, 1941) 158-188. See also 1 Oppenheim, International Law (4th ed. 1928) 795.
While a body of regulations analogous to that developed during the early expansion of the federal interstate commerce power was thus developing in the field of international transportation, efforts by the League to implement the more important part of Article 23(e)—that calling for the equitable treatment of commerce in general—were unsuccessful. The economic committee, it is true, had some slight success in promoting commercial arbitration, uniform laws governing bills of exchange, promissory notes and cheques, and the elimination of double taxation. The League, however, signally failed to achieve what its experts consistently realized was its most urgent program—the abolition of prohibitions and quantitative restrictions on trade; the suppression of economic warfare among nations (involving such practices as governmental subsidization of exports and alleged “health” regulations that were in effect commercial embargoes); the stabilization of tariff rates; and the conclusion of long-term commercial treaties, involving, at the least, most-favored-nations treatment. This failure has been frequently stated by competent economists to be one of the main reasons for the world collapse of 1929 and the economic crisis that led to the present war, and it is to be hoped that mechanisms such as the one herein advocated will prevent recurrence of such conditions.

Frustration likewise characterized efforts to cope with what on the surface appears to be an independent and potent source of international friction—the charge by various “have-not” nations that they lacked access to raw materials. As far back as 1920, an international office for the distribution of fuel, ores, and other raw materials had been proposed in quarters as diverse in basic social viewpoint as the International Miners Congress of the International Labor Office, and Walther Rathenau, head of the German General Electric Company and German Raw Materials Administrator during the war. At the Paris Peace Confer-

19For a summary of the major recommendations advanced at the economic conferences which took place at Brussels in 1920, Genoa in 1922, Geneva in 1927, and London in 1933, together with the interim national and regional action implementing those recommendations, see Commercial Policy in the Inter-War Period: International Proposals and National Policies (League of Nations, 1942). The recommendations set forth in the Genoa conference of 1922, id. at 22, have remained substantially unaltered as the program of the League’s experts.

20Trade Relations between Free-Market and Controlled Economies (League of Nations, 1943) 65 et seq. For an excellent summary of the bad effects of exchange controls, import quota systems, and other varieties of governmental regulation of foreign trade, see id. at 85.

21Staley, Raw Materials in Peace and War (1937) 197.
ence, Italy, one of the leading “have-nots,” submitted the following statement: “The international distribution of the foodstuffs and raw materials required to sustain healthy conditions of life and industry must be controlled in such a way as to secure to every country whatever is indispensable to it in this respect.”22 At Italy’s request, the League made futile inquiries into the problem in 1921-22 and in 1927.23 In order to ward off German and Italian armed expansionism (in 1935 Italy attacked Ethiopia), Sir Samuel Hoare in 1935, and Anthony Eden in 1936, suggested that the problem be studied.24 A committee appointed by the League in 1937 established that colonies were not indispensable sources of raw materials, since only three per cent of the commercially important raw materials was produced in colonies.25 More significantly, however, like all the general economic conferences of the League, it located the roots of the world’s economic troubles in export and import prohibitions and duties, discrimination against foreigners, and the activities of international cartels—economic conditions which kept nations like Germany and Italy from exploiting their theoretically adequate access to raw materials. It concluded that the only permanent solution of this problem was to be found in the “restoration of international exchanges on the widest basis,”26 thereby identifying this grievance with that dealt with in the preceding paragraph.

By that time, however, access to raw materials was part of the battle cry and armament programs of the totalitarian countries,27 and the failure to establish free international trade had provided fertile background for the irrational but emotionally popular slogans of Lebensraum and the Greater Asia Co-Prosperity Sphere, achievable only by military con-

25 Id. at 1234.
26 This was pointed out by the Soviet member of the committee, who stated that raw materials were being used by certain states for aggressive and warlike purposes; that obstacles to access to raw materials were due to the armament policies and aggressive acts of such states; and that credits supplied by way of financial assistance should not be used for purposes detrimental to peace.
quest. An international trade tribunal might serve in the future as a safety-valve to validate justifiable economic grievances that any country might have and to ventilate their probably far more numerous and spurious propagandistic ones.

Resort to raw material sanctions after an act of military aggression is doomed to failure, for it ignores a protracted background of emotional and political tension that is only aggravated by the attempted sanction. There is justification for Professor Borchard's contention that the sanctions machinery relied on prior to this war did not work because it did not ameliorate grievances but prevented their consideration. Furthermore, it requires a comprehensive coverage of nations and commodities which, because of diplomatic and technological factors, is unattainable in practice. On the other hand, a tribunal that was authorized to allocate raw materials in peace time would be an instrumentality of distributive justice to the extent that such allocations were equitable, and an instrumentality of preventive justice, in that it would deprive sabre-rattling nations of materials constituting the physical backbone of war. It would also act as an agency of distributive justice in eliminating the economic discriminations, fancied and real, that form the mental climate leading to war. The support of the United Nations, which control seventy-five per cent of total world mineral production, would put such a trade tribunal in a most favorable position to execute these peace-making policies.

III.

An international trade tribunal finds current justification not only as a method of dealing with the Axis powers, but also as a positive aid to the achievement of economic policies considered vital by the United Nations in the international sphere. Let us, for example, take two foreign programs which have commanded bi-partisan support in the United States—the trade agreements program and the international commodity agreements program. The tribunal not only could help test and advance those programs but could cope with policies pursued by other powers that tend to bring such programs to naught.

29INTERNATIONAL SANCTIONS (Royal Inst. of Int. Affairs, 1938) 39, 47, 198; COHN, NEO-NEUTRALITY (1939) 29.
30LEITH, FURNESS, AND LEWIS, WORLD MINERALS AND WORLD PEACE (1943) 200.
31Id. at 52.
The Hull reciprocal trade agreement program is founded on the notion of bringing forth the maximum stimulation of international trade. Since restrictive trade practices, whether pursued by private organizations or by national governments, have admittedly the opposite tendency, a body with jurisdiction to terminate or mitigate such practices would advance that program. Likewise, the wheat, cotton, and other international commodity agreements sponsored by the Federal Government to protect the producers of those staples are based on the assumption that agricultural products are subject to more extreme price fluctuations than forest, mineral, or manufactured products; and that governmental intervention is needed in order to put agricultural producers, who lack organized bargaining strength because of their individual small size and large numbers, in a position of price parity with those of other commodities. If producers of non-agricultural commodities are allowed to engage in restrictive practices which have the effect of raising their prices, the desired improvement in the status of agricultural producers becomes dissipated.

It has been said that private international cartels have a tendency to run counter to the course of governmentally-negotiated trade agreements; and that they tend to be substitutes or supplements for government controls over trade. This has served in part as a basis for the suggestion that an international trade tribunal be given the power to

---

32In the original Trade Agreements Act, 48 Stat. 943 (1934), 19 U. S. C. § 1351 et seq. (1940), Congress authorized the President to suspend the Act's application to any country which discriminated against American commerce or engaged in other acts tending to defeat the purpose of the Act. The recently adopted extension of the Act includes, among such interdicted acts, the "operation of international cartels." See 57 Stat. 125 (1943), 19 U. S. C. § 1351 et seq. (Supp. 1945), and Hearings before Committee on Ways and Means on H. J. Res. 111, 78th Cong., 1st Sess. (1943) 191, 468, 505, 609, 615, 626 (referred to in subsequent footnotes as Trade Agreement Hearings).

33See Resolution XXV of the Final Act of the United Nations Conference on Food and Agriculture, Hot Springs, Va., (1943); Dietrich, World Trade (1939) 366. The domestic American counterpart of this policy is to be found in the "parity price" provisions of the agricultural legislation upheld in United States v. Rock Royal Co-operative, 307 U. S. 533 (1939).

34Report on International Trade (Political and Economic Planning, 1937) 94. Private cartel negotiations are frequently the real basis of subsequent governmentally-imposed quota arrangements. Governments have supported cartel policies by their manipulation of tariff duties and other trade barriers. See Condliffe, Reconstruction of World Trade (1940) 216, 286.
register and approve cartel agreements, in order that consumers might be adequately represented, prices kept from becoming too high, etc.\(^5\)

However, the official American position in favor of the outright abolition of international cartels,\(^37\) concording as it does with the strong antagonism towards such cartels that prevails in lay American circles,\(^38\) would seem definitely to foreclose such a supervisory jurisdiction as running counter to our basic policies and interests.

\(^{50}\)Bingham, The United States of Europe (1940) 226; Staley, War and the Private Investor (1935) 502. See also note 45 infra.

The French delegation to the League of Nations in 1931 had asked for official governmental support of international industrial agreements for nine major industrial groups. See League of Nations Official Journal (Spec. Supp. 95, 1931) 25. A similar favorable attitude towards international cartels, provided they are regulated in the public interest and afford adequate representation to consumers, had been taken by the economic experts of the League in 1926 and 1931, as well as individual statesmen like Edouard Herriot, Walther Rathenau, and Salvador de Madariaga. See Commercial Policy in the Inter-War Period: International Proposals and National Policies (League of Nations, 1942) 59; Bingham, op. cit. supra at 10; Report on International Trade (Political and Economic Planning, 1937) 97. A similar American attitude towards cartels is to be found in de Hans, Economic Peace Through Private Agreements (1944) 22 Harv. Bus. Rev. 139; McClellan, Rule of Cartels in Modern Economy (1944), 20 For. Policy Rep. 179.

\(^{50}\)See letter of President Roosevelt, N. Y. Times, Sept. 9, 1944, p. 1, col. 2; letter of Secretary Hull, id. Sept. 14, 1944, p. 10, col. 2. Cf. also various proposals for domestic infra-national regulation of international cartels, such as S. 1476, 78th Cong., 1st Sess. (1943), introduced by Senator O'Mahoney, which provides for the registration with the Attorney General of all copies of cartel contracts containing limitations on production, sale, or prices, divisions of the field, license and assignment of patents, etc. See §§ 4 (e) and (f) of his earlier bill, S. 2438, 77th Cong., 2d sess. (1942). See also Final Report and Recommendations of the Temporary National Economic Committee's Investigation of Concentration of Economic Power, Sen. Doc. No. 35, 77th Cong., 1st Sess. (1941) 32; Senator O'Mahoney's statement to the Special Committee on Post-War Economic Policy and Planning, Sen. Doc. No. 106, 78th Cong., 1st Sess. (1943) 26, 131; H. R. 3786, 78th Cong., 1st Sess. (1943), introduced by Rep. Voorhis.

\(^{50}\)See Cartels and National Security, Sen. Subcom. Rep. No. 4, 78th Cong., 2d Sess. (Subcom. on War Mobilization of Military Affairs Com., Nov. 13, 1944). A most forceful exponent of this antagonism is Eric Johnston, President of the U. S. Chamber of Commerce. See Life, Oct. 25, 1943, at 105; Wall Street Journal, Sept. 7, 1943. More comprehensive statements of the basis for this antagonism are to be found in Borkin and Welsh, Germany's Master Plan (1943); Arnold, Bottlenecks of Business (1940); Berge, Cartels: Challenge to a Free World (1944); Edwards, Economic and Political Aspects of International Cartels (a study for the Subcommittee on War Mobilization of the Senate Military Affairs Committee, 1944). For an English view strongly reminiscent of antitrust strictures in this country, see Herbert Morrison, as reported in The Economist, July 31, 1943. For an expression of dissatisfaction with some of the excesses of international cartels, but an acceptance of their inevitability in the field of foreign trade, see Perkins, Cartels: What Shall We Do with Them, Harpers Magazine (Nov. 1944) 570.
A nation supporting a free trade policy like the United States finds considerable difficulty in dealing with the controlled economies and restrictive trade policies of other countries. Restrictive trade practices benefit only some producers, and then frequently only for the short run; thus, for example, retaliation is usually provoked and consumers drop out of the market or turn to substitutes. Price-fixing and production and distribution allocations also tend to run counter to the interests of consumers. American manufacturers, for example, have lodged vehement protests against high price policies pursued by the international rubber and tin committees; American industrial and agricultural producers have frequently been aggrieved by subsidized agriculture abroad and by foreign-imposed limitations on exports from the United States.

If a nation as economically self-sufficient as the United States has had occasion to voice diplomatic protests at restrictions placed by other countries on its imports and exports, can it not be inferred that the other United Nations, whose economies are so much more dependent on international trade, are all the more interested in the freedom of that trade?

In their official declarations, the United Nations seem to recognize the desirability of removing the international trade restrictions and friction, towards which the International Trade Tribunal will be directed. Thus, for example, Article 4 of the Atlantic Charter promises "the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world," and Article 5 expresses the desire of the United Nations for the fullest collaboration among all nations in the economic field. The mutual aid Lend-Lease agreements provide for "the elimination of all forms of discriminatory treatment in international commerce and the reduction of tariffs and other trade barriers." Resolutions II and III of the Final Act of the Third Meeting of the Ministers of Foreign Affairs of the American Republics and the Inter-American Judicial Committee have

[For a technical account, see Trade Relations Between Free-Market and Controlled Economies (League of Nations, 1943) passim.
44Leith, Furness, and Lewis, World Minerals and World Resources (1943) 119.
45Trade Agreement Hearings, supra note 32, at 191, 787; Condliffe, Reconstruction of World Trade (1940) 339; Leith, Furness, and Lewis, op. cit. supra note 40, at 116.
46See Dietrich, World Trade (1939) 98; Lauterpacht, The Function of Law in the International Community (1933) 305, n. 1.
47For a general discussion of the background of this clause and the promise it holds, see Lee, Access to Raw Materials, Editorial Research Reports, No. 21, June 5, 1942, at 365 et seq.; Istel, "Equal Access" to Raw Materials (1942) 20 For. Affairs 450.]
struck a similar note.\textsuperscript{44} It is therefore only to be expected that, in this war as in the last, American and British writers have proposed the creation of international commissions to help achieve these policies.\textsuperscript{45} These proposals, however, contain little more than the suggestion that such commissions be established, with vague and partial indications of functions, and do not probe the delicate economic, legal, and administrative issues involved.

IV.

Thus far, this article has dealt with the disruptive economic tendencies the regulation of which should be the major function of an international trade tribunal, and has given some idea of that body's possible jurisdiction. It is now in order to inquire why ideas and principles which seem to have had such general acceptance in theory have not worked out better in practice. The jaundiced political complexion of the world is only one explanation. An equally germane answer is that the principles have thus far not been associated with an agency or procedure that could put them into effective operation.\textsuperscript{46} The remainder of this

\textsuperscript{44}The Inter-American Judicial Committee, under the head of "Limitation of Economic Nationalism," has called for free competition and the lowering of tariff barriers. See Hajo \textit{and Holborn, War and Peace Aims of the United Nations} (1943) 590.

\textsuperscript{45}Huston Thompson, Chairman of the Federal Trade Commission during the last war, only a few years ago repeated his suggestion of an international trade commission to hear complaints of "unfair trade practices" in international trade. See Thompson, \textit{An International Trade Tribunal} in \textit{Proceedings, 34th Annual Meeting of American Soc. of Int. Law} (1940) 1.


For more recent proposals see \textit{Chronicle of World Affairs} (Nov. 1936) (calling for a mediatory body which would have the authority to recommend the redistribution of raw materials which are in shortage to the "have-not" nations); \textit{Trade Relations between Free-Market and Controlled Economies} (League of Nations, 1943) 88. As part of his program for handling international private investment, Eugene Staley has recommended a world commercial court. See Staley, \textit{Raw Materials in Peace and War} (1937) 232. James E. Meade has endowed his proposed International Monetary Authority with trade regulation powers. See Meade, \textit{The Economic Basis of a Durable Peace} (1940) 137, 166, 169.

\textsuperscript{46}Schuman, \textit{International Politics} (1941) 189.
article will therefore deal with some aspects of the procedural functioning of the proposed Trade Tribunal.

The Advantages of a Quasi-Judicial Tribunal

While arbitration is basically a judicial process, a judicial tribunal has certain advantages over an arbitral one that should give it more potent status both in the creation and in the acceptance of international law. A judicial tribunal, unlike an arbitral one, consists of a panel of judges existing independently of the parties to the dispute; its proceedings are publicly conducted; and in those proceedings skilled advocates are given the opportunity to argue the points at issue in great detail. These are important technical distinctions. However, there are also certain more impalpable distinctions which are vital because they affect confidence in, and the flow of business to tribunals. Although critics of arbitration are somewhat divided in their views on this subject, there is a strong feeling among some of them and among laymen that there is a lack of definite standards to guide arbitral proceedings; and that arbitrations involve the exercise of diplomacy and discretion and the application of the subjective views of arbitrators. In other words, there inheres in the concept of arbitration for many people a notion of law-

47 Moore, International Adjudications (Mod. Ser. 1929) XV-XCI; Moore, Fifty Years of International Law (1937) 50 Harv. L. Rev. 395, 406; Orfield, Equity as a Concept of International Law (1929) 18 Ky. L. J. 31, 32-36.


49 Orfield, supra note 47, at 31, 116 is a good discussion of the scope of the equity that is applied in arbitral proceedings. The author concurs heartily in Prof. Orfield's evaluation of what that scope should be; he leaves to the experts the question of the extent to which arbitration in practice has reached the ideal high plateau of its advocates. Woolsey, The Future of International Arbitration (1927) 21 Am. J. Int. L. 111, 113, points out that: "Arbitration has been regarded as leaning toward diplomacy rather than toward jurisprudence and as subject to being swayed by political motives or national policies." However, he shortly thereafter quotes with approbation John Bassett Moore's conclusion with respect to arbitral bodies that: "... the decisions of those international tribunals are characterized by about as much consistency, by about as close an application of principles of law, and by perhaps as marked a tendency on the part of one tribunal to quote the authority of tribunals that preceded it, as you will find in the proceedings of our ordinary judicial tribunals." Id. at 114.
lessness, of intent to evade law, and of the selection of laws and arbiters at the whim of the parties.\textsuperscript{50}

In the international sphere, a quasi-judicial body has certain current advantages over a supra-national legislative body. For one thing, the legislative body tends to engage in diplomatic activity, which, in the words of one author, "tends to widen and complicate disputes, instead of narrowing and localizing them as an efficient institution of adjustment ought to do, for it enlists nationalistic feelings and stakes national prestige on issues of private origin."\textsuperscript{51} International legislative activity has also been felt to involve a fundamental "derogation from the traditional attributes of national sovereignty,"\textsuperscript{52} and on that score encounters strong nationalistic opposition. Neither of these difficulties applies in that case of a quasi-judicial tribunal. "... States submit more easily to an international court than to an international government."\textsuperscript{53} It seems much easier to avoid, in the judicial domain, the usual insistence of smaller States on the theoretical equality of treatment to which they are entitled under existing notions of sovereignty.\textsuperscript{54} On the other hand, the interest of the larger States in the continuity of international commercial relationships leads them to accept "a degree of substantive equality between greater and smaller states which has no parallel in the essentially political domain."\textsuperscript{55}

A judicial body consisting of judges chosen for their expert qualifications tends to reduce to a minimum troublesome features of diplomatic and political negotiation. As Harold Laski has put it, "Technique keeps the trivial in its right perspective. If a Foreign Office is brought in to

\begin{itemize}
  \item \textsuperscript{50}See, e. g., Kronstein, \textit{Business Arbitration—Instrument of Private Government} (1944) 54 \textit{Yale L. J.} 36, 66. One may well hope that the numerous legislative reservations which are attached, on the basis of national sovereignty, to arbitral proceedings will not apply to a judicial body that is governed by a more stable law, more fixed jurisdiction, and a less clumsy pleading procedure. See Anderson, \textit{The Senate and Obligatory Arbitration Treatise} (1932) 26 \textit{Am. J. Int. L.} 328; Garner, \textit{The Senate Reservations to the Inter-American General Treaty of Arbitration} (1932) 26 \textit{Am. J. Int. L.} 333; Woolsey, \textit{supra} note 49, at 117.
  \item \textsuperscript{51}Staley, \textit{War and the Private Investor} (1935) 442.
  \item \textsuperscript{52}Lauterpacht, \textit{The Function of Law in the International Community} (1933) 258.
  \item \textsuperscript{53}Kelsen, \textit{Law and Peace in International Relations} (1942) 169.
  \item \textsuperscript{54}Dickinson, \textit{The Equality of States in International Law} (1920) 325 et seq.; Kelsen, \textit{Compulsory Adjudication of International Disputes} (1943) 37 \textit{Am. J. Int. L.} 397.
  \item \textsuperscript{55}Schwarzenberger, \textit{The Development of International Economic and Financial Law by the Permanent Court of International Justice} (1942) 54 \textit{JUR. Rev.} 21, 80, 100.
\end{itemize}
grapple with a dispute about railways, almost inevitably a hinterland of discussion beyond railways begins to pervade the atmosphere. And to keep discussion technical has the great additional advantage of keeping it undramatic. It cannot be surrounded with those miasma of report and scandal which have poisoned so many international conferences in the last few years.\textsuperscript{37,66} A continuing docket of cases, involving economic and technical issues and coming before judges or administrators faced with the necessity of evolving a more or less consistent line of decision, is more likely to reach its results on the basis of considerations of equity and rational economics\textsuperscript{67} and to win acceptance and understanding for those results\textsuperscript{58} than a succession of \textit{ad hoc} decisions or the enunciation of general but non-sharpened diplomatic clichés.

Practice and legal theory alike emphasize the central role of judicial decision in the development of international law.\textsuperscript{69} In the development of primitive law (and international law is certainly a form of primitive law), the law-applying precedes the law-creating organ.\textsuperscript{60} Article 38 of the statute setting up the Permanent Court of International Justice assigns a primary importance to international custom and generally recognized principles of law, but judicial decisions are the most substantial evidence of such custom and principles. In fact, when "precedents are plentiful there is no need to discuss the general principle which the precedents have affirmed and illustrated."\textsuperscript{61}

It is not to be imagined from the foregoing that political considerations can be completely eliminated from the purview of the Trade Tribunal. As in the case of municipal litigation, the element of compromise will continue to be significant;\textsuperscript{62} legal disputes in the international field have an essentially political character, much as so-called political disputes have a legal base.\textsuperscript{63} There is no feasible distinction between legal and

\textsuperscript{64}LASKI, A Grammar of Politics (1925) 619.
\textsuperscript{65}SCHUMAN, International Politics (3d ed. 1941) 210; TOMASEVICH, International Agreements on Conservation of Marine Resources (1943) 56.
\textsuperscript{66}MAINE, International Law (1888) 215, 219.
\textsuperscript{68}See, e.g., Kelsen, \textit{op. cit. supra} note 53, at 145-8, 151, 152, which argues this as the major cause for the downfall of the League of Nations.
\textsuperscript{69}WILLIAMS, Aspects of Modern International Law (1939) 52; see HUDSON, The Permanent Court of International Justice, 1920-1942 (1943) 612-615, 626-630.
\textsuperscript{70}See Borchard, \textit{International Arbitration} (1930) 2 Encyc. Soc. Sciences 162.
\textsuperscript{71}\textit{Lauterpacht, The Function of Law in the International Community} (1933) 153-6.
political conflicts; both can be settled judicially. An effective international tribunal is characterized not so much by its capacity for achieving justice (a largely subjective concept), as by its authority to establish law that will preserve the peace.

**AVOIDANCE OF RESERVATIONS**

Another drawback to much so-called international legislation, e. g., conventions, treaties, arises from the fact that it involves the formulation of broad economic policies. The wide scope of these policies often leads to attempts by nations to forestall situations that might prove particularly prejudicial to their own interests. This had led to an insistence on reservations in international agreements that go far to undo their general tenor. Thus, for example, Article 23(e) of the League Covenant, the parsimonious fruit of which we have already discussed, was made "subject to and in accordance with the provisions of international conventions hitherto existing or subsequently agreed upon", and was also dependent on the special necessities of the areas that had been devastated during the World War.

The ambitious draft convention proposed at the Geneva Economic Conference of 1927, undertaking to abolish all import and export prohibitions and restrictions, permitted exceptions to protect the "vital interests" of the contracting countries and further stipulated that the convention was not directed against the tariff systems of the contracting countries; these reservations were fatal to the success of the convention. More currently, the Atlantic Charter clause guaranteeing "equal access to raw materials" to all nations requires the maintenance of "due respect for existing obligations". This qualification has been strongly attacked by Foreign Minister Van Kleffens of the Netherlands Government, who pointed out that "such existing obligations should not be perpetuated, even as exceptions . . . . Since in the economic field protection engenders protection, there should not be left in being, in our

---

64 See Kunz, *The Law of Nations, Static and Dynamic* (1933) 27 Am. J. Int. L. 630, 634; Kunz, *The Problem of Revision in International Law* ("Peaceful Change") (1939) 33 Am. J. Int. L. 33, 44. For an analogue on the domestic scene, it is hard to imagine a question as fraught with political and sociological considerations as the effects of rates on our national and regional economies, yet the Supreme Court has very recently agreed to accept jurisdiction of a dispute involving that very issue. Georgia v. Pennsylvania R. R., 65 Sup. Ct. 716 (1945).

opinion, important exceptions to the general rule of free access to trade and raw materials on the basis of equal opportunities for all. . . . at the end of the last war, the same principle found solemn expression in almost identical terms, and we all know what became of it when the snowball of protection was set rolling until it became so large that it was a serious obstacle in the path of international trade.  

Specific international trade and tariff difficulties do not rise to the dignity of attacks on the “vital interests”, “honor”, or “independence” of a State—the usual grounds for withdrawing them from the scope of international economic and legal commitments—because, viewed by themselves, they are of small importance and do not affect the basic economic life of the State itself. In many cases, such interests “signify nothing save the commercial interests of an infinitely small section of the nation involved.” It is when individual trade difficulties cumulate over a period of time, assume the proportions of a general trend, and are not satisfactorily treated, that they become dangerous to international security. The establishment of an international trade tribunal and the consequent “submission to judicial settlement of trivial issues will at least prevent such issues from becoming magnified and from embittering international relations. . . .”

THE SANCTION OF PUBLICITY

It is proposed that for the time being the only sanction obligatorily to be attached to the judgments of the Trade Tribunal, in suits involving sovereign States, be that of unrestricted publicity; normal judicial redress can still be given in suits concerning only individuals or where the States involved consent thereto. Because of its limited scope, use of the sanction of publicity would insure greater cooperativeness on the part of politically sensitive sovereign States in submitting cases to the tribunal for adjudication. Since the publication of a court decision calls for no surrender of sovereignty, it should prove more acceptable than the procedure which has been followed by the Permanent Court of International Justice. Furthermore, as is true of advisory opinions, such a sanction leaves needed room for “adaptation in accordance with the

66Holborn, War and Peace Aims of the United Nations (1943) 510.
67Lauterpacht, The Function of Law in the International Community (1933) 11, 47, 141.
68Ralston, International Arbitration from Athens to Locarno (1929) 33.
69Lauterpacht, op. cit. supra note 67, at 192. Such reservations have “the effect of neutralizing every honest attempt to secure the judicial settlement of international disputes.”
requirements of political expediency." It might therefore induce nations not to insist on reservations of the type which have been condemned in the preceding section. Publicity would also remove the likelihood that private groups, by virtue of the secrecy of official negotiations, might acquire undue influence over the conduct of such negotiations.71

Publicity is not necessarily a weak sanction. International law is, in large measure, the process of giving greater publicity and a wider sphere of influence to rules first applied in individual cases. It "has been built up very largely on the mere research and opinions of learned writers."72 Even strong defenders of the cartel system have conceded that cartel agreements and negotiations should be subjected to the scrutiny of official publicity.73 And, by way of analogy, it may be noted that the Laws of Oleron and Wisby had much wider acceptance and a far greater influence on the development of admiralty jurisprudence than is explicable on the basis either of the territorial sway of those two trading cities or of the volume of traffic moving through their ports.74

**Additional Administrative Powers**

In order to function effectively, the Tribunal should, like commissions in this country which exercise quasi-judicial functions, be given ancillary administrative powers. It should, for example, be authorized to conduct investigations, and be given definite powers in aid thereof, such as the authority to compel the attendance of witnesses and the production of documents.75 Also, it should abandon the coordinate method of

---

70 Id. at 333.
71 Condliffe, Reconstruction of World Trade (1940) 33.
74 Higgins and Colombos, The International Law of the Sea (1943) 24-8; Oppenheim, International Law (6th Lauterpacht ed. 1937) 74, lists as two of the most important sources of international law in the era preceding Grotius the admiralty codes adopted after the eighth century and the leagues of trading towns, such as the Hanseatic League. See also Friedmann, The Contribution of English Equity to the Idea of an International Equity Tribunal (1935) passim.
pleading used in arbitrations for the alternative method of pleading that is more characteristic of judicial process and allows for a clearer and speedier presentation of the issues involved. It might also be accorded the power to issue charters of international incorporation to corporations which engage in international commerce and which thereby tend to elude effective regulation by individual countries. Power to confer or withdraw such charters could also supplement the sanction of publicity. The knowledge which it would acquire of the problems of international corporations might also qualify the Tribunal as an administrative and perhaps adjudicatory aid in the field of international bankruptcy. The grant of ancillary powers such as these would solidify the independence and enhance the technical competence of the Tribunal.

Development of Basic Standards and Substantive Law

While the emphasis of the Tribunal should be on the economic and technical problems involved, it is impossible for any tribunal of this character to avoid giving some weight to political and social factors, in much the same manner as domestic courts do when they deal with questions of "social philosophy" and broad political issues. In such context, judicial decisions necessarily involve the application of subjective slants, but this is not the same as permitting the Tribunal to apply subjective standards of morality and justice. It is to be hoped, as has already been pointed out, that the equity which is to be applied by an international tribunal will be an admixture with law, rather than a separate distillation from it. On the whole, therefore, it seems fair to assume that it is unnecessary for the Tribunal to adopt any guide of action more precise than that of the "international public interest" or "consumer protection"; certainly similar standards have been established as legally and pragmatically valid for the tough and knotty economic problems which are daily resolved by American administra-


77Staley, World Economy in Transition (1939) 310.

78Cf. Nadelmann, Bankruptcy Treaties (1944) 93 U. Pa. L. Rev. 58. It may be noted that it was not until 1898 that an effective bankruptcy law was enacted by the Federal Government, and that until 1934 there was no federal proceeding for the reorganization of insolvent corporations. Id. at 88.


80See page 374 supra.
tive commissions. If more specific standards are sought, they can readily be found in numerous declarations which have already been made by the United Nations in the field of international economic policy, and which ground the trade and commodity agreements already referred to, e.g., the achievement of stable price levels which will reflect fair remuneration to producers and will be beneficial to the consumers involved, the most efficient international utilization of resources, the promotion both of the balance and of the volume of international trade.

Two current proposals, although they involve international authorities with powers of comprehensive administrative regulation, exemplify the juridical nature of the standards that are sought to be applied to international commerce. The Petroleum Agreement signed a short time ago by representatives of the United Kingdom and of the United States provides for the rendering available of petroleum supplies to the nationals of all peaceable countries at fair prices and on a nondiscriminatory basis; the development of petroleum resources so as to encourage the sound economic advancement of the countries wherein they are located; equal opportunity with respect to the acquisition of exploration and development rights; and non-interference with all valid concession contracts and lawfully-acquired rights. In addition to the five "freedoms of the air" for international air services which were so widely discussed at the Chicago Air Conference, Canada, which took the lead in pressing the case for an "International Air Authority", there were set forth in its draft convention such basically judicial objectives as: the avoidance of economically wasteful competitive practices; the fair and equitable division of international air routes and services; the discouragement of discriminations with respect to operations, use of bases, customs arrangements, etc.

---


82 See, e.g., Recommendation XXV of the Final Act of the United Nations Conference on Food and Agriculture (1943); the Final Act of the Third Meeting of the Ministers of Foreign Affairs of the American Republics, Rio de Janeiro (Supp. 1942) 36 Am. J. Int. L. 61; and the recommendations of the London Economic Conference of 1933, as reproduced in DICTRICE, WORLD TRADE (1939) 367.


84 See revised preliminary draft of the International Air Convention, Oct. 1944; Howe, Address at International Conference on Civil Aviation, Nov. 1944.
In scrutinizing both documents, the question readily arises: Is not an all-inclusive economic administrative scheme preferable to the rationale of this article—the judicial handling of individual conflicts as they arise? One broad answer is the improbability of being able to elaborate similar proposals for all the numerous segments of international business and effectively staffing all the necessary administrative authorities with personnel of the requisite objectivity and technical competence. Furthermore, a perhaps over-pessimistic appraisal of the current status of international trust and confidence leads one to ask: Will not sovereign nations be unwilling to give more than formulary adherence to all-embracing administrative schemes of this character? Would they not be more likely to tolerate individual application of the basic standards involved to specific areas of tension susceptible of judicial redress? And, even if oil and aviation were to become amenable objects of international administration, would not the regulating authority tend to become primarily identified (as administrative agencies in all countries subtly do) with the interests of those regulated? If that be true, what more appropriate forum to vindicate an alleged consumer or public interest than an independent judicial or quasi-judicial tribunal?

**STATUS OF PRIVATE PARTIES**

A recurring criticism of the Permanent Court of International Justice and other international arbitral bodies was that recourse to them could be had only through the instrumentality of the sovereign States. It is therefore suggested here that properly accredited organizations representing consumer and other interests be allowed to lodge complaints with the Tribunal. Such a procedure had precedent in the constitution

---


89Borchard, *The Access of Individuals to International Courts* (1930) 24 Am. J. Int. L. 359; Hu Shih, *Factors Necessary for a Durable Peace in the Pacific Area in A Basis for the Peace to Come* (1942) 144; and references cited in Hudson, *The Permanent Court of International Justice 1920-1942* (1943) 395. Prof. Hudson himself is not in accord with this viewpoint. See Hudson, *id.* at 397. Even those authors who feel that the requirement of State sponsorship is justified on the ground that its absence would result in swamping the tribunal, concede that access by individuals and organizations is desirable. See Alguy, *Permanent World Peace* (1943) 73; Schwarzenberger, *The Development of International Economic and Financial Law by the Permanent Court of International Justice* (1942) 54 Jur. Rev. 21, 27.
of the Central American Court of Justice and embodies the principle, already recognized in the case of the International Labor Organization and the governing councils of the international sugar and proposed international wheat agreements, of affording representation to consumer interests. In any event, it seems reasonable to assume, for international law as for municipal law, that "the public interest is promoted by the protection of individual relationships."87

Adoption of this procedure should augment the flow of business before the court, but not to the extent, feared by some commentators, of inspiring, under a broad interpretation of parties in interest, a flood of inquiries "so harassing and unprofitable as to be avoided."88 Furthermore, it would have the advantage of bringing to the attention of the court arguments which might be submerged were a neutral government official to present the case, for a State would probably present some sort of compromise between the various producer and consumer interests that would be more artificial than real and justify certain interested groups in the feeling that they were not adequately represented. By allowing private organizations to appear before the Tribunal, the State could put it squarely up to the different interested groups among its own nationals to present the particular considerations which they deem relevant, and thereby avoid self-embarrassment and obtain an honest presentation of the issues involved.

Even ardent proponents, however, of the basic belief that international law must look to the welfare of individuals and peoples rather than States and sovereigns are noncommittal with respect to the proposition that such individuals or nongovernmental groups should have direct access to international tribunals.89 Their failure to endorse this proposition is mainly attributable to the formidable and venerable doctrinal notion that individuals are not and cannot be the subject of international law—a notion which, the author submits, is entirely inconsistent with the realities of the case. Even by-passing the possibly too functional view that international law is individually binding on the individuals who are official organs of the State and collectively binding on the indi-

viduals whom the State represents,\textsuperscript{90} international law had dealt directly with such nongovernmental "persons" as pirates, belligerent insurgents, or an international church. Not only the Central American Court of Justice, but the proposed International Prize Court has recognized the amenability of individuals to the jurisdiction of an international tribunal, irrespective of State sponsorship.\textsuperscript{91} International law is taking increasing cognizance of the extent to which class interests and functional responsibilities cut across national boundaries, by allowing individuals to appear at international conferences as the spokesmen of labor, consumer, and other particular groups rather than as delegates of the State itself.\textsuperscript{92} In fact, not only is the State (as the political pluralists put it) not entitled to primacy over other groups and associations within its boundaries,\textsuperscript{93} but it is showing a tendency to voluntarily relinquish the Nessus' shirt of being the spokesman or its clamorous and contending groups. In the treatment of racial minorities, furthermore, the international community has been, and will continue to be, the judge of whether States are preserving minimum standards of human rights or civil liberties in the treatment of their own nationals. It is a necessary implication of such a responsibility that individuals and groups have direct judicial standing to present their complaints of unfair treatment.\textsuperscript{94} Not only have the processes of government escaped from the categories in which a national State has sought to imprison them,\textsuperscript{95} but there will be after this war considerable administration undertaken by international bodies involving direct contact with individuals and numerous conflicts that will require judicial settlement.\textsuperscript{96}


\textsuperscript{91}Kunz, supra note 90, at 405, 406; Edmunds, The Law of Nations: A Science That Has Stood Still (1927) 14 Va. L. Rev. 19; Laski, Studies in Law and Politics (1932) 266.

\textsuperscript{92}Brown, International Revolution (1935) 29 Am. J. Int. L. 670, 672; Hill, supra note 89, at 280.

\textsuperscript{93}Laski, op. cit. supra note 91, at 259.


\textsuperscript{95}Laski, op. cit. supra note 91, at 272.

\textsuperscript{96}A good statement of this is to be found in Hill, supra note 89, at 278-30.
The foregoing is exclusive of the practical difficulties created by the disparate interests of national States, on the one hand, and the people who engage in commercial and other operations within States, on the other. The increasing scope of government control over foreign trade and commercial activities, further complicates the picture. Private parties are frequently on a parity with government, yet in other cases governments insist that economic disputes in which they are involved be settled by their own governmental tribunals, involving potential discrimination against private parties. There are frequent borderline cases where it is difficult to determine whether the government has contemplated or actually participated in the boycotts, cartels, and other acts of private groups. This increasing assimilation of governmental and private activities is still another argument for submitting all international economic disputes, irrespective of the degree of State involvement, to international tribunals.

To liberate ourselves from the thralldom of a concept of sovereignty that is historically a relic of State absolutism and potentially a tool of totalitarianism is not to give up the concept of sovereignty as such. There is no single jurist who has contributed as much to the establishment of both the practical and theoretical sovereignty of the United States as Chief Justice Marshall, yet his notion of sovereignty is in no wise inconsistent with what has just been said:

"... government is a mere agency established by the people for the exercise of those powers which reside in them. The powers of government are not, in strictness, granted, but delegated powers, and may be revoked. It results that no portion of sovereignty resides in the government. A man makes no grant of his estate when he constitutes an attorney to manage it."


*Cf.* Comment (1937) 1 ARB. J. 372.


*Cf.* Marshall's statement during the debate at the Virginia Constitutional Convention: "Is not liberty secure with us, where the people hold all powers in their own hands, and delegate them cautiously, for short periods, to their servants, who are accountable for the smallest mal-administration? ... We are threatened with the loss of our liberties by the
An enlightened view of sovereignty will simply acknowledge that some human disputes are not dependent on State sponsorship for clarification, and that the solution of others may even be impeded by State intervention. The need for judicial organs to safeguard international administration, as well as to implement the prospective "International Bill of Rights," is particularly urgent in a period when the Allied Nations will be trying to obliterate the political philosophies of the totalitarian States.

**Additional Grants of Jurisdiction**

Certain specific types of jurisdiction, roughly comparable to those already discussed, could readily be added to the competence of this Tribunal. One such jurisdictional category is the various international conventions that have been adopted for the protection of patents, trademarks, trade names, and other forms of industrial property culminating in the proposed convention governing unfair methods of competition in general. In this connection, it is noteworthy that the peace treaties entered into after the last war contained articles on unfair competition whereby the defeated powers undertook to protect the commerce of the Allied and Associated Powers from all forms of unfair competition, including, especially, false indications of the origin of goods; in the general draft convention on unfair competition, jurisdiction is conferred on the Permanent Court for International Justice. Policies have been proposed with respect to the equitable division of fishery and marine resources, equal access to communication facilities, and freedom of air for aviation purposes; all these policies, calculated to relieve inter-

possible abuse of power, notwithstanding the maxim that those who give may take away. It is the people that give power, and can take it back. What shall restrain them? They are the masters who give it, and of whom their servants hold it." 1 Beveridge, *The Life of John Marshall* (1916) 417-8. See also McCulloch v. Maryland, 4 Wheat. 316, 402-405 (1819).

103The protection of trade-marks and trade names and other forms of industrial property is part of the law of unfair competition. Ladas, *International Protection of Industrial Property* (1930) 472, 649. Unfair competition is defined in the conventions to include acts which tend to create confusion with the goods of competitors, and false allegations of a nature to discredit the goods of a competitor. *Id.* at 703-5.

104Ladas, *op. cit. supra* note 103, at 681.

105*Id.* at 174, 696, 825.

106For the tremendous importance to the economies of Holland, Norway and Japan of access to fisheries, see Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942) *passim*; Tomasevich, *International Agreements on the Conservation of
national friction, could also be referred for judicial and administrative implementation to this Tribunal. It has also been strongly urged that the troublesome questions which arise in connection with international loans and investments be adjudicated by an international judicial tribunal. Alleged violations of the production, import and export limitations on the traffic in narcotic drugs could likewise be certified to this body. To the extent that any future limitation of armaments production and traffic follows (as has been suggested) an approach similar to that of the drugs traffic, such control measures might well be submitted to the Trade Tribunal for interpretation and enforcement.

In short, a tribunal competent as this one is to assume jurisdiction over acts of unfair competition in international commerce would, ipso facto, be competent to handle almost all international economic disputes. Another way of stating this conclusion is that "unfair competition" embraces measures adopted by individuals in violation of the industrial property of others, as well as those more widespread public interferences caused by restrictive commercial policies, transportation preferences, dumping, customs regulations, and other undesirable government-sponsored trade practices.

Marine Resources (1943) 54. For the importance to the United States and to the world, of free access to world communications, see Fly, Post-War World Communications, Foreign Commerce Weekly, Dec. 18, 1943, at 8, which expands, in the light of present day conditions, a proposal by Walter S. Rogers, President Wilson's communications adviser at the Paris Peace Conference, with respect to the captured German oceanic cables. Baker, Woodrow Wilson and World Settlement (1922) 44. For an indication of the resentments arising when the freedom of airways is impinged on and the advantages of such freedom to our economy, see Lissitzyn, International Air Transport and National Policy (1942) 316, 473. For a good summary of the five specific "freedoms of the air" discussed at the Chicago Air Conference, see Warner, The Chicago Air Conference (1945) 23 For. Affairs 406. The British proposed at this Conference that an international air transport convention be adopted which would make provision, among other things, for arbitration of matters in dispute. See White Paper on International Air Transport (C. M. D. 6561) Oct. 1944.

Hill, supra note 89, at 286. In advancing this proposal, Hill suggests that the States be relieved from the necessity of protecting their own nationals and from other responsibilities arising from State intervention—another argument for the independent status of individuals in international law. See page 394 supra.

For a summary of the measures undertaken in this field, see Renborg, Narcotic Drugs—International Administration in World Organization (1941) 99-111.

For this possibility, see Morgan, Armament and Measures of Enforcement in World Organization (1941) 133.

Ladas, op. cit. supra note 103, at 719.
V.

An international trade tribunal of the type which has been set forth will meet certain pragmatic considerations essential to the successful functioning of an international agency. It will, to follow Justice Holmes' adjuration, "found itself in actual forces", and thereby be able to resolve its problems on the basis of technical and economic rather than merely political considerations. "To be realistic we must recognize that strategy dictates an approach to the business relations of peoples rather than the politics of nations."111 "The weaknesses of international law, the inevitable result of its being in part subservient to and limited by power politics, are less noticeable in this sphere than in any other. . . . The certainty of the law is more important in economic and financial relations than the occasional advantages to be derived from its violation. Thus there exists the necessary community of interests which is the basis of reciprocity."112

In short, the establishment of the proposed International Trade Tribunal would take both pragmatic and legal cognizance of the interdependence of the community of nations,118 since it rests on the permanent functional needs of mankind rather than on transitory compacts and arrangements.114 By stressing the settlement of concrete disputes and encouraging individuals to present them, an "international authority, judicial in character, might find a way of escape from the clash of interests arising from the independence of sovereign authorities."115 "That most disruptive and intractable of international principles, the principle of state equality, may well be tamed by specific functional arrangements which would not steal the crown of sovereignty while they would promise something for the purge of necessity."116

112Thompson, An International Trade Tribunal in Proceedings, 34th Annual Meeting of American Soc. of Int. Law (1940) 1, 2. See also Thayer, Cases and Materials on the Law Merchant (1939) xi-xii.
112Williams, Aspects of Modern International Law (1939) 43; Root, A Requisite for the Success of Popular Diplomacy (1922) 1 For. Affairs 3, 8.
112Hawtrey, Economic Aspects of Sovereignty (1930) 142.
BROADCASTS FROM FOREIGN COUNTRIES—CONFLICT OF LAWS PROBLEMS

ROBERT NEUNER†

TODAY a broadcast from a foreign country is usually regarded and treated as a means of propaganda, and rightly so. It is assumed that the sender of the broadcast wants it to be used and spread as far as possible. Whoever follows this presumed invitation may perhaps violate one of the rules protecting our internal security but he has little reason to fear legal action from the foreign broadcaster. Should this war end with a real peace and not with only a deceptive armistice, as did the first World War, the situation might well be reversed. Direct and open propaganda to other countries would then be banned or restricted either voluntarily or under international treaties following examples set by the League of Nations shortly before the outbreak of the second World War.¹

In this new political atmosphere the foreign broadcaster will assume the same attitude as our domestic broadcaster. He will regard his broadcast more or less as a commercial article and will desire to retain a certain amount of control over its utilization by other persons. A new problem will then arise: what rules should govern the utilization of foreign broadcasts?

Since this is a problem of the future we should not be surprised that it has, to date, been given little attention by legal writers,² and less by

†J.U.D. (1922) Univ. of Munich; professor of the University of Prague (1927-1939); lecturer in Yale Law School (1939-1942); since 1942, with the Federal Communications Commission; presently assigned to the Chief of Counsel for the Prosecution of Axis Criminality. Author: Criminal War and Criminal Warfare (1942) 2 New Europe 364; Policy Considerations in the Conflict of Laws (1942) 20 Can. B. Rev. 479; Modern Divorce Law—The Compromise Solution (1943) 28 Iowa L. Rev. 272; and many other contributions to legal periodicals.

¹Convention Concerning the Use of Broadcasting in the Cause of Peace, opened for signature at Geneva, Sept. 23, 1936, League of Nations Document, C. 399(1). M. 252(1). 1936. XII; 7 Hudson, International Legislation 409. See Art. 7, South American Regional Agreement on Radio Communications, signed at Buenos Aires, April 10, 1935. In the revised agreement, signed at Rio de Janeiro, June 20, 1937, the provision was replaced by more general ones, Arts. 2, 3.

the courts. The more desirable it is to open the discussion, for these problems should be solved in full awareness of their implications and ramifications.

A broadcast may be utilized in many different ways. They have been enumerated and discussed as to their internal aspects by numerous writers and congresses. This article will limit itself to three forms of "piracy", as they have been appropriately called, which seem to be of particular practical importance:

(1) Rebroadcasting may be expected to occur in such situations as when some important international event, e.g., a meeting of statesmen, takes place, and certain broadcasters receive the exclusive right of reporting the event.

(2) Playing of a foreign broadcast over the loudspeaker in a restaurant is probable in regions near the frontier and must be particularly tempting as long as broadcasts from American stations cannot be used.

(3) Utilization of foreign broadcasts for the purpose of a news service is a form of exploitation which is most likely to occur.

Piracy of broadcasts has been regarded under many different legal angles, but only two of the approaches proved to be fruitful: the copy-

---


The problem has been discussed by the Second International Juridical Radio Congress, Geneva 1927 (Proceedings, 49 et seq.); the Third Congress, Rome 1928 (Proceedings, 95 et seq.); the Fourth Congress, Liège 1930 (Proceedings, 56 et seq.); the Fifth Congress, Warsaw 1934 (Proceedings, 130 et seq.); and the Sixth Congress, Brussels 1935 (Proceedings, 103 et seq.).
right aspect and the unfair competition aspect. For this reason the following discussion will concentrate upon these two points.

**REBROADCASTING**

Rebroadcasting\(^5\) falls within the scope of the Communications Act of 1934 and the jurisdiction of the Federal Communications Commission under that Act. Section 325 reads as follows:

"** * * nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."\(^6\)

Literally interpreted, this rule seems to forbid the rebroadcasting of the program of a foreign station. But it is doubtful whether a literal interpretation is indicated.\(^7\) Since the purpose of the provision is to protect the broadcaster against piracy of his programs, it is improbable that the section is designed to accord such protection to foreign broadcasters without securing similar protection for our own broadcasters in foreign countries. This protection for American broadcasters could be achieved by an international treaty\(^8\) or a provision in the Communications Act making the protection of the foreign broadcast against rebroadcasting dependent upon reciprocal treatment of our own broadcasts in the country of origin of the foreign broadcast.

Whatever answer may be given to this question of interpretation, it will solve only one side of a many-sided problem. There are many other rights and rules which come into play: copyrights of the author whose work was broadcast, those of the performers, rules against unfair competition, etc. Before the single questions are analyzed, it will be helpful to put the problem in a general way, reserving, of course, the exceptions and modifications demanded by particular situations. The general problem is the following: which law shall govern the broadcast,

---

\(^5\)This may be done either directly or by making a record of the broadcast, which is later played. Whether spot description of a contemporaneous event is covered by § 28 of the Radió Act of 1927, 44 Stat. 1172 (1927) (now § 325 of the Communications Act) is doubtful. See Caldwell, *supra* note 4, 2 J. Radio L. at 496.


\(^7\)Caldwell, *supra* note 4, 8 R. I. R. at 202.

\(^8\)See Art. 11, South American Regional Agreement on Radio Communications, signed at Rio de Janeiro, June 20, 1937.
the law of the place of the transmitter (or studio),9 the law or the laws of the country where the broadcast was or could be heard, or the law of the place where the program that was rebroadcast originated.

There exists, it seems, only one decision which passed upon this question: \textit{RCA Mfg. Co., Inc. v. Whiteman}, et al.\textsuperscript{10} In the \textit{Whiteman case}, Judge Learned Hand denied an injunction against the playing of records over a New York station. Assuming, but not deciding, that the performing artists have a copyright on the performance recorded on the disc played over the radio, and that this copyright was not lost by publication, he declared the playing of the record to be legal because the record could not be encumbered with a servitude of restricted use. Since the Supreme Court of Pennsylvania had arrived at a contrary solution,\textsuperscript{11} Judge Hand was compelled either to declare the principle of the Pennsylvania case to be erroneous and not binding or to hold it inapplicable to the situation. The copyrights claimed by the performing artists or the record producers acting in their behalf are, if they exist at all, common law copyrights and consequently, it would seem, governed in every state by the common law of such state.\textsuperscript{12} From this point of view the Pennsylvania court decided in a binding way that according to Pennsylvania law the performing artist could, in Pennsylvania, prevent the unauthorized playing of records embodying his performance. The question remained open with regard to the performer's rights in New York and the rest of the world. Although he did not say so expressly, it must be assumed that Judge Learned Hand regarded the question which he had to decide as a question of New York law; otherwise he could not have conceded the binding effect of the Pennsylvania decision without following it.

\textsuperscript{9}In exceptional cases transmitter and studio are in different countries. By this device some American broadcasters tried to escape the federal legislation on broadcasting. The practice was stopped by § 325 (b) of the Communications Act, 48 Stat. 1091 (1934), 47 U. S. C. § 325 (b) (1940). The situation is too rare to merit special discussion.

\textsuperscript{10}114 F. (2d) 86 (C. C. A. 2d, 1940), \textit{cert. denied}, 311 U. S. 712 (1940).


\textsuperscript{12}This was the view of the legislatures of North and South Carolina, which in identical words abolished "any common law rights attaching to phonograph records and electrical transcriptions". N. C. Gen. Stat. Ann. (Michie, 1943) § 66-28; S. C. Civil Code (1942) § 6641. The opposite view was taken in Palmer v. De Witt, 47 N. Y. 532, 538 (1872), where the law of the domicile of the owner was applied according to the now obsolete rule, \textit{mobilia ossibus inhaerent}. 


But then the problem arose: can a broadcast be enjoined if it is legal at the place of the broadcast and possibly in the rest of the United States but illegal in one of the states where it can be and actually is received? Judge Learned Hand treated this problem as a problem of equity, not of conflict of laws. He said in such a case the granting of an injunction would be "an obvious misuse of the writ which goes only in aid of justice". It is to be regretted that Judge Hand did not make these equity considerations more specific.

An attempt to supplement the omitted reasons reveals only one substantial argument: a broadcaster cannot be expected to comply with all the laws of all the states and countries where his broadcast can be heard. This argument would have supported not only an equity decision but a conflict of laws rule: the legality of a broadcast is to be judged by the law of the place of the transmission. To base the decision on this conflict of laws principle would have been preferable, for it would have solved the problem of damages in Pennsylvania, which now is still open. Judge Learned Hand did not choose to do so. Consequently the question can hardly be regarded as authoritatively decided, but a strong indication in favor of the rule that the law of the place of the transmission governs is undoubtedly given.

This rule seems to require a modification in a particular situation: if a broadcaster directs the broadcast exclusively or at least predominantly to a certain foreign audience. This criterion is not as indefinite as it might seem at first sight. It catches, for instance, the well-known English broadcasts of Mexican stations near the northern frontier; and there seem to be many other situations where the destination of the broadcast is not doubtful. To give another example: American jazz music broadcast from Germany by short wave is clearly addressed to the American public. In such cases the law of the country where the broadcast is intended to be received should be applied. In all other situations, where reception on the other side of the border line is only an unavoidable collateral effect, as for instance, if Canadian broadcasts are received in the United States or Spanish broadcasts of Texas stations

---


14Claxton, supra note 2, at 671. As to the law of the members of the International Copyright Union, see Neugebauer, supra note 2, at 264. With regard to relayed programs, Caldwell, supra note 2, at 295, advocates the single performance principle.

15Brown, supra note 2, at 179.
in Mexico, the general rule, that the law of the place of transmission is applicable, obtains.

This rule is, of course, only a general guiding principle which must be retested and reappraised when applied in each specific situation. Of these specific problems one of the most important ones is the question whether a rebroadcast violates the copyright of the author whose work is played. If the work is copyrighted in the United States, the legal situation is simple. The copyright law of the United States is applicable. This follows from the territorial nature of the copyrights.\(^{16}\) In every country the author enjoys the protection of the copyright law of this country.\(^{17}\) According to American principles, rebroadcasting is a separate and new performance\(^{18}\) and is not permissible without the consent of the author. It is irrelevant whether the original broadcast was legal under the law of the place of the originating station.\(^{19}\) Only if the authorization had included rebroadcasting would it be permissible in this country.

Much more difficult is the question, where the work is not copy-


\(^{17}\) This is clearly expressed by the International Copyright Treaties. Art. 4, Convention for the Protection of Literary and Artistic Works, signed at Rome, June 2, 1928, 4 Hudson, International Legislation 2463, states:

"Authors within the jurisdiction of one of the countries of the Union enjoy for their works . . . such rights, in the countries other than the country of origin of the work, as the respective laws now accord or shall hereafter accord to nationals, as well as the rights especially accorded by the present convention.

". . . Consequently apart from the stipulations of the present convention, the extent of the protection, as well as the means of redress guaranteed to the author to safeguard his rights, are regulated exclusively according to the legislation of the country where protection is claimed."

Art. 6, Pan-American Copyright Treaty, signed at Buenos Aires, August 11, 1910, 38 Stat. 1785, provides that authors "shall enjoy in the signatory countries the rights that the respective laws accord, without those rights being allowed to exceed the term of protection granted in the country of origin."

\(^{18}\) The question has not yet been directly decided, but if playing of a broadcast over a loudspeaker in a restaurant is a public performance (see note 42 infra) and the original broadcast itself is a public performance, which is not disputed, rebroadcasting cannot be treated differently.

\(^{19}\) The leading case, Buck v. Jewell-LaSalle Realty Co., 283 U. S. 191, 199 (1931), left the question open whether a license to play the broadcast over a loudspeaker in a public place can be implied if the broadcast itself was licensed. The contracts concluded between the associations of authors and the broadcast stations now expressly exclude such an inference.
righted in the United States but is in the country of the origin of the broadcast. Under the above suggested principle, American law is applicable in this situation also. Since under our assumption the work is not copyrighted in the United States, the author can find protection only in the rules of the common law. This is not the place to analyze the various presuppositions of a common law copyright. Only one point must be mentioned because of its special significance in this peculiar situation: the broadcast over the foreign radio station does not affect the common law copyright in this country. This seems to follow from *Ferris v. Frohman*,20 where it was decided that performance of a play on an English stage does not destroy the American common law copyright. Whether other forms of "publication" in a foreign country would entail the loss of the common law copyright in the United States is doubtful. The case, *Italian Book Co. v. Cardilli*,21 seems to indicate that not even printing in a foreign country necessarily destroys the common law copyright. According to *Basevi v. Edward O'Toole Co.*,22 however, this case has been overruled by *American Code Co. v. Bensinger*.23 Be that as it may, the analogy between broadcasting and a performance on the stage is too close to leave any doubt that the doctrine of *Ferris v. Frohman* is applicable, especially as it has been decided that performance before a microphone in this country does not amount to an abandonment of the ownership or a dedication to the public.24

From the preceding discussion it seems to follow that, in many cases, rebroadcasting of a foreign broadcast will constitute a violation of the common law copyright of the author whose work is transmitted. The author is, however, not the only person who, in this case, might allege that his copyright was violated. Performing artists,25 radio play pro-

---

20223 U. S. 424 (1912), cited supra note 16.
25In this country, the prevailing opinion seems to be that the performers do not enjoy copyright protection. See HOMBURGER-SPEISER, LEGAL RIGHTS OF PERFORMING ARTISTS (1934) 145; 2 LADAS, op. cit. supra note 2, at 733; Pforzheimer, Copyright Protection for the Performing Artist in His Interpretive Rendition in First Copyright Symposium (1939) 9; Shelton, The Protection of the Interpretative Rights of a Musical Artist afforded by the Laws of Literary Property or the Doctrine of Unfair Competition in First Copyright Symposium (1939) 173.
ducers,26 and record producers27 claim copyrights with varying success in the different countries.28 On principle, their situation seems to be the same as that of the authors. American law, or more accurately, the common law of the state of the rebroadcast, is applicable. This law determines whether the claimant can have a copyright at all and under what conditions. Whether he enjoys a copyright protection in the country of the origin of the broadcast is irrelevant. This again follows from the territorial nature of the copyright and from Ferris v. Frohman, where it was held that loss of the common law copyright in England did not entail loss of the common law copyright in the United States.29

In Great Britain, performing artists are not protected by the copyright law. Musical Performers’ Protection Ass’n, Ltd. v. British International Pictures, Ltd., 46 T. L. R. 485 (K. B. 1930). The contrary solution has been adopted by the courts of Germany, German Supreme Court, Nov. 14, 1936, 153 Entscheidungen des Reichsgerichts in Zivilsachen 1; of Switzerland, Société Suisse de Radiodiffusion à Berne c. Turicaphon (1937) 13 R. I. R. 235; and of Argentina, Civil Chambers of Buenos Aires, Oct. 28, 1930 (1931) 1 J. Radion. L. 409. As to French law, see the decision of the Conseil d’Etat, Franz-Charny c. Ministère P. T. T. (1932) 8 R. I. R. 53. Further information on the legal position of performing artists in various countries may be found in the books and articles cited at the beginning of the note.


27The disc producer enjoys copyright protection in Great Britain, according to § 19 (1) of the Copyright Act, 1 & 2 Geo. V, c. 46 (1911). In Gramophone Co., Ltd. v. Stephen Carwardine & Co., 50 T. L. R. 140 (Ch. 1933), it was held that the disc producer may enjoin the public performance of the record. According to Italian Decree, Law No. 595 of Feb. 28, 1937, the disc producer cannot prohibit the commercial utilization of his records, but he can protect an indemnification. In Germany and Switzerland, the disc producer is protected as the transferee of the rights of the performing artists. See cases cited supra note 25. The disc producer has been denied a copyright by the Court of Appeals of Buenos Aires, Decision of Sept. 4, 1936 (1937) 13 R. I. R. 345, and by the Civil Tribunal of Oslo, Norway, in The Gramophone Co., Ltd., et Fédération des Marchands d’Appareils de Musique de Norvège c. Norsk Riksbrinkasting (1938) 14 R. I. R. 210. See also Diamond and Adler, Proposed Copyright Revision and Phonograph Records (1940) 11 Air L. Rev. 29, 54; Audinet, op. cit. supra note 4, at 154; Proceedings of the 7th Juridical International Congress of Radioelectricity (1936) 64 et seq.

28As to the question whether the broadcaster has a copyright on his broadcasts, see American Broadcasting Co. v. Wahl Co., 36 F. Supp. 167 (S. D. N. Y. 1940), on the one hand, and Cole v. H. Lord, Inc., 262 App. Div. 116, 28 N. Y. S. (2d) 404 (1941), on the other. The precedents are collected in the Note (1941) 12 Air L. Rev. 425. The problem is discussed in Orange, op. cit. supra note 4, at 73 et seq., and in Audinet, op. cit. supra note 4, at 75. Caldwell, supra note 4, 30 Col. L. Rev. at 1097, believes that the broadcaster alone should be given protection.

29The holding itself was that non-existence of a common law copyright in Great Britain, where it is replaced by a statutory copyright, does not entail the non-existence
This matter is of particular importance with regard to performing artists. Their achievements are not everywhere a possible subject of a copyright, e.g., not in England. Nevertheless, an English performing artist whose work has been rebroadcast in this country can invoke the rules of the common law of the state where the rebroadcast took place. This result looks less surprising if one considers that the performing artist enjoys in England the protection of a special statute, the "Dramatic and Musical Performers' Protection Act" which makes it unlawful to make, sell, let for hire, distribute, or use for public performance a record of a performance of a musical or dramatic work without the written consent of the performer. Since it is a penal law, this statute cannot be applied in this country. The rules of the American common law on copyrights fill a gap and give the performer protection, although in a form different from that of the country of origin of the broadcast.

If the recourse to copyright principles should not prove to be helpful, persons deeming themselves injured by the rebroadcast may seek to invoke the broader principles of the rules against unfair competition. Again, it must first be ascertained which law is applicable as the law of the place where the harm was inflicted—the law of the place of rebroadcast, the law of the place where the rebroadcast was received, or the law of the place of the original broadcast. Conflicts problems arising from laws against unfair competition seem to have received little attention in common law countries. If unfair competition is a


2 Socolow, THE LAW OF RADIO BROADCASTING (1939) 806; Caldwell, supra note 4, 30 Col. L. Rev. at 1110; Caldwell, supra note 4, 2 J. Radio L. at 518.

This is the typical situation. There might be cases where the owner of the originating station has his domicile in a third country. In these cases the law of the domicile of the owner seems to be applicable. They are unlikely to happen, because the radio regulations of most countries make such a set-up unlawful.

The main attention is devoted to the problem of jurisdiction. In Vacuum Oil Co. v. Eagle Oil Co. of New York, 154 Fed. 867 (C. C. N. J. 1907), it was held that unfair competition can be enjoined if not wholly performed outside the United States. The conflict of laws problem itself, namely, the question which law should be applied, was evaded by the assumption that the laws which might be applicable have identical contents. In Morris v. Altstedter, 93 Misc. 329, 156 N. Y. Supp. 1103 (1916), the court held that the fact that some of the fraudulent acts were committed outside of the jurisdiction of the State of New York or the United States did not deprive the court of its jurisdiction. In Johnston & Co. v. Orr Ewing & Co., 7 App. Cas. 219 (1882), an
tort, and in a broad sense of the word it certainly is, the law of the place of the wrong is applicable.\textsuperscript{94}

Simple as this rule is, it encounters well-known difficulties as soon as the wrongful action is related to more than one territory. In the situation under discussion the rebroadcast takes place in the United States, it is possibly heard in a third country, and the damage is done—at least in the majority of cases—in the country where the original broadcast took place. Any of these places can be called the “place of the wrong” as long as one remains on the level of purely verbal interpretation. But such interpretation carries no weight. Only a solution that satisfies the test of justice and practicability can be convincing. Under this point of view the application of the law of the place of the rebroadcast seems to be advisable. This is the law with which the “wrongdoer”—if he is one—is most familiar and about which he can most easily obtain information.\textsuperscript{35} It is the law of the court which in the majority of cases

English firm was enjoined from making unfair competition against another English firm in India and Aden. In “Morocco Bound” Syndicate, Ltd. v. Harris, [1895] 1 Ch. 534, an injunction against the playing of a play in Germany was denied on the ground that an English court could not enforce German copyright law in Germany, the application of which was based on the International Copyright Convention.

Judge Wyzanski’s decisions, Triangle Publications v. New England Newspaper Pub. Co., 46 F. Supp. 198 (D. Mass. 1942), and National Fruit Product Co., Inc. v. Dwinell-Wright Co., 47 F. Supp. 499 (D. Mass. 1942), do not make a very clear distinction between the problem which conflict of laws rule must be applied and which rules of unfair competition. From the context it is clear, however, that Judge Wyzanski assumes that there are as many laws against unfair competition as there are jurisdictions, and that the Massachusetts conflict of laws rule prescribes the application of Massachusetts rules on unfair competition if some of the acts of competition have taken place in Massachusetts.

In Branch v. Federal Trade Commission, 141 F. (2d) 31 (C. C. A. 7th, 1944), it was held that the Federal Trade Commission has jurisdiction to prevent unfair competition between American firms which partly take place in Latin America.

Fox, The Canadian Law of Trade Marks and Industrial Designs (1940) 212, says that a Canadian court has no jurisdiction to enjoin an infringement which takes place wholly abroad.

The problem has been very much discussed in Germany, see Nussbaum, Deutsches Internationales Privatrecht (1932) 339 et seq., and to a lesser extent in France, see 5 Répertoire de Droit Internationale 444 (1929).

\textsuperscript{a}Perrin frères c. Vaurillon, Federal Court of Switzerland (1905) 27 Semaine Judiciale 133, 135.

\textsuperscript{A}A conflict of laws problem was involved in the case of Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A. (2d) 302 (1939); see (1939) 10 Air L. Rev. 226. In that case a defamatory statement was broadcast from a studio in New York, and the business of the injured company was in Pennsylvania. The court applied Pennsylvania law without mentioning the conflict of laws problem.
has jurisdiction. For in most cases the rebroadcaster will be sued in the courts of the state where the broadcast took place. Legislative and procedural jurisdiction need, of course, not necessarily coincide. But if such a result can be achieved, it is welcome.

Assuming that American law on unfair competition is applicable, we encounter the following problems peculiar to the situation: The claimant who alleges to be injured by the rebroadcast is in the majority of cases an alien. However, this element is of no importance, because the common law grants equal protection against unfair competition to both citizens and aliens. In addition, most aliens are protected by one of the international treaties stipulating equal protection for the citizens of the contracting parties. The most important of these treaties is the "Union for the Protection of Industrial Property", which, since the revision agreed upon in the Washington conference of June 6, 1911, expressly provides for protection against unfair competition. This protection must be given to all citizens of the contracting parties alike.

Similar provisions are to be found in the various Pan-American treaties.

More complicated problems than those connected with foreign citizenship arise from the fact that the person injured has his business in a foreign country, and the fact that he may not be in a competitive relationship with the American rebroadcaster. Both of these facts are closely related. Does American law forbid acts of unfair competition against businesses in foreign countries and acts which become effective in foreign countries? In view of the generally accepted theory of the territorial nature of all national laws, one might hesitate to answer the question in the affirmative. But in our situation there are enough connections with the American territory to apply the American law to the facts under discussion. The fact alone that the broadcast was rebroadcast in this country indicates that there was a possibility of arranging a relay of the broadcast with one of the domestic stations. The unauthorized rebroadcast impaired the chance to arrange such a relay, and

---


97Art. 2: "Persons within the jurisdiction of each of the contracting countries (ressortissants) shall, as regards the protection of industrial property, enjoy in all the other countries of the union the advantages that their respective laws now grant, or may hereafter grant, to their nationals, without prejudice to the rights specially provided by the present convention."

Art. 10 bis: "The contracting countries are bound to assure to persons entitled to the benefits of the Union an effective protection against unfair competition."
in this sense it is an act of unfair competition committed in the territory where American law prevails.

This argument also disposes of the objection that the foreign broadcaster has not suffered any damage. There remains however the question whether the foreign broadcaster can be regarded as a competitor of the American rebroadcaster. Many of the foreign radio stations are owned and operated by the State or a government corporation and receive their income from public funds. Nevertheless such radio stations must in many respects be regarded as commercial undertakings. Here the views of the German Reichsgericht are suggestive. The fact that this court under the Nazi regime has declared that the German radio, which is conceded in the first line a means of indoctrination, is a commercial enterprise gives its opinion much persuasive force. For the court would certainly not have flouted the official doctrine and the outward legal appearances if it had not felt that the real situation made a different evaluation absolutely necessary. The issue of the decision of November 14, 1936, was the question whether the German broadcasting agency, the Reichsrundfunkgesellschaft, violated the copyrights of the record producers by playing the records over the radio. The Reichsgericht assumed that the record producers were the holders of a copyright transferred to them from the performers. Under this assumption, the question arose whether the playing of records over the radio was a performance in the exercise of a profession and for consideration ("gewerbsmässig und entgellich"). For under German law only such performances are reserved for the copyright owner.

The German broadcasting company, the Reichsrundfunkgesellschaft, is a government corporation. It derives no income either from its listeners or from advertisers. The listeners pay a license fee to the post office for the possession of their receiving sets, but these payments are not transferred to the broadcasting company. In the face of these facts the Reichsgericht declared that the broadcast was done in the exercise of a profession and for consideration. The court, in addition to citing three earlier cases, based its decision on considerations which we might render in the following somewhat amplified form: Government broadcasting has so many commercial aspects that in many regards it must

---

38Supreme Court of Germany, Nov. 14, 1936, 153 Entscheidungen des Reichgerichts in Zivilsachen 1.
39The technical term of the German law is Bearbeiter, which is difficult to render adequately in English.
40R. G. Z. 113, 413; R. G. Z. 136, 377; R. G. St. 43195.
be treated as a commercial undertaking. The broadcasting company wants to furnish its services as cheaply as possible; thus it prefers canned music to live talent. The services are of a type that usually is furnished only for consideration, namely entertainment. The broadcasting company, of course, wants to attract as many listeners as possible. But what is most important, from the public point of view, the listener pays for the broadcast. In the last analysis this decision has said that the public character of government broadcasting cannot exempt it from the rules of private law which require payment for services and goods which are obtainable only for consideration. Now, if the government can obtain such services and goods only under the same conditions as any other business enterprise, it must also have the right to protect its goods and services as any other business enterprise, namely by the rules against unfair competition. Consequently, there exists a competitive situation between commercial and government radio stations.

It is interesting to note that recently an American court has taken a first step in the same direction. In Associated Music Publishers, Inc. v. Debs Memorial Fund, Inc.,\(^{41}\) it was decided that the playing of a musical work by a non-profit corporation during a sustaining program is a performance for profit. This was deduced from the fact that one-third of the programs of the station carried advertisements and that the station tried to find sponsors for its sustaining programs. The decision is another indication of the principle that broadcasting as such is subject to certain restrictions deriving from copyright laws and, perhaps, other laws, quite independently of who operates the station.

**Playing of a Broadcast Over the Loudspeaker in a Restaurant or Theater**

One of the most important differences between rebroadcasting and this form of utilization of a foreign broadcast is that only the former is under the administrative control of the Federal Communications Commission. The problems presented by the playing of a broadcast over the loudspeaker in a restaurant or theater are governed only by the rules of private law.

Playing of the broadcast over the loudspeaker in a restaurant, barber shop, etc.,\(^{42}\) may violate a copyright. Since the copyright laws of the

---


\(^{42}\)Or distribution of the broadcast from a master receiving set to the rooms of a hotel where the guests may listen to the broadcasts by turning a knob. Society of European S. A. A. C. v. N. Y. Hotel Statler Co., 19 F. Supp. 1 (S. D. N. Y. 1937).
various countries differ widely on this question, the conflict of laws problem becomes all important. By analogy to what has been said above, the application of the law of the place of the action seems to be the obvious solution, i.e., application of American law. Assuming that American law is applicable, one must again distinguish two situations: (a) If the work played over the loudspeaker is copyrighted in the United States, the well established doctrine that such playing is a public performance for profit is applicable. This doctrine is based on the theory that playing over the loudspeaker is a new and independent performance. Consequently, it is irrelevant whether the original broadcast was legal or not, whether or not it was authorized by the author of the work, and whether or not the broadcast work was copyrighted in the country of origin of the broadcast. (b) If the work played over the radio was not copyrighted in this country, the author can rely only on the rules of the common law. Whether public playing over the loudspeaker violates the common law copyright has not yet been decided, but there seems to be little doubt that in this respect common law copyright and statutory copyright would be treated in the same way. Existence or non-existence of a copyright in a foreign country is, as shown above, relevant only in so far as it is connected with the loss of the common law copyright in this country. From this principle somewhat surprising consequences follow. Since the copyright laws of a number of countries do not grant protection against the public playing of a broadcast over a loudspeaker, it will often happen that an author whose copyrighted work is broadcast in a foreign country can enjoin the public playing over the loud-

---


speaker in this country, but not in the country of the origin of the broadcast.

**News Services Based on Foreign Broadcasts**

The third of the commercial uses of foreign broadcasts which have great practical importance is the following: systematic monitoring and digesting of foreign newscasts and their utilization for a news service in this country. The Communications Act does not forbid such an enterprise if only news broadcast to the public is utilized. Nor is a conflict with copyrights to be feared. In no country is news, as such, subject of a copyright. There are only some minor exceptions to this rule.\(^{45}\)

A quasi-copyright on news exists, in a few countries, among them Norway. According to Art. 3 of the Law of June 6, 1930, news may not be reproduced in Norway during the first sixteen hours following its publication in Norway. This provision has clearly no extra-territorial effect. It would prevent only the selling of the news service to Norwegian customers in so far as it contains news picked up from a Norwegian broadcast.\(^{46}\)

There remain the rules against unfair competition. According to the principles developed at the beginning of this article, American rules against unfair competition must be applied. The question, consequently, is whether the doctrine of the *International News case*\(^{47}\) must be applied to this situation.

Collection and dissemination of news picked up from foreign broadcasts may be unfair to the foreign broadcaster or to the person or agency which has expended efforts and money in the collection of news. The unfairness of the action of the American news collector consists in the appropriation of the fruits of the labor of others. In this respect the situation is the same as in the *International News case*.

But does there exist also a competitive situation? An affirmative answer is clear if the foreign news was collected by a news agency which itself sells news.\(^{48}\) This agency can then object to the commercial utili-


\(^{48}\)As said *supra*, text to note 36, aliens enjoy the protection of the American law if they are "ressortissants" of one of the countries of the Union for the Protection of International Property. See Hudson, *supra* note 45, at 389.
zation of its news service by another news agency even if the news was broadcast, for its potential market has been destroyed. That these potentialities can become a very solid reality is shown by the wide diffusion of Raymond Gram Swing’s news casts in foreign countries, which of course enjoy, in addition, the protection of the copyright laws, because they are the results of creative efforts. Similarly, the news services of Reuter have, and those of the other great European news agencies will undoubtedly have, commercial value in this country. If news is appropriated from their news casts and sold to the public in this country, an act of competition is clearly committed. This would be the case even if the foreign news agency is a government institution, such as we may expect in the future. For in this case the same considerations as in the case of government radio stations would be applicable.

Much more doubtful are the rights of the foreign broadcasting station itself. It can hardly have any claims if it has bought the news from a third person or agency unless the latter has given it an exclusive right and thus transferred its claims against competitors. If the foreign station has collected its news itself, it would have to prove that the use of its news cast by the domestic collector impaired at least a potential market. It may, for instance, be possible to show that the foreign station has a possibility of relaying its program to this country. But this will seldom be possible.

We arrive at the following conclusion: News which has been collected by a person or institution which commercially sells its services cannot be taken from a foreign broadcast and used for a domestic news service. Only news that is broadcast with the intent that it be freely used may be used with complete safety.

Conclusion

In the problems discussed in this article, questions of conflict of laws and questions of the territorial efficacy of domestic laws are intertwined. No clarification is possible unless the two questions are distinguished. One precedent and general considerations of justice and practicability suggest the application of American law to the various forms of utilization of foreign broadcasts. The rules of the American common law on copyrights and unfair competition are broad enough to grant the foreign broadcasters and their associates effective protection against an unfair exploitation of their efforts. This protection is granted independently of the protection granted American broadcasters in foreign countries. As it may be assumed that this latter protection is not always as extended
as the one given by the American law, equal treatment should be set up as the goal of American legal policy. It could be obtained by international treaties of two types: treaties which regulate the taking of programs of foreign countries as they were inaugurated in South America, and treaties which introduce a uniform treatment of literary and industrial property of the citizens of the contracting parties. If the United States joined the Union for the Protection of Literary and Artistic Property, it should not be too difficult to arrive at an agreement on the rights of broadcasters, authors, performers and disc producers in relation to each other.
THE MEXICAN SUIT OF "AMPARO"

HELEN L. CLAGETT†

MEXICO has developed within her judicial procedure a summary suit for the protection of individual freedoms and rights that is, in many of its aspects, unique, and for which there is no adequate equivalent either in the legal procedure or in the terminology of our common law. It is known as *amparo*, a term literally signifying protection, favor, aid, or defense. In some particulars, this suit may be compared to the various remedies of *habeas corpus*, injunction, writ of error, and *certiorari*, as they were developed in the Anglo-American legal system.

One of the more concise definitions found for the *amparo* is that given it by the distinguished Mexican jurist and dean of the law school of the National University of Mexico, Dr. Manuel Gual Vidal, who describes it as "a constitutional suit of a summary nature, the object of which is to protect, in a special case and at the request of an injured party, private persons whose individual rights as established in the Constitution have been violated through laws or acts of the authorities, or when the laws or acts of the Federal authorities injure the sovereignty of the States."1 The Constitution of Mexico provides also for another instance in which this action may be brought, that is, in "all controversies arising out of the laws or acts of the State authorities which invade the sphere of the Federal authorities."2

The rights of persons as outlined in our own Bill of Rights3 are well known and are enumerated here only for purposes of comparison. They include freedom of religion; freedom of speech and of press; the right to assemble and to petition the Government for redress of grievances; the right to keep and bear arms; the right not to have soldiers quartered in one's home during peacetime; the right to be secure in one's person, house, papers and effects against unreasonable search and seizure; the right to be held for capital and otherwise infamous crimes only upon presentment or indictment of a Grand Jury, with certain exceptions; the right not to be compelled in a criminal case to be a witness against oneself, nor to be deprived of life, liberty, or property without due

†A.B., University of Puerto Rico (1928), LL.B., George Washington University (1941); member of the California Bar; Head of Latin American Section, Law Library of Congress.

1GUAL VIDAL, Mexican Amparo Proceedings in Selected Papers and Reports of the Section of International and Comparative Law (Am. Bar Ass'n, 1941) 82.

2CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS (Ed. Oficial, 1917) Art. 103.

3U. S. CONST. AMENDS. I-VIII.
process of law; the right that one's private property shall not be taken for public use without just compensation; the right of the accused, in all criminal prosecutions, to a speedy and public trial by an impartial jury, and to be informed of the nature and cause of the accusation; the right to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have counsel for his defence; the right to a trial by jury in civil actions, with certain exceptions; and the right that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The comparable rights granted to persons in the Mexican Constitution are contained in the first twenty-nine articles and are set forth in much more detail than are ours—a characteristic of the system of written law of a civil law country. In addition to the rights mentioned in the United States Constitution, the Mexican chapter "Personal Guarantees" has included also the following: free public instruction; freedom to engage in a chosen profession, industry or occupation, provided it is lawful; no compulsory personal services without due compensation and full consent, except in such cases as military and jury service; the right of petition in political matters; the right to enter and leave the Republic, to travel through, and to change residences, etc.; the provision that no law shall be given retroactive effect to the prejudice of any person; the guarantee that there shall be no imprisonment for debts of a purely civil character; the right to be granted freedom on bail, with certain exceptions; the provision that capital punishment is forbidden for all political offenses, and imposed only for other grave offenses enumerated; the right to own property and the right of the government to expropriate it under certain conditions (the famous Article 27); and the prohibition of private and government monopolies with certain stated exceptions, such as coinage of money, patents, etc.

By its very nature, the suit of *amparo* protects only the aggrieved person against any illegal act which may tend to decrease his enjoyment of, or cause injury to, any of his individual rights mentioned above. The individual's rights guaranteed in our Constitution, founded as they were on natural justice, had already been assured to us through the common law and equity inherited from England. Their incorporation in our Constitution thus consisted merely of a reiteration of the rights and immunities which already belonged to the people. These rights in our country are adequately protected by access to the courts through the various

---

legal remedies extensively used in our procedure. In the newly-born Republic of Mexico, these rights and immunities established by the Mexican Constitution were new and almost unknown; and it was therefore necessary to set up an effective protection against their violation. This purpose was accomplished wisely and well by the comprehensive constitutional suit, so peculiarly adapted to the Mexican system of government "that unquestionably it was not slavishly copied from any other country, but based on our [Mexico's] political education, with the customs and historical precedents in the conflict between the Federation and the State."5

The origin of the amparo suit has been a matter of controversy. Some Mexican legal historians hold that it developed gradually from traditional customs coming to Mexico from her mother country, Spain. Other authors contend that it came into existence through the influence of the constitutions of France and the United States on the Spanish Constitution of 1812, which was in force in Spain's colonies for a short time before the consummation of independence in 1821. At any rate, the suit is founded on the civil, social, and political rights of the individual as they are enumerated in the Mexican Constitution.

The amparo is found definitely established and clearly described for the first time in the Mexican Federal Constitution of 1857.6 No mention of it was made in the first Constitution of the new nation in 1824,7 since that document failed even to enumerate the fundamental civil rights which are protected by this suit. In the charter known as the Siete Leyes8 (Seven Laws), enacted in 1836, an attempt was made to create a government that was midway between a centralized and a federative one; and at that time a "fourth power" was established in addition to the three historical ones universally recognized, i.e., executive, legislative, and judicial. This fourth power was denominated the Supremo Poder Conservador (Supreme Preserving Power), and it was charged with the duty of seeing that the Siete Leyes were faithfully and rigidly observed. Upon complaint of unconstitutionality of some legal provision, it was the duty of the fourth power to examine such law or decree and declare it to be either constitutional or unconstitutional. In 1840, a committee was appointed to revise the Siete Leyes; and the suggestion

6Lanz Duret, Derecho Constitucional Mexicano (2d ed. 1933) 347.
7Constitución Federal de los Estados Unidos Mexicanos (1824).
8Bases y Leyes Constitucionales de la República Mexicana decretadas por el Congreso General de la Nación el año de 1836.
was made at that time, although not immediately carried out, that the power previously given to the Supremo Poder Conservador concerning the constitutionality of laws should be transferred to the Supreme Court of Justice of the Nation.

During the same year, 1840, a deputy to the legislature of the State of Yucatán, Manuel Crecencio Rejón, sometimes called the “father of the amparo”, drafted a local constitution for his state (adopted the following year), which contained the first germs of the amparo proceeding. He maintained that the Superior Tribunal of the State should protect or aid (amparar) individuals in the enjoyment of their fundamental civil rights if they should appeal to the court for such protection against violations thereof through laws or decrees enacted by the government. In that document the word amparo was, for the first time, used in this connection. The important provisions embodying this principle in the 1840 Yucatán Constitution were contained in Articles 8 and 62. The latter specified that the power to protect the rights of the individual should be granted to the judicial branch of the Government, which should exercise it by declaring the law or decree complained of to be unconstitutional or not. The Superior Tribunal of the State was designated as the proper court for such purpose. In Article 8, there was a division of jurisdiction, in that Rejón proposed that the “Justices of First Instance [trial judges] shall protect any individual in the enjoyment of the rights guaranteed against violation by any functionary of the judicial branch of the government”. In other words, the Superior Court of the State should have jurisdiction over cases involving violation of the individual’s rights by laws or decrees, while the Courts of First Instance should adjudge cases of violation by decisions of other judicial bodies.

In 1847 a committee of six members was appointed to draw up a draft for a new Federal Constitution. Rejón, from Yucatán, was appointed as a member; and Mariano Otero, who vies with Rejón for the title of the creator of the amparo action, was another member. Otero had previously shown much interest in the preservation of the fundamental rights of individuals. The result of the committee’s work was the revival of the 1824 Constitution—Mexico’s first—thus re-establishing the federative form of government, with some modifications and amendments. This revised charter was called the Acta de Reformas of 1847 (literally, Document of

---

9Constitución Política del Estado de Yucatán sancionada en 31 de Marzo de 1841.
30La Constitución Política de Reformas sancionada por el Congreso Estraordinario Constituyente de los Estados-Unidos Mexicanos, el 18 de Mayo de 1847.
Amendments). Otero is given credit as being the author of the majority of the amendments adopted, and he was the signer of the interesting *Exposición de motivos* (statement of purposes) which accompanied the *Acta* upon its presentation to the national Congress. In this exposición he stated that the frequent attacks by the Powers of the States and of the Federation upon the individual make it urgent that, upon the re-establishment of the Federation, some guarantee of individual liberties be assured, and that such protection may be found only in the judicial power, the natural guardian of the rights of individuals, and for this reason the only suitable one. The *Acta de Reformas* conferred upon the federal courts the jurisdiction to *amparar*, or protect, any inhabitant of the Republic in the preservation of the privileges granted him by the Constitution against violation by the legislative or executive powers of the Federation as well as of the States. A distinctive amendment provided that any state law which violated the Federal Constitution, or the general federal laws, would be declared void by the national Congress, but that a resolution to that effect could be initiated in each instance only in the Senate. This provision was not carried over to the Constitution of 1857, since the situation was taken care of by the wider use of the *amparo*, explained more fully below. The Constitution of 1857 also provided that a special law relating to the procedure and regulation of an *amparo* suit should be enacted subsequently.

There has been much controversy as to whether Rejón or Otero should have full credit for the actual creation of this unique remedy, although one might draw the conclusion, after examination of many sources, that apparently Rejón initiated the idea in the Yucatán Constitution of 1840, while Otero gave it concrete form in the *Acta de Reformas* of 1847.

The constitutional *amparo* suit was definitely established in the Constitution of 1857. No procedural law regulating the suit was adopted, however, until 1861; and its application was further delayed for several years, first by the war in which the nation was then engaged, and

---

11 *Id.* Art. 22.

12 *Constitución Federal de los Estados-Unidos Mexicanos* (1857) *Art.* 102.

13 *Gaxiola, Mariano Otero, Creador del Juicio de Amparo* (1937); *Echánoye Trujillo, La Obra Jurídica de Manuel C. Rejón, Padre del Amparo* (1937).


later by the establishment of the Empire under Maxmilian of Austria, which suspended the constitutional government. This law of Amparo was divided into four sections dealing respectively with: (1) violations of the rights of individuals; (2) federal laws and acts violating the sovereignty of the states; (3) laws and acts of the states infringing upon the power of the Union; and (4) decisions and sentences. This law, being a first attempt, was naturally defective; and at the end of the year 1868 the Secretary of Justice presented a draft for new legislation in this field. It was approved by the Congress and promulgated as law on January 20, 1869. This law was more simple in its procedure, establishing a single suit to be judged in a summary proceeding by the district courts of the federal judiciary.

Between the year 1869 and the passage of a third regulatory law in 1882, the use of the Amparo action was increased to a great extent. It may be taken as an indication of the attitude of the Government toward the individual and also as a justification of the need for such a remedy that, whereas in 1869 only 123 such suits were decided, in 1880, only a little more than a decade later, the number of cases had risen to 2,108. These figures are given by Isidro Rojas, who also states that in a three-month period from June to August, 1901, there were heard and decided 957 Amparo suits.

The third regulatory law on Amparo procedure was promulgated on December 14, 1882, effective the following year, and resulted in great improvement over its predecessors because of the lessons learned through experience and practice. An interesting innovation was the authorization of the use, in certain specified instances, of the telegraph in judicial affairs, without cost to either the Government or the individual complainant. When, in 1897, the first Code of Federal Procedure was enacted, it included among its contents provisions on the Amparo suit, thus effectively repealing the special law of 1882. Similar provisions were also included in the Federal Code of Civil Procedure of 1908; but following the adoption of a new Constitution in 1917, President

---

17 Ley orgánica constitucional sobre el recurso de amparo, Jan. 20, 1869, 10 Legislación Mexicana 521 (1879).
18 Rojas y García, El Amparo y sus Reformas (1907) 60.
19 Ley orgánica de los Arts. 101 y 102 de la Constitución federal de 5 de febrero de 1857 (1882).
20 Código Federal de Procedimientos Civiles (Mexico, 1897).
21 Código Federal de Procedimientos Civiles (Ed. Oficial, Mexico, 1908).
22 Constitución Política de los Estados Unidos Mexicanos (Ed. Oficial, 1917).
Venustiano Carranza, during his constitutional régime, approved the promulgation of a new regulatory law on Articles 103 and 107 of the new charter bearing on the *amparo*. This law was dated October 18, 1919. Each new law was able to contribute more than its predecessor toward overcoming defects, for at the period of each compilation the drafters were naturally unable to foresee the contingencies which would present themselves in the future. The procedure and rules set forth in the special law enacted on December 30, 1935, effective on January 10, 1936, are still in effect today. Although a new Code of Federal Civil Procedure has recently been enacted, the 1935 law was not repealed thereby.

Before proceeding further, a brief description of the Mexican judicial system would not be amiss. In structure, it is not dissimilar to that of our own country. There are federal and local courts. The former are described and their jurisdictions limited by the provisions of the Federal Constitution and by codes and laws enacted by the national Congress. The local courts are governed by the individual states, although in form and procedure they follow closely the pattern of the local courts of the Federal District and federal territories. Like the District of Columbia, both federal and local courts are found in the Federal District of Mexico. In the federal judiciary, the district courts, of which six are found in Mexico City alone, act as courts of first instance, or trial courts, the circuit courts as courts of second instance, or of appeal, and the Supreme Court of Justice of the Nation as the court of last resort and supreme interpreter. In the federal system there are also various administrative courts, such as Fiscal Courts and the labor Courts of Arbitration and Conciliation, which have direct appeal to the Supreme Court. The Supreme Court of Mexico has twenty-one justices, five sitting in each of the four chambers or *salas*, and a Chief Justice, or *Presidente*. The latter is elected yearly by the members from among themselves, with a right to be re-elected. The four *salas* hear cases in the civil, criminal, administrative, and labor fields, respectively, while in certain types of cases, the court sits *en banc*.

The field of protection of the individual rights and immunities as

25*Ley reglamentaria de los artículos 103 y 107 de la Constitución federal* (Ed. Oficial, 1919).
26*Nueva ley de amparo reglamentaria de los Artículos 103 y 107 Constitucionales* (1936).
27*Nuevo Código Federal de Procedimientos Civiles* (Mexico, 1943).
enumerated in Articles 1 to 29 of the Mexican Constitution of 1917 is governed by Articles 103 and 107 thereof, and by the 210 articles in the special regulatory law of 1935. In Article 103, the Constitution provides that federal tribunals, i.e., the district courts, the circuit courts, and the Supreme Court of Justice of the Nation, shall take cognizance of "all controversies arising out of laws or acts of the authorities which shall infringe any personal guarantees." The majority of cases are based on this first section of the article. The other two sections provide for cognizance of suits by the same courts involving "all controversies arising out of laws or acts of the federal authorities which limit or encroach upon the sovereignty of the states" and of "all controversies arising out of the laws or acts of state authorities which invade the sphere of the federal authorities." An emergency war measure of interest here provides that an amparo suit may not be brought against any provision of war legislation, or acts resulting therefrom.

"The Supreme Court of Mexico rules that the amparo may not only be brought for direct violations of the first 29 articles of the Constitution, but also, if there is injury to persons through violation of some other constitutional article, this article may be related with the guarantee of Article 14 [equivalent to our due process clause]. So, in the subject of taxes, even though the obligation of Mexicans to contribute for the public expenditure in the proportional and fair manner provided for by law is contained in Article 31, it has been regarded that its violation constitutes likewise a violation of the guarantee of Article 14. In this manner, relief may be had through an amparo suit, although the guarantee does not come within the first 29 articles.

The Constitution establishes the general form and procedure to be followed in the controversies mentioned in Article 103, and this procedure is further developed and described in detail in the regulatory law on amparo of 1935. The suit exclusively protects only aggrieved individuals, not corporations or other legal entities; and it protects only those injured individuals who specifically demand redress for a viola-

---

27 Id. Art. 103, § I.
28 Id. Art. 103, §§ II, III.
29 Decreto de 1 de junio de 1942, Art. 18.
30 "No person shall be deprived of life, liberty, property, possessions or rights, without due process of law instituted before a duly created court in which the essential elements of procedure are observed and in accordance with previously existing laws."
31 GUAL VIDAL, supra note 1, at 83.
tion of their rights occasioned by a law or an act of some public authority. The decision of the federal court is confined to affording aid to the individual in the specific instance to which the complaint refers, but it may make no general statement as to the law or act which formed the basis of the complaint.\textsuperscript{33} Among other precepts set forth in Article 107 it is stated that in civil and criminal cases, with the exception of certain instances, "the amparo shall issue only against final judgments, when no other recourse is available by which these judgments may be modified or amended, provided that the violation of the law shall have occurred in the judgment; or provided that, although committed during the trial, objection was duly noted and protest entered against the denial of reparation, and provided further that if committed in first instance [in the trial court], it shall have been invoked in second instance [on appeal] as a violation of the law."\textsuperscript{34} The amparo also issues in both civil and criminal cases if rules of procedure have been substantially violated and if the violation deprives the petitioner of means of defense.\textsuperscript{35}

Articles 16, 19, and 20 of the Constitution provide that an individual shall not be molested in his person, family, home, papers, possessions, etc., except by persons duly armed with executed warrants; that he shall not be detained under arrest for a period exceeding three days except for stated reasons; that every accused shall be given freedom on bail except under certain conditions; that he may not be forced to be a witness against himself; that he must be apprised of the name of his accuser and the nature of the accusation, confronted with the witnesses against him, be heard in his own defense, and other similar rights. The law of amparo provides that in the event of violation of these specific rights and immunities, recourse is had to the appellate court for the court which committed the breach or to the corresponding District Court having jurisdiction.\textsuperscript{36}

In order for federal protection to be granted in amparo suits, it is required that the act or law be the direct cause of the injury to the complainant, whether to his person, interests, or property. When the injury ceases, his right to bring the suit or to continue it also ceases.

The regulatory law of 1935 amplifies the procedure set forth in the

\textsuperscript{33}Id. \textsuperscript{34}Id. \textsuperscript{35}Id. \textsuperscript{36}Nueva ley de amparo reglamentaria de los Artículos 103 y 107 Constitucionales (1936) Art. 37.
constitutional article, the rules having been developed by the Supreme Court during its long practice in the field. Article 23 of this law provides that the petition for *amparo* may be applied for, substantiated, and decided on any day of the year, with certain exceptions, but that it may be petitioned any day and at any time of day or night when it is a question of acts which imply danger of deprivation of life, an attack on individual liberty, deportation, exile, conscription into the Army or Navy, and other similarly urgent instances. In these cases, a temporary injunction, described later, may be granted immediately pending a final decision in the case. The citizen complainant and the court may make use of the telegraph free of cost in such instances, whether during or after office hours.

Another interesting provision is found in Article 33, which states that the responsible officials or authorities, against whom the complaint is directed, are under the obligation to receive official communications addressed to them on *amparo* matters, either in their offices, homes, or wherever they may be located at the time; and these notices shall have legal effect as to the relief sought, immediately upon delivery either to the official himself or to whoever is in charge of receiving his correspondence in the office.

A suit of *amparo* may be direct or indirect. The former is that in which the Supreme Court or any one of its four chambers takes original jurisdiction; and such a suit lies only against the final judgments in civil and criminal cases mentioned above, from which no further appeal is available.\(^3\) Such final judgments may include the decisions of the labor Boards of Conciliation and Arbitration. The Supreme Court of the Nation, composed of twenty-one justices, may sit either as a whole in certain cases, or divided into four *salas*, to hear either direct or indirect *amparo* suits. In the fourth *sala*, in which labor cases are heard, the *amparo* appeals come from the decisions of the labor arbitration boards. The indirect *amparo* cases are generally heard by the district courts. Relief is granted in such cases only when there is no other legal remedy which may be used to prevent the injury threatened by the acts or laws. A review of the judgments rendered by the district courts in *amparo* cases can be demanded *sua sponte* by the Supreme Court.\(^4\)

In order to restore things to the *status quo* during the pendency of *amparo* proceedings, our Mexican neighbors have developed a most effec-

---

\(^3\) *Id.* Art. 44.

\(^4\) *Id.* Art. 83.
tive means to secure this result. It consists of an incidental petition, which may be made during the trial of the suit, for what is called suspensión, a form of relief similar to our injunction. The outstanding authority on this point, Ricardo Couto,⁴⁰ states that the suspensión is an essential part of the amparo proceedings; that it is one more means of protection within these proceedings which the law of Mexico concedes to the individual. In its results, the suspensión acts as a provisional amparo because of the temporary relief which it affords the individual against the act complained of.

In Mexican suits, this stay in the proceedings serves a two-fold purpose. First, it maintains things in statu quo, and thus preserves the subject matter of the amparo, making it possible to repair any injury to the complainant in the event that the decision rendered is favorable to him. Secondly, it prevents the infliction of further or continuing injury or damage to the complainant while the suit is still in progress. The first type of injunction, known as suspensión de oficio requires no petition, but may be granted by the judge sua sponte. The second, petición de parte, issues only upon the petition of the injured party himself. The former is granted under such urgent circumstances as in cases involving death penalty, exile, or some act violating Article 22 of the Constitution.⁴⁰ It may also be granted when an act, should it reach consummation, would cause irreparable injury and make it impossible to restore to the complainant the full enjoyment of his right.

Couto⁴¹ admits that the suspensión can never produce the identical effects of the amparo itself since it cannot invalidate the act complained of, because this nullification may only be the subject of the final decision of the court in the amparo suit. The amparo may produce results of a definite and final character, while the suspensión merely gives temporary relief during the proceedings. However, from a practical point of view, the immediate protection which is made available gives the suspensión

⁴⁰Couto, La Suspensión del Acto Reclamado en el Amparo (1929) 45.
⁴¹Art. 22: “Punishment by mutilation and infamy, branding, flogging, beating with sticks, torture of any kind, excessive fines, confiscation of property or any other penalties, unusual or working corruption of the blood, is prohibited; attachment proceedings of the whole or part of the property of any person made under judicial authority to cover any civil liability arising out of the commission of any offense, or by reason of the imposition of any tax or fine, shall not be deemed a confiscation . . . ; capital punishment is likewise forbidden for all political offenses; in all cases other than political, it shall be imposed only for high treason committed during a foreign war, parricide, homicide with malice aforethought, arson, abduction, highway robbery, piracy, and grave military offenses.”
⁴²Couto, op. cit. supra note 39, at 47.
a temporary effect analogous to that which is permanently accorded by the *amparo*. The purpose or object of the *amparo* is to protect the individual permanently against the abuse of Power, while that of the *suspensión* is merely to protect him during the continuation of the suit.

In this aspect, the Mexican constitutional suit resembles the Anglo-American writ of injunction. The injunction procedure is the broadest of which individuals may avail themselves, and it finds its sources in equity. It may be preventive or reparative, interlocutory or permanent. It operates *in personam* and requires persons to whom the writ is directed by the jurisdictional court to do or refrain from doing a particular thing—it is directed to persons and not to courts. It may issue against the violation of not only those rights found in the Federal Constitution, but also those given by the states and those found in common law and equity.

Maurice Minchen, in a comparative work, devotes an interesting chapter to the comparison of the *amparo* suit with our various legal remedies, particularly with our writs of injunction and *habeas corpus*. Some of the points of similarity and difference between the *amparo* and the injunction to which he calls attention are the following: Our injunction can prohibit the authority who has violated the right in controversy from continuing his act, while the *amparo* merely surrounds the injured party with the protection of the Federal Government against the authority responsible for the invasion. In both countries, however, this public authority is liable to punishment if he should disregard this injunction order. The Mexican Constitution provides that:

“If after the granting of the *amparo*, the guilty official shall persist in the act or acts against which the petition of *amparo* is filed, or shall seek to render of no effect the judgment of the Federal authority, he shall forthwith be removed from office and turned over for trial to the corresponding District Court.”

Other points of difference are that the Anglo-American injunction will issue against a person whether he be a public official or a private individual, while the *amparo* may be petitioned only with regard to violatory acts of public officials. Our courts may enjoin the continuation of a suit or they may order an official to perform a legal or an equitable duty, or desist from performing an act, the order being of a mandatory or prohibitory nature, while the *amparo* applies only to persons who have

---


43 *Constitución Política de los Estados Mexicanos* (Ed. Oficial, 1917) Art. 107, § XI.
been injured by a violation of their constitutional rights. The injunction is a protection granted by a judicial power, which, in Anglo-American countries, may be either a federal or a local court; but the amparo is only a federal aid, an appeal created by the sovereign power of the Republic, regulated by the legislative power, and administered by the judicial branch. Such is the custom in Roman Law countries, which thus makes their courts administrative rather than independent and sovereign powers.

In our injunction cases, once the judge has obtained jurisdiction, he may, within his discretion, rule on both questions of law and questions of fact and decide the entire controversy on the merits. In the amparo cases, only protection is granted; and this is limited to the individual complainant and to the circumstances of the case in litigation. If the appeal should arise from a civil suit, the proceedings are returned to the trial court to be continued, following the decision of the higher court on the point for which it was sent up—that is, whether or not to grant federal protection. In the United States, the judge may declare the law or act involved to be unconstitutional and, in this manner, grant final and definite protection to all, while the amparo, as stated previously, grants protection only to the aggrieved person requesting this aid, and the court may not make a general declaration with respect to the constitutionality of the law or act complained of.

In another of its aspects, the Mexican constitutional suit of amparo also resembles, in a limited way, our writ of habeas corpus. On this point the Mexican appeal is unquestionably superior because of its broader jurisdiction, for it protects property and interests as well as the person of the individual involved.

The history of our writ which champions the civil right of liberty for persons imprisoned without just cause is lost in antiquity. It was in use in England long before the Magna Charta, and came to us as part of our inheritance, forming part of our common law. It was incorporated in our own "Magna Charta"—the Constitution. It is not only duly guaranteed by our Federal Constitution but also provided for in the state constitutions. The object of our writ is to obtain the prompt release, by means of a judicial order, of those persons who have been illegally deprived of liberty—it is essentially a writ for investigation into matters in which the Government is interested in protecting truth and freedom. Although often compared with the Mexican suit, the similarity is slight and is found only in the results in the special cases in which the amparo is applied. The Law of Amparo states that:
“If the act complained of affects personal liberty, the effect of the suspension shall be the placing of the complainant at the disposal of the District judge, but only in so far as his personal freedom is concerned, the complainant remaining at the disposal of the authority who is to judge him when the order emanates with regard to the continuation of the penal proceedings.”

When the act complained of consists of the detention of a plaintiff charged with some offense by administrative authorities, or by the judicial police, the suspension shall be granted if applicable, without prejudice to the plaintiff’s being turned over to the authorities. If the suspension is granted in cases of orders for arrest, the District judge shall order such precautionary measures as he deems necessary in regard to the complainant, in order that he may be returned to the authority responsible in the event that the *amparo* is refused.

Where the plaintiff is held by order of the judicial authorities for precautionary imprisonment, he may be set free under bond in accordance with the federal or local laws applicable to the case.

Another provision of the Law reads:

> “Whenever there is good evidence that the authority responsible is endeavoring to evade compliance with the order to free the plaintiff, or is endeavoring to keep him in concealment by transferring him elsewhere, the District judge may order the authority brought before him to enforce said order.”

Our writ of *habeas corpus* vindicates only the right of personal liberty, when illegally restrained, while the Mexican action protects not only the body of the individual, but also his interests and property. As limited to the point of personal freedom, the *amparo* is available only against arbitrary imprisonment and detention, against detention of a duration of more than three days, against imprisonment for debt, and for the protection of individuals in cases concerning crimes not deserving of corporal punishment where freedom can be obtained only under bond. In Anglo-American law, under the writ of *habeas corpus*, it may become necessary for the court to decide also the constitutionality of the federal or state legislation involved in the case. In Mexico, the judgment in *amparo* must be so drawn as to cover the individual exclusively and confine itself to affording redress in his special case. It may not go further and make any other statement concerning the validity of the law or act forming the basis of the complaint.

There exist in the United States other types of legal remedies such
as the writ of certiorari, the writ of mandamus, and, formerly in much use, the writ of error, now abolished by statute in federal courts. One may find similarities in these remedies to the various aspects of the Mexican amparo. The writ of error had as its object the review of errors which may have been committed in a decision rendered by an inferior court. The federal court could, through this writ, examine to ascertain whether there had been an unwarranted application of the fundamental laws. This procedure resembles the Mexican cassation suit, which is an appeal of an extraordinary nature interposed in order to repair any errors of law which may have been committed by the courts in rendering their judgments. The appeal is directly to the highest tribunal of the land. Our Judicial Code reiterated the assurance of the supremacy of our fundamental laws by providing that:

“A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. . . . The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.”

The use of the writ of error has been abolished, however, and relief is now obtainable by appeal or certiorari in both civil and criminal cases. Even prior to its repeal, the writ of error had been replaced to a large extent by the more frequent use of the writ of certiorari. Since 1914 the Judicial Code has provided that:

“It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination . . . any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the


Judicial Code § 237 (a), 43 Stat. 937 (1925). By virtue of the act abolishing writs of error 45 Stat. 54 (1928), wherever the words writ or writ of error appeared in § 237 (a) of the Judicial Code, the word appeal is now substituted, 28 U. S. C. § 344 (a) (1940).
Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States . . . .”

As the Supreme Court has said, “The difference between the two modes of securing a review, as contemplated by the statute, lies in the fact that a writ of error is granted as of right, while a writ of certiorari is granted or refused in the exercise of a sound discretion.”

The common-law writ of certiorari has little use today in the federal judiciary, although it still has wide application in some of the states. The comparison made here of our writs of error and certiorari with the Mexican amparo relate rather to the common law writs than to our statutory remedies. In this connection the direct amparo approximates in some measure our writs of error and certiorari, since the former may also be petitioned against the violation of fundamental laws as well as the violation of procedural legislation. The 1935 Law of Amparo states:

“The Supreme Court of Justice has exclusive jurisdiction of amparo proceedings [direct amparo] in the following instances:

I—Against final sentences pronounced in criminal or civil cases, for violation of laws of procedure committed during the proceedings, when substantial parts thereof are affected, and where the violation has deprived the plaintiff of a defense;

II—Against final sentences pronounced in civil or criminal cases for violation of guarantees committed in the sentences themselves.”

Even our writs of prohibition and mandamus find analogies in the Mexican constitutional suit in the power given the judicial authority to compel another authority to carry out its official duty or obligation, or to constrain it from carrying out an official act. It may even order a judge to render a decision in a certain case in which he has failed to do so.

A difference noted between the constitutional law of Mexico and that of the United States is to be found in the distinction which is drawn in the Mexican legal doctrine between those fundamental rights which are granted in the Constitution and those which are acquired through treaties and federal laws. According to Judge Rabasa, the authors of the Constitution of 1857 divided into two parts the article on the juris-

---

48JUDICIAL CODE § 237 (b), 38 STAT. 790 (1914), as amended, 43 STAT. 937 (1925), 28 U. S. C. § 344 (b) (1940).
50Nueva ley de amparo reglamentaria de los Artículos 103 y 107 Constitucionales (1936) Art. 158.
51RABASA, EL JUICIO CONSTITUCIONAL (1919) 176.
diction of the judicial power, which corresponds to the single provision on the same subject in our own Constitution. This separation of jurisdiction was not an oversight but a deliberate act on the part of the drafters. They were aware of the peculiar circumstances existing in their country, and this division of jurisdiction is perhaps one of the best innovations introduced by the drafters. It stipulates that, although provision is made that the _amparo_ may be petitioned for protection against the violation of privileges granted by the Constitution, it may not issue in order to maintain respect for the treaties and laws. The drafters considered that the latter could in themselves be unconstitutional and unworthy of such protection; and they were content, therefore, and with much reason, to include under the subject matter for the direct jurisdiction of the federal tribunals of the Nation all controversies arising from the application of treaties and federal laws.52 These problems, then, would not be approached through an _amparo_ suit.

In the constitutional law of the United States, as in that of Mexico, the Supreme Court is recognized as the final judge of all constitutional questions which come before it. In each country this high tribunal is the supreme interpreter. The first essential difference is the manner in which cases come before the respective courts. In the United States, except for the instances in which it has original jurisdiction, the Supreme Court in constitutional cases acts as an appellate court to which problems are carried from the local tribunal, usually today by statutory certiorari and sometimes by appeal. Although Mexico has adopted the same fundamental principles as found in our country, the organization of her judiciary is different. It is only in particular cases that her Supreme Court may have the power to declare the unconstitutionality of laws, and this is not accomplished through a system of reviewing the decisions of the lower tribunals but by virtue of the _amparo_ suit only. A point of similarity, however, lies in the fact that in both countries no law may be declared unconstitutional until an individual has been injured thereby. In Mexico this unconstitutionality, as mentioned previously, would apply only to the aggrieved person requesting _amparo_. As Lozano states it:

"The mere existence of an unconstitutional law which may violate an individual's guaranteed rights is not sufficient. So long as the law is not exercised or applied, it may be considered a dead letter, which offends or injures no one. . . . The law acquires a real existence and produces its effects when it is applied

---

52 Constitución Federal de los Estados-Unidos Mexicanos (1857) Art. 97.
in a particular case; as a result, only then is a person injured thereby and only then does he have the right to defend himself against the application of the law through recourse to the *amparo* suit. . . . In this manner, an unconstitutional law which injures some individual in each case of application is made impossible and is therefore annulled without the necessity of a general declaration and without the excitement and commotion which the legislator would cause. . . .”\(^{53}\)

In a similar vein, Story tells us what constitutes a case within the meaning of our Constitution:

“. . . It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. When it has assumed such a form, it then becomes a case; and then, and not till then, the judicial power attaches to it. A case, then, in the sense of this clause of the Constitution, arises when some subject touching the Constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law. . . .”\(^{54}\)

Perhaps the greatest difference between the *amparo* suit and remedies employed in our country lies in the effect of the decisions rendered by the highest tribunals. As has been pointed out previously, in Mexico the relief granted is limited to the person requesting it, and no general statement of the validity or invalidity of the law or act in litigation can be made by the court. In this country, on the other hand, the effect is the outright repeal of the law which has been declared to be unconstitutional by the Supreme Court of the nation. As Ignacio Vallarto, one of the greatest authorities on Mexican constitutional law, has written:

“. . . the decision which grants the protection of the *amparo* against a law, does not necessarily bring about its immediate repeal by the legislative power, even though the law was not applicable solely to the person protected. This appeal merely nullifies the law in the special case in question, but does not oblige the legislator to revoke it. It is true that he is under a duty to do so when the judicial power by continual judgments has declared the law unconstitutional, because the legislator himself, in the enactment of the laws, is bound to respect the decisions of the supreme interpreter of the Constitution, and he would be rebelling against the Constitution itself if he persisted in promulgating or upholding laws which have been declared to be unconstitutional; but from this point to the one of imposing on the legislator by force the repeal of one of his laws, there is an incommensurable distance.”\(^{55}\)

\(^{53}\)Lozano, *Tratado de los Derechos del Hombre* (1876) 439.


\(^{55}\)Vallarto, *El Juicio de Amparo y el Writ of Habeas Corpus* (1881) 300.
Mexican authors in the field of constitutional law claim that one of the drawbacks in our system of judicial review is that in making the decision binding on all authorities, even those outside of the judicial field, the judicial power invades the legislative field. They maintain, moreover, that the summary repeal of a law does not always allow sufficient opportunity for that law to prove its good points, if any. They believe that this affects the stability of institutions and the order which is so necessary for peaceful administration. The corresponding drawback in the Mexican suit is that the effect of a favorable decision is merely to excuse one individual from compliance with the law, while it obliges other persons to bring analogous suits for similar violations for which the court, in its discretion, may or may not protect them against the law. As a matter of fact, there is nothing to prevent the same person from being injured anew by the same law. Under such circumstances he would have to petition another amparo for each injury, so long as the law itself is not repealed by the legislative branch of the government. Vallarta\textsuperscript{56} also illustrates this point by explaining that an individual, once given relief through an amparo appeal against the payment of a certain tax, will yet be obliged to bring a new suit to become exempt from the next or different payment exacted under the same tax law, while a second person, likewise aggrieved, must also bring a suit in his own name, and may not use as a precedent the favorable decision of his predecessor. On the other hand, Vallarta points out also that in the event that an unfavorable decision be rendered in the trial court, the second and subsequent aggrieved persons are not prevented from petitioning for relief and being successful in spite of the fact that it was refused in the first case.

The legislator's sovereignty in Mexico has been upheld by the Supreme Court on numerous occasions. One outstanding case\textsuperscript{57} held that the amparo which may be granted against a law violating the complainant's guaranteed rights does not constitute an attack on the sovereignty of the legislative authority, for the latter has had its powers defined and limited by the Constitution, which may not be violated in any way; nor may the amparo granted restrict the power to legislate, for the granting of federal protection is limited merely to protection of the com-

\textsuperscript{56} Id. at 310.

\textsuperscript{57} Maria Cristina Alvarez, petitioner, Amparo No. 4274, Supreme Court of Justice of the Nation, Tercera Sala, Mex. Distrito Federal, June 3, 1935, 44 \textit{Semanatio Judicial de la Federación} 4215.
plainant in the special case in litigation and does not have as its purpose the declaration of a particular law as unconstitutional.

While a decision of the highest federal court of the United States holding a law to be unconstitutional causes that law to lose its total efficacy, and while the decision is a precedent binding upon everyone, an amparo decision of the Supreme Court of Justice of the Nation, or of any one of its four chambers, does not have a similar effect unless it is one of a series of five consecutive amparo decisions on the same point, holding the same way, uninterrupted by one to the contrary.\(^58\) Such a series constitutes precedent of a kind called jurisprudencia, which is binding thereafter on all inferior courts, federal and local, but not on authorities outside of the judicial branch.\(^59\) In other words, the doctrines of res judicata and stare decisis as they exist in our country are practically unknown in Mexican practice. However, the practical effect of the jurisprudencia is to repeal the law whose violation has brought the cases before the Supreme Court. In this manner, then, the amparo, besides insuring the rights of man, may also fulfill an even higher duty by enabling the Supreme Court, through its decisions as the supreme and final interpreter of the Constitution, to take its place in the formulation of the public law of the nation.

\(^{58}\)Nueva ley de amparo reglamentaria de los Artículos 103 y 107 Constitucionales (1936) Art. 193.

\(^{59}\)Id. Art. 194.
THE
GEORGETOWN LAW JOURNAL
Volume 33 Number 4
MAY, 1945

THE BOARD OF EDITORS

JAMES FAY HALL, JR., of Mississippi..............................Editor in Chief
LEO A. HUARD, of New Hampshire.................................Associate Editor
S. WALTER SHINE, of Maryland.................................Associate Editor
EDWIN R. FISCHER, of New York............................Administrative Law Editor
RAY E. BAKER, of Montana....................................Federal Legislation Editor
MAURICE E. WRIGHT, of Texas.................................Note Editor
BARTHOLOMEW B. COYNE, of the District of Columbia......Recent Decision Editor
R. VERNON RADCLIFFE, of Maryland..........................Recent Decision Editor
ROBERT L. HEALD, of Ohio......................................Book Review Editor
MANSARD BULLOCK, of Mississippi..............................Secretary

STAFF

ALBERT W. BICKNELL
District of Columbia

HENRY BISON, JR.
Ohio

RICHARD R. BROWNSTONE
New York

LOUIS CHAPPELL
Michigan

JAMES E. COTTER
Alabama

JAMES P. DURKIN
New York

GERALD L. ENRIGHT
Washington

PHILIP FELDMAN
Massachusetts

THOMAS B. GRAHAM
Massachusetts

JACOB D. HORNSTEIN
Maryland

JULIUS H. HULL
Michigan

WILLIAM A. KEHOE, JR.
District of Columbia

JACK MCHUGH
California

JOHN F. REILLY
Massachusetts

STANLEY M. ROSENBLUM
Missouri

JAMES C. TOOMEY
District of Columbia

STANLEY WALSH
North Dakota

ROBERT A. MAUER, Faculty Advisor

438
ADMINISTRATIVE LAW

LEGALITY OF THE "BASING POINT" PRICING SYSTEM: THE FEDERAL TRADE COMMISSION'S ENFORCEMENT OF PRICE DISCRIMINATION PROVISIONS OF THE CLAYTON ACT

An interesting and important development of the administrative process is found in the history of the Federal Trade Commission's interpretation of the price discrimination section of the Clayton Antitrust Act and in its application to the so-called "basing point" system. After a long-continued effort to accomplish its enforcement ends, the Commission found vindication in two recent Supreme Court decisions.

"Basing point price systems", so-called, have been widely used in the United States for more than a half century, and administrative and judicial decisions holding them illegal have a far-reaching effect upon industry in this country.

As long ago as 1924, the Federal Trade Commission struck the initial blow against the well-known business practice, popularly referred to as the "Pittsburgh Plus" system, of quoting selling prices on steel products upon a single basing point rather than upon a producing or shipping point. In that year, the Commission found the United States Steel Corporation to be violating Section 2 of the old Clayton Act of 1914 which then read, in part, as follows:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities... where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition:..."3

The Federal Trade Commission brought its proceeding against the United States Steel Corporation and its chief subsidiaries. It held4

8 F. T. C. 1 (1924).
that there was unlawful price discrimination under Section 2 of the Clayton Act where the prices did not make due allowance for differences in the cost of "transportation". The facts cited in the complaint drawn by the Commission in that case illustrate the "basing point" system.

The United States Steel Corporation owned a plant in the vicinity of Chicago and one at Pittsburgh. A purchaser in Chicago ordering steel from the company would be charged a base price plus a fictitious railroad freight charge from Pittsburgh to Chicago, regardless of the fact that actual delivery was made from the Chicago plant. The Chicago purchaser, who received deliveries from the local plant, desiring to enter into competition with one who operated in the Pittsburgh area, could not possibly hope to compete successfully with the latter, because he would have to bear not only the fictitious railroad freight charge from Pittsburgh to Chicago but also the actual freight charges for shipment of his goods from Chicago to the Pittsburgh area, where they would be used. However, the Pittsburgh purchaser could easily compete with the Chica-goan in the Chicago area, because the former would pay only the actual railroad freight charge on the goods purchased by him and shipped from the Pittsburgh plant, whereas the latter would pay an equal but fictitious freight charge from Pittsburgh to Chicago, although his goods were made in and delivered from the Chicago plant.

The Federal Trade Commission issued an order in the above case requiring the Steel Corporation to cease and desist from the "Pittsburgh Plus" practice. The cease and desist order was never challenged in the federal courts.

We shall pass over the years which followed, in the course of which the Federal Trade Commission, from time to time, made various reports to Congress and to the President which indicated that the Commission had, from numerous investigations, formed an opinion that the use of the "basing point" price system, by industry generally, and by the cement industry in particular, was illegal.5

It should be noted here, however, with relation to the cement industry, that a decision6 of the Supreme Court in 1925, in an injunction suit brought by the Government under the Sherman Antitrust Act7 against the Cement Manufacturers Protective Association, was not unfavorable to a multiple basing point system used in that industry. The Government

---

had charged that the defendants controlled prices and production of cement by various devices, one of which was the compiling and distribution of freight-rate books which gave the rates from arbitrary basing points to numerous points of delivery. The Court's opinion, written by Mr. Justice Stone, spoke of the freight rate from a basing point as "an essential element in making a delivered price, since selling by any particular manufacturer at the lowest of the delivered prices computed from several basing points is a necessary procedure in competing in the sale of cement."8

When the Clayton Act was amended by the Robinson-Patman Act9 in 1936, without any clear reference to the "basing point" pricing system, any doubt as to its legality or illegality was only accentuated. The Federal Trade Commission had urged clarification of the price discrimination provisions of Section 2 of the Clayton Act, but the amendment left in doubt the intention of Congress with respect to basing point practices. As amended, Section 2 reads as follows:

"(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discriminations, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . ."10

In 1938, The Federal Trade Commission issued complaints against the Corn Products Refining Company and its subsidiary the Corn Products Sales Company, and against the A. E. Staley Manufacturing Company, averring that the companies had violated Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The Commission issued orders directing respondents to cease and desist from applying the "basing point" pricing system in formulating their prices and from indulging in certain other practices. For many years, both the Corn Products and the Staley Companies have been manufacturing glucose, commonly known as "Corn Syrup Unmixed"; and have sold and shipped it in inter-

10Ibid.
state commerce in competition with other corporations which have plants located in Chicago, Kansas City, St. Louis, Clinton and Cedar Rapids, Iowa, Granite City, Illinois, and Robey, Indiana. Corn syrup is widely used in the manufacture of candy and in the mixing of table syrup. The essential facts in each of the two cases may be briefly summarized.

**THE CORN PRODUCTS CASE**

The Corn Products Company's principal plant, which is at Argo, in the Chicago switching limits, began operations in 1910. It sold only at delivered prices and determined them for any destination by adding to the Chicago price, the carload freight rate from Chicago to that destination. In 1922, the company opened another plant at Kansas City. Thereafter, whether syrup shipped to fulfill a particular order was shipped from the Kansas City plant or from the Argo (Chicago) plant was entirely at the company's election, and the decision depended upon conditions at the two plants. With the opening of the Kansas City plant and continuously thereafter, the company continued to employ the same method of determining delivered prices at different destinations as theretofore, the price to all customers at a given point being arrived at by adding to the Chicago base price the freight rate from Chicago to that point, whether the corn syrup, delivered under their contracts, was shipped from Kansas City or Chicago.

Purchasers located in Kansas City, Mo., St. Joseph, Mo., Springfield, Mo., Fort Smith, Ark., Hutchinson, Kans., Lincoln, Nebr., Sioux City, Iowa, Waco, Texas, San Antonio, Texas, Denver, Colo., and Salt Lake City, Utah, all had an actual delivery cost from Kansas City that was substantially less than from Chicago.

The amounts per cwt. collected by the Corn Products Company in excess of the differences in actual cost of delivery from Kansas City to purchasers in Kansas City was 40 cents and in the other cities named, were respectively, St. Joseph, 31 cents; Springfield, 4 cents; Fort Smith, 20 cents; Hutchinson, 25 cents; Sherman, 23 cents; San Antonio, 19 cents; Denver, 10 cents; and Salt Lake City, 10 cents. It is thus to be noted that these cities were discriminated against in varying degrees. Kansas City was discriminated against 10 times as much as Springfield, 4 times as much as Denver and Salt Lake City, and twice as much as Fort Smith. But all of them were discriminated against, in comparison with Chicago, to the extent that shipments were made from Kansas City at less than the freight cost from Chicago.

The Corn Products and its subsidiary company petitioned the United
States Circuit Court of Appeals for the Seventh Circuit to review the Commission’s cease and desist order. The order which the petitioners sought to set aside directed them to refrain from (1) discriminatory price practices between purchasers of glucose, corn products and corn gluten feed and meal; (2) supplying services to the Curtiss Candy Company while failing to accord the same services to other competitors of Curtiss; and (3) selling merchandise to certain purchasers upon the condition that the purchasers refrain from buying similar products from petitioners’ competitors. The facts in the Corn Products case were stipulated by both parties.

The limitation of the cease and desist order being clearly defined, the circuit court had to decide whether the evidence was sufficient to justify the Federal Trade Commission’s finding that petitioners had in fact discriminated in prices between competitive purchasers, or whether the evidence disclosed that the discrimination arose only out of due allowance for differences in the cost of delivery resulting from different methods or quantities of sales and deliveries under Section 2(b) of the Act, which reads:

“(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers were made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.”

Sharply commenting upon the “basing point” system as a method of price discrimination, the majority of the court severely criticized the practice and declared that the price discriminations of the petitioners were violative of Section 2(a) of the Clayton Act; that upon “the principle of equality, the Act forbids any difference in charges to different competitive customers not based upon actual differences in service or delivery. . . . The inclusion of a fictional cost of delivery, having no justification in fact, in itself suggests . . . arbitrary fixation of prices discriminating illegally as between competitive customers.”

\(^{11}\) Ibid.

further found that it was "irrefutable from the facts that resulting substantial loss is reasonably likely to accrue to purchasers in the less favorably located communities."13

The court was unanimous in upholding the findings of the Federal Trade Commission that petitioners were unlawfully discriminating in prices between different competitors in allowing favored buyers options for delivery at a future date at old lower prices than at new higher prices; that the privilege of "booking" orders on an advancing market for future deliveries at abandoned lower prices was discriminatory; and that by reason of giving certain selected purchasers special allowances and refraining from offering the same savings to other competitive buyers was equally discriminatory and reasonably tended to have an injurious effect upon competition.

Equally discriminatory was the petitioner's arrangement with the Curtiss Candy Company concerning the advertisement of dextrose. Section 2(e)14 of the Act deals with a kind of discrimination wholly different from the price discrimination forbidden under Section 2(a). This was the first case to reach any circuit court of appeals for review of an order predicated upon a violation of this section.

Dextrose is corn sugar prepared for marketing as a separate commodity in dry and powdered form. In both forms it becomes an ingredient of candies. After a year or more of experimentation and negotiation between petitioners and the Curtiss Candy Company, the latter undertook to use dextrose as an ingredient in most of its candies and to advertise them as "rich in dextrose" and to explain the nature of dextrose. After September of 1936, petitioners spent large sums of money in advertising Curtiss candies, featuring the presence of dextrose therein but not identifying it as petitioners' product. In a little over three years, the Corn Products Company had spent $750,000 for the purpose of advertising Curtiss candies containing dextrose which Curtiss had purchased from petitioners. While petitioners were spending this money to advertise Curtiss candies, they were selling substantial quantities of dextrose to other candy manufacturers but without making

13Ibid.

1449 Stat. 1527 (1936), 15 U. S. C. § 13 (e) (1940). "That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."
benefit of the exclusive or offering them any similar or other advertising arrangement. The circuit court readily concluded that the vast expenditure for the sole benefit of Curtiss was detrimental to other competing purchasers.

Regarding the petitioners' practice of selling certain merchandise "on the condition that the purchaser shall not use similar products of a competitor", petitioners asserted that they and the purchasers had agreed to eliminate the clause from their contracts.

Unquestionably, the real purpose of the Federal Trade Commission in serving a complaint upon the petitioners, which ultimately brought about this appeal to the circuit court, was to test judicially the validity of the "basing point" system, which was the paramount issue in the Corn Products case. Judge Major wrote a bristling dissenting opinion in support of the system in A. E. Staley Manufacturing Company v. Federal Trade Commission, to which he made reference in this case. In regard to the 1936 amendment to the Clayton Act, he said: "I agree that the strict literal language of § 2(a) makes it appear that the system has been proscribed, but at the same time I am even more certain that it was not the intention or purpose of Congress so to do." However, the majority of the court, in an opinion written by Judge Lindley, simply but firmly maintained that the system was neither condemned nor approved by Congress and "this in face of the fact that the Federal Trade Commission previously in 1924 had held that the 'basing-point' method of distribution employed by the steel companies embraced unlawful price discrimination under the Clayton Act. 8 F. T. C. 1. Such was the administrative ruling in effect at the time when Congress acted."17

**The Staley Case**

The Federal Trade Commission also issued an order directing the A. E. Staley Manufacturing Company to cease and desist from applying the "basing point" pricing system in formulating its prices and from indulging in certain booking practices. As in the Corn Products case, the Staley Manufacturing Company filed a petition with the Circuit Court of Appeals for the Seventh Circuit for review of the Commission's order and, as in the Corn Products case, the Commission cross-petitioned for enforcement in accordance with statutory procedural pro-

---

144 F. (2d) 221 (C. C. A. 7th, 1944).
16Id. at 228 (dissenting opinion).
visions. On May 10, 1943, the court remanded the cause to the Commission for "further consideration and hearings if necessary, in order to show with more clarity ... wherein the discriminations occur and how they substantially lessens competition and promote monopoly. ..." Upon the remand, the Commission did not hear any additional evidence; it merely restated its findings of fact.

The A. E. Staley Manufacturing Company is engaged in the manufacture and sale of corn syrup unmixed, in interstate commerce, operating a manufacturing plant in Decatur, Illinois, and one in Chicago. Prices of corn syrup were quoted strictly upon a delivered price basis with all delivered prices calculated from Chicago and composed of a Chicago base price plus rail freight from Chicago. Under this formula, the delivered prices charged by the Staley Company for its corn syrup varied as between purchasers according to their respective geographical locations in relation to Chicago, although shipments were actually made from some other point. The company's competitors sold according to the same formula regardless of the location of their plants and the actual freight therefrom to points of destination. Accordingly, even though shipments were actually made from one point, a purchaser whose geographical location was closer to Chicago than to the point of shipment paid a lower delivered price for corn syrup than a purchaser whose geographical location was closer to the point of shipment than to Chicago, the difference in price being equal to the difference in the published freight rates from Chicago to destination, and from point of shipment to destination. Whenever the actual cost of delivery from point of shipment was less than the cost of delivery from Chicago, the companies added the difference to the net prices at the point of shipment. The Federal Trade Commission described this practice as "phantom freight", which the companies did not pay. Differences in price under this practice had at various times been as great as:

33\(\frac{1}{2}\) cents per cwt. between customers at Decatur and at Chicago
27\(\frac{1}{2}\) " " " " " Kansas City and at Chicago
25\(\frac{1}{2}\) " " " " " Dallas and at Chicago
24 " " " " " Sioux City and at Chicago
20\(\frac{1}{2}\) " " " " " Little Rock and at Chicago
20 " " " " " St. Louis and at Chicago
19\(\frac{1}{2}\) " " " " " St. Joseph, Mo., and at Chic.
18 " " " " " Shreveport and at Chicago

\(^{19}\text{135 F. (2d) 453, 456 (C. C. A. 7th, 1943).}\)
In addition to the discrimination in price described above, the Staley Manufacturing Company was charged with price discrimination in other ways. These discriminations grew out of the practice of announcing an increase in price, but permitting purchasers, during a specified period of from five to ten days, to place orders for the next thirty days' requirements of corn syrup for delivery within that period at the price in effect prior to the announced increase. All purchasers were given an equal opportunity to place such orders at the time a price advance was announced. Purchasers might, during the prescribed period, take all, only a part, or none of the corn syrup ordered from the company, and upon expiration of the thirty-day period secure an extension of delivery time to sixty, ninety, and, in some instances, one hundred and twenty days. In some instances, company salesmen, even though failing to secure orders, reported sales to customers on the occasion of a price advance and converted some of these fictitious sales into actual orders after the increase had gone into effect as to other buyers. This practice was followed by all corn syrup manufacturers. When the Staley Manufacturing Company first commenced the manufacture of corn syrup in 1920, these practices had already been generally followed by the industry for many years.

Corn syrup, depending upon the quality of the product, constitutes up to 90 per cent of the finished weight of candies in which it is used as an ingredient. Candy manufacturers may attract customers by underselling competitors by as little as \( \frac{1}{8} \) cent per pound on cheaper grades of candy. Mixed table syrups contain approximately 85 per cent corn syrup, and syrup mixers may attract customers by selling such syrup at but 5 cents per case lower than a competitor.

The question whether the "basing point" pricing system was outlawed by Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, was squarely presented by the Federal Trade Commission's cease and desist order. The factual situation relied upon by the Commission to show a "discrimination in price between different purchasers" was that the company sold corn syrup at prices composed of an f.o.b. Chicago price plus rail freight from Chicago to point of destination, irrespective of whether the freight from point of actual shipment was greater or less than that from Chicago. However, the circuit court of appeals declined to give a definitive answer to the question of the legality of the "basing point" pricing system as such. The court ruled that it was not necessary to decide this question since the Commission had found, and there was substantial evidence in the record to support the
finding, that as employed by the company, the “basing point” pricing system produced discriminations and these discriminations were such as “may substantially lessen competition or tend to create a monopoly”.

If it can be granted that the pricing system employed by the company constituted discriminations in price between purchasers, the discriminations arose out of the operation of the system itself.20 This is so because by its operation the “basing point” pricing system transferred a freight advantage which one group of purchasers had as a result of geographical proximity to point of actual shipment, to another group of purchasers whose geographical location lay closer to the point from which the freight was computed. Therefore, notwithstanding the court’s ruling that it was not necessary to decide whether the “basing point” pricing system was legal or illegal, the opinion, by condemning that system as employed by the company, was in effect a holding that it was illegal under Section 2(a) of the Clayton Act.

An important feature in the case was the defense presented by the Staley Manufacturing Company. The company claimed that its pricing system was justified under the terms of Section 2(b) of the Clayton Act on the ground that its “lower price . . . was made in good faith to meet an equally low price of a competitor . . . .”21

This question of meeting, in good faith, an equally low price of a competitor is of very great legal significance and merits careful examination. The statute lays down three requirements to justify alleged discriminations in price between purchasers: (1) good faith; (2) a seller’s lower price; and (3) the seller’s lower price must be to meet an equally low price of a competitor.

The Staley Manufacturing Company sought to support its contention that it adopted the “basing point” pricing system in good faith to meet an equally low price of a competitor upon the following stipulation: In 1920, when it entered the corn syrup industry in Decatur, Illinois, the “basing point” pricing system was in general use in that industry. The quality of its product, while equal to that of its competitors, was not so superior to it as to command the market. Large manufacturers were producing syrup and delivering it in Chicago at prices which were lower than those quoted in other markets. The delivered price in markets

---

20 For a discussion of the competitiveness of the “basing point” pricing system, see Daugherty, De Chazeau, and Stratton, The Economics of the Iron and Steel Industry (1937); Smithers, Aspects of the Basing Point System (1941) 32 Am. Econ. Rev. 705.

outside of Chicago was equal to the Chicago base price plus freight to point of destination. The Staley Manufacturing Company’s chief competitors and the largest corn syrup market in the country were in Chicago.

The Federal Trade Commission countered this argument on the ground that the Staley Manufacturing Company on several occasions had increased and reduced its prices for corn syrup independently of any similar prior action by competitors. Thus, it is seen that the main point of difference in the position of the Staley Manufacturing Company and that of the Federal Trade Commission, with respect to the issue of adopting the “basing point” pricing system in good faith to meet an equally low price of a competitor, involved the question whether its adoption was justified under the terms of Section 2(b) of the Clayton Act because it was in general use at the time a newcomer in the industry entered the field, and the further question whether the protection of that Section is lost to a member of the industry who takes the initiative in reducing prices. The circuit court of appeals decided this issue in favor of the Staley Manufacturing Company. The court said: “The fact that the companies were first in the field with a price is not controlling. The question here is: Were they first in the field to use the basing point pricing system? . . . The companies’ competitors were using the system when the companies entered the field. The companies merely followed the system and practices which had been established by their competitors. That this was done in good faith is not questioned in the evidence.”

Judge Evans in a vigorous dissenting opinion concluded that the “basing point” pricing system was outlawed by Section 2(a) of the Clayton Act. On the question of adopting the “basing point” pricing system in good faith to meet an equally low price of a competitor, he was equally forthright. “Good faith”, he said, “cannot be ascribed to a seller who adds a freight charge to the selling price where there was no freight charge. It is utterly inconceivable that Staley could charge a customer a price which included a freight item from Chicago to Decatur, when no shipment was ever made by Staley, and delivery was to a customer in Decatur, where Staley’s plant is located, and then assert that said practice was to justify a lower price and to meet the equally low price of a (Chicago) competitor.”

22Id. at 226 (dissenting opinion).
Evans continued, "which the law permits is limited to the instance where the seller lowered its price to meet an equally low price of a competitor." 24

**The Supreme Court Decides**

The Corn Products and Staley cases were reviewed by the Supreme Court on certiorari 25 because the questions involved were of importance in the administration of the Clayton Act, in view of the widespread use of "basing point" price systems.

In the Corn Products case, the Supreme Court sustained the Federal Trade Commission in holding that the statute forbids price discrimination between purchasers in different localities as well as between those in the same locality, the Commission having found that the purchasers of glucose in different localities were in fact in competition with each other. In its opinion, written by Mr. Chief Justice Stone, the Court said that the Robinson-Patman amendment was adopted by Congress at the recommendation of the Commission and to strengthen the prohibitions against price discriminations.

The Court referred to the Cement case of 1925 26 as one in which a multiple basing point system was used by the defendants, with a basing point at or near each production center. Since that situation was not now before it, the Court said it had no occasion to pass judgment upon it. After reviewing the legislative history of the Robinson-Patman Act, the Court said:

"... We think this legislative history indicates only that Congress was unwilling to require f. o. b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se. On the contrary we think that it left the legality of such systems to be determined accordingly as they might be within the reach of § 2(a), as enacted, and its more restricted prohibitions of discriminations in delivered prices." 27

The Court concluded in both the Corn Products and Staley cases that the discriminations found by the Federal Trade Commission were within the prohibitions of the statute. The use of Chicago as a basis for a delivered price system in the sale of glucose placed candy manufacturers in other cities at a disadvantage because the purchase price was always

---

24 Ibid.
less at Chicago. The "phantom freight" paid in other cities was unrelated to any proper element of actual cost.

The Supreme Court sustained the Commission's findings in both cases that upon the facts—which were for the most part stipulated—the discriminatory practices had an adverse effect on competition, or at least, as the statute provided, "may" have had the effect of lessening competition. The Court emphasized, and reëmphasized, that:

"The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts. [Citations.] We cannot say that the Commission's inference here is not supported by the stipulated facts, or that it does not support the Commission's order."28

As to booking and other discriminatory practices charged by the Commission in these cases, the Court held that there was evidence to support the Commission's findings, and that the findings readily admitted of the inferences drawn that there was a reasonable probability that the effect of the discriminations "may be to substantially lessen competition".

The Supreme Court's opinion in the Staley case also written by Mr. Chief Justice Stone, followed the Corn Products decision on all aspects of a "basing point" system where the price basing point is distant from the point of production and shipment. The Court denied the claim of the Staley Manufacturing Company that it had satisfied the statute by the establishment of a "lower price" made in good faith to meet the equally low price of a competitor. The Court concluded:

"In the present case, the Commission's finding that respondents' price discriminations were not made to meet a 'lower' price and consequently were not in good faith, is amply supported by the record, and we think the Court of Appeals erred in setting aside this portion of the Commission's order to cease and desist".29

Apparently, it is still an open question whether a multiple basing point pricing system would also be illegal under the Clayton Act, as amended. The Supreme Court mentioned the problem in the cases under consideration but left it unanswered.

CHARLES L. AULETTE*
ARTHUR D. SCHAFFER†

†LL.B. (1943) Georgetown Law School.
FEDERAL LEGISLATION
OUTLOOK FOR POST-WAR AVIATION LAW

With the almost daily increase of flying in the United States and with the realization that the present terrible conflict is at last drawing to a close, there has been an increasing amount of attention given to civil aviation and the laws which control it. There are many indications that the art of flying, immeasurably improved under the impetus of war, will bring to the people of the United States and the world, more than ever before, a new concept of time and space in their daily lives.

There are many bills now before Congress which seek to amend the present laws that regulate interstate air commerce. Before the various state legislatures there are numerous bills looking toward a greater participation on the part of the states in the control of state aviation. There is, at present, no real definitive line beween the jurisdictional area controlled by the Federal Government and the area which could or should be controlled by the state governments. There is no reliable standard which would indicate just how far the jurisdiction of either the state or federal controls might or can extend. At present, federal and state aviation laws conflict in many various ways. It is to be hoped that the legislation now being considered by both state and federal legislative bodies will bring to an end this jurisdictional conflict before incalculable harm is done to aviation in this country.

But, just as an attorney must know all the facts of a particular case as well as the laws applicable to those facts before he can apply corrective treatment, so must the lawmakers and the citizens of this country know the facts concerning the development of aviation and the law applicable to it before any opinion worthy of note or corrective law that will have the desired effect can be formulated.

Aviation as we know it today was born on a windswept hillock at Kitty Hawk, North Carolina, on a bleak and forbidding day in December, 1903, when Wilbur Wright rose from the ground for a few seconds in the first flight ever made in a heavier-than-air machine.¹

The following ten years saw a period of rapid development in planes and flying technique. Public interest kept apace and even ahead of the technical development of aviation, and the states began to pass aeronautical legislation as early as 1911.²

¹For an excellent description of this flight, see Smith, Airways (1942) 3-18.
²Judge Simeon E. Baldwin of Connecticut succeeded in obtaining passage of a state
That state legislation was passed before any federal regulatory acts were accepted is natural, because state legislatures are usually closer to the people and are more responsive to the changing viewpoint of public desires and demands. Then too, aviation had not developed the national characteristics that were later to bring it to the attention of Congress. However, with the passage of more state laws, conflicts became more and more apparent and troublesome, as aviation began to take on the aspects of a national and even international means of transportation and communication.

In 1909 the Wright machine was accepted by the United States Government and was thereby accorded the first recognition as a new means of transportation and as a new military weapon. In June of the following year the first aviation bill was introduced in Congress. This bill asked for an investigation of air mail costs and was not an aviation control bill. In September of 1911 the first air mail was carried from Nassau Boulevard, Long Island, to Mineola, Long Island, by Earl L. Ovington in an experimental flight which was the forerunner of the giant industry that was to be developed.

During the first World War the airplane became a military weapon and attained the recognition of Congress and of the people of the world in a manner and to a degree that would have required many years of peacetime flying. Congress appropriated vast sums of money for the building and developing of planes and training of airmen. As a result, the post-war period was one of tremendous growth of aviation, as these men and planes spread the gospel of aviation. County fairs vied for honors in having stunters to show their wares, as parachutists jumped and wing-walkers paraded before gaping throngs below. There was born in the breast of young America the desire to fly—a desire which has not faltered but has continued to grow and spread among each succeeding generation.

Connecticut was the first state to have a regulatory aviation law, but others quickly followed. In 1913 Massachusetts enacted a statute that provided for the licensing and registration of aircraft by the Massachusetts highway commission and fixed certain rules of the air for ma-

---

law requiring registration and marking of planes and the licensing of operators thereof. Each "aeronaut" was made responsible for all damages "caused by any voyage in an airship directed by such aeronaut." Conn. Pub. Acts 1911, 60. See (1911) 16 Va. L. Reg. 778.


See note 2 supra.
chines meeting head-on, obliquely, and when overtaking one another. In 1917 Hawaii prohibited civilian flying across that territory without a license from the Governor; California and Michigan passed laws prohibiting hunting from airplanes; Texas, New York, Washington, and Wisconsin also passed laws regulating some phases of aviation. Of course these laws were rudimentary as we know aviation laws today, but they showed an increasing awareness of the need to regulate this new mode of transportation.

These few state laws grew and developed until a vast network of restricting and conflicting laws stretched across the various states. It was early determined that there must be some attempt to make these laws uniform throughout the states, or else this new air commerce would be stunted in its growth. However, it was not until 1922 that a uniform state law was drawn up by the National Conference of Commissioners on Uniform State Laws, and this draft form was enacted in some twenty-one states during the next few years. This first uniform aviation law has been followed and superseded by the provisions of the Uniform Aeronautical Code, which contains five parts:

5. Uniform Air Jurisdiction Act (1938).

Since 1929 the various National Committees have been working on this proposed code, many parts of which have been enacted into state laws throughout the United States. As of January 3, 1945, forty states had laws requiring all aircraft operating in the state to have a federal license and all pilots to have federal pilot licenses. Five other states required pilots and aircraft to have either a federal or state license.

---

6Hawaii Laws 1917, Act 107.
7Cal. Stats. 43d Sess. 1919, c. 300.
11Wis. Laws 1919, c. 613.
13See note 13 supra.
three remaining states had no such laws but required all aircraft and all pilots to have state licenses. Thirty-four states had air traffic regulations and provisions for airport zoning. Eleven states had requirements for the economic regulation of intrastate air commerce and provisions for the issuance of certificates of convenience.\footnote{American Aviation Daily, Legisl. Supp. No. VII, Feb. 5, 1945, at 5. Source material is a table prepared by the Civil Aeronautics Board.}

Thus we may readily perceive that there is a great deal of doubt and confusion among state lawmaking bodies concerning the proper scope of state legislation on aeronautical matters. The states are naturally unwilling to give up any more of their sovereignty than is necessary, and yet there is a growing awareness that a great deal of centralized control is essential if the regulation of aviation is to be successful.

Court decisions have not been sufficiently clear or numerous to offer a pattern of future conduct without more definite expressions of Congress and state committees. The Civil Aviation Joint Legislative Committee, on March 21, 1944, issued a statement of principles on state-federal relations. This declaration of principles advocated leaving all operations that are intrastate, as well as zoning and insurance regulations, to the jurisdiction of the several states.

The National Association of State Aviation Officials has recently adopted and advocated a program of state objectives. This program contemplates the development of a national airport plan with federal-state local cooperation, with licensing of all airports by the states, zoning based on a uniform zoning code, certification of aircraft and pilots by the Federal Government with the right of the states to make local regulations not inconsistent with federal safety regulations, state control of all intrastate air commerce, state registration of pilots and aircraft, and other provisions.

Opposed to these views are those of the American Bar Association, which has decided that state regulation is not desirable and that all support of the Uniform Aeronautical Regulatory Act based on the Association's approval in 1935 should be withdrawn.

This uncertainty is causing a great deal of confusion both in regard to state legislation and in regard to the present and future area of federal control of aviation. Some states are seeking the advice of the Civil Aeronautics Authority as to the proper scope and wording of proposed state laws to regulate intrastate aviation. Others are going along on their own, acting completely independently of any existing or
The proposed federal control, while still other states are trying to follow the advice of various national associations and bar groups in the enactment of such legislation.

At present, the question confronting all persons interested in the regulatory phases of aviation is whether the commerce clause16 of the United States Constitution, or any other constitutional power of Congress will support federal control of all aviation in the United States with the exception of a very limited field which some of the most radical "Federalists" admit still belongs to state areas of control.

The original federal law17 was based upon the commerce clause of the Constitution, although various other powers given to Congress were advocated and considered. The admiralty powers,18 the money spending powers under the general welfare clause,19 the war powers,20 and the treaty making powers21 were all considered as supporting bills introduced in Congress during the years 1919 through 1926. One of the first bills introduced in Congress seeking to utilize the commerce clause proposed to control and regulate intrastate as well as interstate air commerce. But this bill was not passed, and it was not until three years later that a bill was finally passed and became the first general federal regulatory air act. This Act, the Air Commerce Act of 1926, was passed under the power given Congress to regulate interstate commerce.22 It was the clear intent of the proponents of this bill that only interstate air commerce was to be regulated—and that, only to the extent of general safety provisions; no economic regulation was to be undertaken.23

This first regulatory law was modeled upon the marine navigation laws, and its fundamental features may be summarized as follows:

1. The act related solely to civil air regulation.
2. The Secretary of Commerce was vested with its administration.

22 See note 17 supra.
23 See the legislative history of the Air Commerce Act of 1926, Law Memoranda upon Civil Aeronautics, compiled by F. P. Lee, at 29.
(3) He was granted general powers to foster civil air navigation.
(4) He was given broad powers to register aircraft and airmen.
(5) Foreign aircraft were forbidden in interstate commerce.
(6) Provision was made for the establishment, operation, and maintenance of airways and air-navigation facilities.
(7) The Weather Bureau was charged with the duty of furnishing meteorological information necessary to air navigation along airways.
(8) Penalties were provided for violations.

The real life span of the Air Commerce Act was short but very important. During its existence a tremendous growth took place in the field of aviation, and the broad provisions of the Act were just what was needed to keep some reins of control over air commerce and, at the same time, not hamper or confine it with too many restrictive regulations.

During the years between 1926 and 1934 the airlines of the country operated under two sets of laws. The air mail legislation afforded the fledgling air carriers a life-giving stream of ready cash that was much needed for expansion purposes; and these payments, in turn, gave the Postmaster enormous influence and power over the air carriers receiving such money. This was, in effect, a form of economic control not provided for in the Air Commerce Act. The Bureau of Air Commerce in the Department of Commerce, pursuant to the powers conferred on the Secretary by the 1926 Act, built new airways, improved those that it had inherited from the Army and the Post Office Department in 1926, and continued the development of lighted airways begun by that Department in 1923, making night flying possible, feasible, and safe. The Bureau prescribed traffic rules for both the private flyer and the transport pilot; and, although its first efforts in writing these regulations were clumsy, cumbersome, and confusing, yet, in 1937, the Bureau issued a set of regulations which proved to be so excellent that many are still in effect today.

As the industry continued to grow, the 1926 law became more and more outmoded and ineffectual. The cancellation of the air mail contracts in 1934, with the attendant unfavorable publicity and the several untimely and disastrous crashes of airliners, carrying several famous people to their deaths, caused a general furor. The Bureau bore the brunt of criticism. When the legislators began working on new air mail

---

25 For a detailed discussion of the promulgation of the Civil Air Regulations see Wigmore, Form and Scope of the Civil Air Regulations (1939) 10 J. Air L. and Comm. 1.
legislation, it was natural that they should think and talk about new
regulatory laws for aviation in general.

In the latter part of 1933 Senate investigations had revealed that the
aviation industry was practically controlled by four or five companies.
"They were operating with interlocking boards of directors, and through
banking groups and holding companies, manufacturing concerns like
General Motors, and many other connections, whereby the profits of
the air mail contractors would be diverted into other businesses, and
they would trade with each other. It led to extravagant costs of
operation. . . ."28

In February of 1934 James A. Farley, Postmaster General, cancelled
all air mail contracts held by the commercial airline companies. The
ensuing publicity rocked the foundations of the new aviation industry.27
Army pilots were called in to "carry the mail",28 and many brave pilots
lost their lives because of their unfamiliarity with the routes, the inade-
quate equipment, and the seasonal bad weather. These deaths served
to heighten the intensity of the publicity surrounding the aviation
industry at that time and underscored the need for immediate remedial
action.

The Air Mail Act of 193429 was one result. It directed the Inter-
state Commerce Commission to make a full examination and audit of the
books of those carriers who were the holders of certain air mail con-
tracts and report the findings to Congress with recommendations as to
reasonable rates of compensation. Later, an amendatory act30 was
passed, directing the Commission to fix "fair and reasonable rates".

This Act, with the amendment, constituted the first direct economic
regulation of instrumentalties of air commerce by Congress; and, al-
though elementary and incomplete in that it was more in the nature
of an investigatory statute than a regulatory one, it foreshadowed the
more complete economic control that was to be delegated to the Civil
Aeronautics Authority in 1938.

During the years 1935, 1936, 1937, and part of 1938, federal control
of aviation was vested in three agencies: the Commerce Department,

28Statement of Karl A. Crowley, General Counsel of the Post Office Department, Hear-
ings before subcommittee of Interstate Commerce Committee on S. 2 and S. 1760, 75th
27See Fagg, National Transportation Policy and Aviation (1936) 7 J. AIR L. 155, 168.
2848 Stat. 508 (1934); see Exec. Order No. 6591, Feb. 9, 1934:
with its Bureau of Air Commerce, which had jurisdiction over airports, airways, and all private flying and commercial operations in so far as safety operation in interstate flying was concerned; the Post Office Department, which operated the foreign air mail service and let domestic air mail contracts; and the Interstate Commerce Commission, which fixed air mail rates and exercised various other quasi-judicial functions relative to the regulation of air mail contracts, including the power to forbid any unfair practice on the part of air mail contractors. It will be readily seen that what little economic regulation there was during that period was confined exclusively to those carriers who had contracts to carry mail, and the basis for such control was the fact that they were carrying mail for the United States Government and were therefore subject to regulation. No attempt was made at that time to tie this regulation into any constitutional power, such as the commerce clause, because the necessity for economic control of all carriers had not been sufficiently felt by Congress to pass such a broad statute.

As time went on, however, it became increasingly apparent that there were too many restrictions and too much duplication of effort, which resulted in confusion and added expense. Consequently, more and more attention was devoted to the promulgation of a law that would incorporate all controls into one federal agency.

Senator McCarran of Nevada introduced a bill in the Senate as early as 1934 contemplating the creation of a Federal Aviation Commission.\(^31\) His bill received little consideration, for the probable reason that over forty aviation bills were introduced in Congress between February 10th and March 10th of 1934, many of which advocated independent commissions to control aviation.\(^32\)

In January of 1935 President Roosevelt indicated that he opposed the establishment of an independent agency to regulate air commerce and expressed the thought that an existing agency would be much better and result in less duplication of federal agencies. Senator McCarran thereupon introduced a bill in the Senate that proposed to amend the Interstate Commerce Act to provide for regulating the transportation of passengers and property by aircraft in interstate and foreign commerce.\(^33\)

\(^31\) S. 3187, 73d Cong., 2d Sess. (1934).

\(^32\) Smith, Airways (1942) 284, citing Rhynne, Civil Aeronautics Act Annotated (1939) 26, n. 66.

\(^33\) S. 3027, 74th Cong., 1st Sess. (1935). Hearings were held before a subcommittee of the Interstate Commerce Committee on July 29, 30, 31, and August 6, 1935. The bill was reintroduced as S. 3420, 74th Cong., 1st Sess. (1935).
During the next Congress he introduced two other bills looking toward the economic and safety regulation of air transportation and proposing to lodge such control in the Interstate Commerce Commission.\textsuperscript{84} He had not, in the meantime, given up his idea that an independent commission should be established to handle this type of regulation but had only deferred to the President’s wishes so as to expedite the passage of much-needed legislation.

In January of 1938 the President called Senator McCarran and Congressman Lea of California, who was an able exponent of progressive aviation legislation in the House, to the White House and informed them that he had changed his mind and that he believed the establishment of an independent authority to control aviation would be best.

As a result of this conversation, Congressman Lea and Senator McCarran drafted new legislation to create a Civil Aeronautics Authority, and, after several delays and a great deal of debate, the Civil Aeronautics Act of 1938 was passed.\textsuperscript{35}

This Act is a very comprehensive one, constituting an exercise of federal regulatory powers beyond any previously attempted in respect to air commerce. It was the first real attempt to regulate the economic phases of the interstate aviation industry, and it has proved to be a wise and workable piece of legislation both in its economic regulatory phases and in its safety features. Yet, when the Civil Aeronautics Authority took over the reins on August 22, 1938, the industry was decidedly not impressed with either the caliber of the appointments to the five-man Authority of the first Administrator. One comment was that the “talent in the Civil Aeronautics Authority sloshes about like a gallon of gas in an empty tank.”\textsuperscript{36}

The Authority found the air transport industry in a condition that could best be defined as “chaotic”. Much of the private capital invested in the industry had been irretrievably lost, and the result of shaken faith on the part of the investing public concerning the stability and soundness of the airlines was drying up the stream of capital needed by the industry.

The declared policy of the new Act was “the regulation of air commerce in such manner as to best promote its development and safety”. It also established a new and comprehensive plan to safeguard the air

\textsuperscript{84}S. 2 and S. 1760, 75th Cong., 1st Sess. (1937).
\textsuperscript{35}52 STAT. 973 (1938), 49 U. S. C. § 401 et seq. (1940).
\textsuperscript{37}AVIATION 19 (1938).
carriers and the public against uneconomic and destructive competition, wasteful duplication of services, and discriminatory passenger and express rates. The Act can thus be divided into two distinct categories: functions relating to the safety of civil aircraft operations generally, and functions relating to the development and economic stability of airlines.

The establishment and enforcement of policies and regulations relating to the safe operation of civil aircraft was first attempted in the Air Commerce Act of 1926, as we have already seen; but the 1938 Act extended the field to include "air commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through the airspace over any place outside thereof; or wholly within the airspace over any Territory or possession or the District of Columbia" as defined in the former Act.\textsuperscript{37} It also gave the Authority control over flying in "interstate, overseas, or foreign air commerce or the transportation of mail by aircraft of any operation or navigation of aircraft . . . which directly affects, or which may endanger safety in, interstate, overseas or foreign air commerce."\textsuperscript{38}

This latter definition as contained in the 1938 Act broadened the scope of control so that any navigation of aircraft that might endanger the safety in air commerce was to be controlled by the Civil Aeronautics Authority. Under these circumstances the flight of any aircraft anywhere in the United States may be controlled by the Federal Government if there is a factual determination that such flight may endanger interstate commerce.

The federal regulatory body was not long in taking advantage of this invitation to control all flying in the United States. In October 1941 the Civil Aeronautics Board issued Amendment No. 135 to the Civil Air Regulations, amending Sections 60.30 and 60.31, requiring that all pilots and all aircraft operating in the airspace overlying the United States be certificated by the Federal Government.

The Board found such regulations necessary because the tremendous increase in the number of pilots and aircraft, as well as in the number of miles flown, created such a problem as to require centralized and uniform control. It found that "the operations of uncertificated airmen anywhere in the navigable airspace overlying the United States consti-

tute a hazard to interstate, overseas, and foreign air commerce," and, in "order to protect interstate, overseas and foreign air commerce, it [was] necessary that all pilots and aircraft operating in the airspace overlying the United States . . . be certificated."

Thus the Board boldly wrote legislation of tremendous importance. Examined in proper perspective, it was one of the most important happenings in air commerce that have occurred for many years. With this regulation the Board gained control of every civil pilot in the country and standardized the method of training and experience necessary for any person to fly in civil aviation. It reached into the states and began the regulation of the type and condition of every plane that was to leave the ground, even if the flight was to be made in lightly traveled intrastate airlanes. After these two amendments no person nor any plane could fly without coming under the jurisdiction of the federal agency which could, and did, virtually control their lives, morally, physically, and in many other ways. If a pilot had questionable moral standards, the Civil Aeronautics Administration might file a complaint with the Board to have his certificate revoked; and if the action was successful, the pilot could not legally fly a plane in the United States.

The story is told by oldtimers in the early "Bureau" days that barnstorming pilots holding pilot certificates issued by the Federal Government used these certificates to convince guileless innkeepers and merchants in small towns to cash checks and extend credit, on the theory that if the Federal Government found such men worthy enough to hold a federal license, they must be reputable citizens. All too often the check was worthless or the bill remained unpaid. As a result, complaints began to find their way into Washington, first in a trickle and then in a stream. The people wanted the Government to collect their money for them. Naturally this could not be done, but the regulations were amended so that a person had to be of good moral character before he could hold a license. After that, when a complaint came in, the procedure was to notify the pilot that he had better pay up; otherwise he might find himself accused of being without sufficient moral character to hold a license. It is said that the credit rating of pilots all over the country began to rise shortly thereafter, and little trouble was experienced on this score afterwards. It is interesting to note that, although this requirement still stands in the Civil Air Regulations today, it will probably be eliminated entirely when the Regulations are revised in the near future.

If the aviation-minded people of the United States have not realized
the true significance of the power that has devolved upon the Authority, the *Rosenhan* and *Drumm* cases should be studied with care for clarification. In these two cases the lower federal courts gave the Board, and incidentally Congress, the "go-ahead" signal with respect to future legislation and regulation of aviation.

The *Rosenhan case* arose when the Civil Aeronautics Authority received a "Report of Violation" of Section 60.31 of the Civil Air Regulations by Cort A. Rosenhan. It was alleged that he had flown an uncertificated aircraft on a civil airway near Salt Lake City, Utah. A "Civil Penalty Letter" was thereupon addressed to Mr. Rosenhan, wherein it was stated that it was reported he had violated the civil air regulation requiring all planes to be federally certificated, and that he was subject to a civil penalty not to exceed $1,000. He was informed, however, that if he submitted an offer of $50 in compromise, the Authority would be requested to accept such offer in full settlement of the matter.

A somewhat similar letter was sent to Alfred A. Rosenhan, who was the owner of the plane. Shortly thereafter the brothers answered that they did not feel justified in paying a single cent. They pointed out that their ship carried a Utah State Airworthiness Certificate and was thereby licensed to fly anywhere in the State of Utah in intrastate commerce, including a civil airway. They had obtained, they said, an opinion from the Utah State Attorney General stating that their right to fly could not be interfered with by the Civil Aeronautics Authority. It further developed that these men had tried to obtain an airworthiness certificate for the airplane from the Federal Government but without success, for the reason that their plane did not measure up to federal standards.

The case was, in time, turned over to the Justice Department for collection of the civil penalty. The United States Attorney for the District of Utah recommended deferment of prosecution in the two cases for two reasons: first, if enforced, the provisions of the Civil Aeronautics Act which prohibited operation of uncertificated aircraft on a civil airway would in effect completely restrict the operation of federally uncertificated aircraft in Utah since the peculiar topography of Utah had resulted in airports being constructed only within the limits of civil airways; second, that the airplane owned by the alleged violators, al-

---

*Rosenhan v. United States, 131 F. (2d) 932 (C. C. A. 10th, 1942).*

*United States v. Drumm, 55 F. Supp. 151 (D. Nev. 1944).*
though uncertificated, appeared to be as nearly mechanically perfect as machines of the type could be made.

The Authority was of the opinion that the operation of uncertificated aircraft on civil airways was considered a potential hazard to air commerce, and that the enforcement of the statutory prohibition against such operation was essential to the promotion of safety in air commerce.

At the trial, defendant Rosenhan admitted all allegations but answered that there was an airworthiness certificate issued by the State of Utah. He also alleged that the regulations of the Authority designating certain paths through the navigable air space of the United States identified by areas on the surface of the Earth extending ten miles on each side of designated center lines, together with the provisions subjecting all aircraft navigated in such areas to federal control, were arbitrary and unreasonable in that the regulation of all such aircraft was not necessary to the regulation and protection of interstate commerce. His contention was that such an attempt of the United States to regulate the operation of aircraft operating in intrastate commerce within paths when such operations do not enter into interstate commerce was an infringement of the powers reserved to the respective states by the Tenth Amendment to the Constitution of the United States. Further, he contended that the Constitution did not give to the Federal Government the power to regulate intrastate commerce or intrastate air navigation.

The case was thereupon heard on the plaintiff's motion for a judgment on the pleadings, and the motion was granted. The Rosenhan cases were then consolidated and an appeal was taken to the United States Circuit Court of Appeals.

On November 16, 1942, that court handed down an opinion that affirmed the decision of the district court to the effect that civil aircraft operated intrastate within the limits of a federal airway were subject to federal regulation. This was the first decision rendered by a federal appellate court with respect to federal versus state jurisdiction over the operation of civil aircraft solely within the confines of a particular state.

In its decision the court stated:

"We think the pleadings as thus cast in this case present clearly and concisely the bare legal question whether the Congress may in the exercise of its commerce powers, by its definition of interstate air commerce, include within its scope 'any operation or navigation of aircraft within the limits of any civil airway', and thereby forbid the intrastate operation of a civil aircraft within a
federally designated airway, unless there is currently in effect an airworthiness certificate issued by the duly constituted federal authority, and whether the state certificate of airworthiness meets the requirements of the Federal Act. No further facts are essential to a decision on this question, and the court correctly based its decision on the facts admitted by the pleadings.

"The Civil Aeronautics Act, supra, was enacted as advanced legislation in recognition of rapidly growing air commerce and was comprehensively designed to promote civil aeronautics, and to that end develop and secure maximum aeronautical safety. Its broad purposes are manifest by the text of the Act. See Section 2 of the Act. The Act created a civil aeronautics authority to be composed of expert personnel, with powers to effectuate the full purposes of the Act. To that end the Authority was empowered to designate and establish civil airways, to regulate other airways established with its approval, and to install or supervise the installation of equipment purposed to maintain the maximum safety. It authorized the Authority not only to establish and to regulate airways, but to regulate and prescribe the mechanical standards for aircraft to be flown within the designated airways. The Act, also, provided for the registration of all aircraft wherever and however used, and provided that no person should operate an aircraft as an airman without a certificate of authority, or that no person should operate any civil aircraft without having currently in effect an airworthiness certificate, or in violation of the terms of such certificate. It provided, further, that any registered owner of any aircraft could apply for a certificate of airworthiness, as required by the Act, and for the issuance of the certificate after inspection and determination of airworthiness, and made unlawful noncompliance with requirements of the Act. The Act does not textually recognize a state certificate of airworthiness as a compliance with its requirements, and we cannot presume a congressional intent to do so.

"Congressional regulation of interstate air commerce in the interest of safety and efficiency is new and modern, but the law applicable thereto is of another generation. To sustain the broad and plenary power of the Congress to regulate interstate air commerce in the interest of safety and efficiency, we need but recur to the prophetic pronouncement of the Supreme Court of the United States, long before the skies were considered aeronautical highways, when it said: 'Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel; yet in its actual operation it touches and regulates transportation by modes then unknown,—the railroad train and the steamship. Just so is it with the grant to the National Government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.' In re Debs, Petitioner, 158 U. S. 564, 595. . .

"It cannot be doubted that if the Federal Act is devoted to the promotion of safety and efficiency in interstate commerce, whether it be stagecoach, sail-
boat, steamship, railroad train, motor truck, or airplane, if the Act bears some reasonable and rational relationship to the subject over which it has assumed to act, the power is supreme and may not be denied, although it may include within its scope activities which are intrastate in character. 'It is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.' Southern Railroad Company v. United States, 222 U. S. 20, 27. . . . See, also, Texas & Pacific Railway Company v. Rigsby, 261 U. S. 33, . . . and Napier v. Atlantic Coast Line Railroad Company, 272 U. S. 605. . . ."41

By this decision the Civil Aeronautics Authority and Congress were given judicial approbation and assurance of power to control a total area amounting to one-fifth of the entire area of the forty-eight states and any other areas that the Civil Aeronautics Administrator might want to claim as part of a civil airway.

But the Drumm case went much farther and few have realized the true significance of the power given the Authority over air commerce in the United States by this decision.

Andrew D. Drumm, Jr., a contractor living in Fallon, Nevada, owned an airplane in which he flew about on business trips. He held no pilot certificate, nor did his plane have an airworthiness certificate. He was charged with eleven separate violations of the Civil Air Regulations and the Civil Aeronautics Act. At the trial no evidence was introduced on the part of the defendant, who relied on the contention that the action of the Civil Aeronautics Board, in amending Sections 60.30 and 60.31 so as to prohibit any person from piloting a plane unless such person held a valid pilot's certificate and the aircraft possessed an airworthiness certificate, exceeded the authority of the Board.

The court concluded that his contention was without merit. It said:

"It cannot be said from any evidence submitted or of which the court may take judicial knowledge, that the findings of the Board were not well founded. . . . Upon such findings, the amendments were within the powers conferred by the Act of Congress creating the Board.

"It is clear from the evidence that the flights in question were not commercial in character and that no commercial air-routes were entered. It is the conclusion of the Court that for all the violation of Regulations set forth . . . judgment be, and the same hereby is, granted in favor of libelant for penalties in the total sum of Two Thousand Five Hundred ($2,500) Dollars. . . .

"That . . . plaintiff be granted a permanent injunction as prayed for, subject to the condition that upon defendant securing a pilot's certificate, as prescribed by said Regulation, such injunction may be terminated."42

41Rosenhan v. United States, 131 F. (2d) 932, 934 (C. C. A. 10th, 1942).
Thus the present status of aviation control for purposes of safety could be said to lie almost entirely within the jurisdiction of the federal regulatory body on the basis of this decision. Flights purely intrastate are controlled and directed by the Authority, even though there might conceivably be some intrastate flights not directly affecting or endangering safety in interstate commerce; yet all such flights "may endanger" such commerce and thus be brought within the jurisdiction of the Authority. The Board found, in 1941 when it amended Sections 60.30 and 60.31 of the regulations that any operation of aircraft in the airspace overlying the United States either directly affects, or may endanger safety in interstate commerce and that, therefore, it was necessary to license all pilots and planes operating in the airspace of the United States.

As a result of this finding and the amendments to the Regulations, and the subsequent decision of the court cited above, the flight of any aircraft is subject to the control of the Federal Government, and so is any pilot who operates a plane in such a flight. This question is settled until and unless a different decision is rendered by the Supreme Court, or until Congress decides to pass further legislation on the point. Such legislation will not be a backward step but rather one to catch up with the regulations already adopted by the Board, and perhaps it will even go beyond.

What has been said above concerns the safety of flight, but what about the economics of air commerce? The Civil Aeronautics Act of 1938 gave to the Civil Aeronautics Authority, and the Reorganization Plans43 transferred to the Board, the power to regulate the economic factors of air carriers operating in interstate commerce throughout the United States. The Board has not sought to regulate the economic life of intrastate air carriers to the extent that it has regulated the safety of intrastate flying. This may be because there are few intrastate air carriers of any note and importance, or for other reasons; but there is little doubt that the Board has a vast amount of precedent upon which to base a decision to regulate the economic phases of intrastate air carriers if it chooses to do so.

The Supreme Court has declared many times that the Federal Government may regulate intrastate commerce when such regulation is neces-

sary to protect interstate commerce.44 It has held that Congress, through the Interstate Commerce Commission, may increase intrastate rates to remove a burden upon or discrimination against interstate commerce in such situations.45 These decisions show a disposition to sustain the exercise of federal authority over commerce purely intrastate whenever the Court is able to discern a reasonably close connection between the subject of federal legislation and interstate commerce.

In 1942 the Supreme Court went even further46 and, although it clothed its decision in language somewhat similar to the cases referred to above, extended federal control to the outermost limits when it interpreted a set of facts in such a manner as to create the illusion of a reasonably close connection between the subject of federal legislation and interstate commerce. In the case referred to, there was no such relationship as would reasonably justify a holding that a minute intrastate operation had a "substantial economic effect on interstate commerce," even though the operation was admittedly local in character and not to be regarded as commerce.

In that case the appellee was the owner and operator of a small farm where he maintained a herd of dairy cattle and sold milk and eggs. It was his practice to raise a small acreage of wheat, sell a portion, feed some to his stock and poultry, and keep the remainder for the following seeding. Twenty-three acres of wheat were involved, but the intended disposition was not known by the Court. It held that the production of wheat for consumption on a farm might be trivial in a particular case, but that this was not enough to remove the grower from the scope of federal regulation intended to restrict the amount of wheat which might be produced for market and to prevent a grower from producing for his own needs, so as to keep him from buying from the market. The Court was of the opinion that his small contribution, taken with that of many others similarly situated, was far from trivial and that it had such a substantial economic effect on interstate commerce as to give Congress the right to control even the smallest farmer's efforts in raising a few acres of wheat.

With such precedents behind it, who can doubt the power of the Board, if it desired to do so, to regulate the economic factors of all intrastate air carriers? Surely there is no air carrier, no matter how

45 American Express Co. v. South Dakota ex rel. Caldwell, 244 U. S. 617 (1917).
short its lines nor how small its revenue, that would not compare favorably in that respect with the farmer who raises a few acres of wheat.

It must be conceded that the power to regulate the safety and economic factors of intrastate as well as interstate air commerce lies within the grasp of the Federal Government today even though Congress has not, as yet, sought to incorporate such power in its legislative enunciations. That it will do so in the near future is certain, but just how far Congress will go still remains to be seen. One bill\(^4^7\) introduced in Congress went so far as to deny the states the right to regulate air commerce at all. It would have prevented the states from imposing or enforcing any tax, assessment, fee, or levy upon any air carrier or air contractor or its property or operations which would result or be "likely to result," in multiple taxation or in the payment of an amount more than fairly allocable to such state. Of course the Federal Government, through its instrumentality the Civil Aeronautics Authority, would have the power to determine what amount was fairly allocable to each state.

The Civil Aeronautics Board, in response to a congressional mandate, has completed a study dealing with multiple taxation of air commerce and means of eliminating taxes that impede the development of air transport.\(^4^8\) The Board does not favor assumption of exclusive control by the Federal Government over taxation of air commerce as a means of avoiding multiple taxation. It only recommends the modification of the taxing practices of the states to the extent necessary to prevent such multiple taxation. The states would remain free to tax air carriers in the same manner as they tax other businesses. However, the Board does recommend the setting up of an allocation formula to be prescribed by Congress and based on the business done in each state where the air carrier operates. The most important feature of this allocation is that it would be on a uniform basis throughout the United States.

As the situation stands at present it is apparent that there is still a place for state regulation of air commerce in that state governments have the necessary police power to protect the public by regulating airports, air schools, air contractors doing purely local business, and

\(^4^7\)H. R. 1012, 78th Cong., 1st Sess. (1943).

other situations. It is true that the Federal Government has no general police powers as do the states, and much regulation must depend upon this power. Also, the states must be allowed to retain the power to tax air carriers and their property, although to such extent as would not constitute multiple taxation, or else suffer serious inroads on their ability to survive as sovereign powers. Some method will be worked out to give an equitable solution to this troublesome problem, so as to leave to the states a source of revenue equal to the protection and advantages they give to the air carrier.

The registration of aircraft for valid police and taxation purposes must be left to the states. The states should not register, however, for the purpose of general regulation. The power to own, operate, and regulate airports should be left to the states, as it will be, along with the power and right to regulate the zoning of airports. In these matters, as well as others not mentioned, the states are best fitted and equipped, because of their peculiar powers and interests, to render such services. The Federal Government, in its sphere, is best equipped to control aviation's regulation uniformly throughout the United States, and this power it should be allowed to keep and extend whenever necessary.

JENNINGS N. ROBERTS*

*LL.B. (1943) Georgetown Law School, LL.M. (1945) id.
NOTE
N.L.R.B. CERTIFICATION—JUDICIAL REVIEW

A PRIMARY objective of Congress in passing the National Labor Relations Act of July 5, 1935, was the creation of an agency which would facilitate the settling of labor disputes involving representation proceedings. The litigation which plagued the courts under Public Resolution 44 had resulted in unending obstruction to elections held to determine the proper bargaining representatives of groups of employees. Under Public Resolution 44 any attempt by the Government to conduct an election of representatives could be contested ab initio in the courts, even though such an election was in reality merely a preliminary determination of fact. That Congress, in the light of actual or impending labor strife, intended to limit review in such proceedings is clear. There has been sharp disagreement, however, in the lower federal courts over the extent to which the judiciary has been ousted; and only recently have the fundamental issues come under the scrutiny of the Supreme Court.

The nature of the certification proceedings has been described by the Act itself in Section 9(c):

"Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice . . . and may take a secret ballot

---

*See Association of Petroleum Workers v. Millis (suit to enjoin holding of election), No. 20854 (N. D. Ohio, 1941) unreported, dismissed on grounds of lack of jurisdiction; International Brotherhood of Electrical Workers v. National Labor Relations Board (suit to enjoin holding of election), No. 21994 (N. D. Ohio, 1943), unreported, dismissed for lack of jurisdiction; American Broach Employees Association v. National Labor Relations Board (suit to enjoin holding of election), No. 4242 (E. D. Mich. 1944), unreported, dismissed for lack of jurisdiction. But see, International Brotherhood of Electrical Workers v. National Labor Relations Board (suit to enjoin holding of election), 41 F. Supp. 57 (E. D. Mich. 1940), court held it had jurisdiction; Klein v. Herrick (suit to enjoin holding of election), 41 F. Supp. 417 (S. D. N. Y. 1941), court held it had jurisdiction but dismissed complaint on ground suit was premature; American Federation of Labor v. Madden (suit to review certification), 33 F. Supp. 943 (D. C. 1940), court held it had jurisdiction.
of employees, or utilize any other suitable method to ascertain such representatives."

Furthermore, judicial review is specifically provided for by Section 10(f) which gives to "Any person aggrieved by a final order of the Board the right of review in the circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in . . . ." The controversies arising under the Act have posed the problems of

(1) the interpretation of exclusive-review features of the Act,
(2) the adequacy of review provided by the statute,
(3) the power of Congress under constitutional limitations to foreclose judicial review.

In Reilly v. Millis and Inland Empire District Council v. Millis, the issues were squarely presented for final adjudication.

The facts of the Inland Empire case show that in March, 1943, the C.I.O. had requested from the National Labor Relations Board, certification as the collective bargaining representative of the employees of three plants of Potlatch Forests, Inc. In the ensuing hearing, the A.F.L., which theretofore had been recognized as the bargaining representative of the employees in all five of the company's operations, contended that the five Potlatch plants comprised the appropriate unit. This contention was accepted by the Board, and the C.I.O.'s petitions were dismissed. Three days later the C.I.O. filed an amended petition asking that it be certified as the exclusive representative of a unit consisting of all five plants. The Board then issued and served upon the A.F.L. a notice to show cause why C.I.O.'s new petition seeking a single company-wide unit should not be incorporated into the record of the earlier hearings and treated as an amendment to their prior petitions; and further to show cause why the Board should not reconsider and arrive at a new decision and order in the earlier cases as thus supplemented without further hearing. The A.F.L. filed a protest and objection, the gist of which was that such action would deprive them of a hearing for the purpose of offering additional evidence. But the Board found the protest and objections insufficient, since the unit sought by C.I.O. conformed to the unit advanced by A.F.L. It reconsidered the

---

earlier C.I.O. petition and made decisions concerning the eligibility for voting and the inclusion and exclusion of so-called "fringe" classifications. In the election C.I.O. received 1,118 votes, and A.F.L. received 953 votes.

A.F.L. then filed "Objections and Exceptions to Election", claiming again that it was deprived of the hearing required by statute. It also maintained that a number of employees were erroneously excluded. The Board heard A.F.L.'s motion to vacate the election, to stay certification of representatives, and to grant an appropriate hearing, and found on reconsideration of the entire record that the further evidence adduced by A.F.L. did not warrant a departure from the Board's previous decision. Consequently, the Board denied A.F.L.'s motion to vacate the "Decision and Direction of Election"; whereupon the A.F.L. filed a complaint in the United States District Court for the District of Columbia praying for a mandatory injunction requiring the Board to set aside the certification of representatives.

The A.F.L. contended in the district court that the hearings satisfied neither the statutory requirements of the National Labor Relations Act nor the due process clause of the Fifth Amendment, whereas the Government answered that the district court was without jurisdiction and asked for a dismissal of the complaint. The Board's motion was denied by the lower court, but this was reversed in the court of appeals, and petition for certiorari was filed in the Supreme Court.

Reilly v. Millis was before the Supreme Court on petition for a writ of certiorari filed January 29, 1945, and denied June 18, 1945. In March, 1943, the Protective Service Employees' Union of Chicago filed a petition alleging that a question affecting commerce had arisen concerning the representation of employees of the City National Bank and Trust Company of Chicago, and of its subsidiary, the City National Safe Deposit Company. This union requested that the bank and its affiliated safe deposit company be determined as the appropriate unit, and that the union be certified pursuant to Section 9 (c) as the collective bargaining representative of the employees of the unit. This action was brought by twenty of the bank's thirty-five employees, who alleged that the inclusion of the safe deposit company, with its eight employees, in the bargaining unit was unfounded both in fact and in law. Furthermore, they sought review on the ground that they desired no such representation and had been deprived of their right to bargain with their employer as they desired. In addition, they charged that the
Board erroneously assumed jurisdiction, since their operations did not affect commerce within the meaning of the Act.\(^8\)

Despite the existence of problems peculiar to each of the cases, certain fundamental questions concerning judicial review are present in both.

Although the stress placed by opposing counsel on congressional intent in the briefs and oral arguments is manifest, it is doubtful that this aspect of the problem warrants such emphasis. The Government's primary contention in this respect had been that the single situation in which court review of representation proceedings has been provided is that described in Section 9 (d),\(^9\) which affords court review before the circuit court of appeals only after a final order under Section 10 (c).\(^10\) The Board carefully pointed out that the fact that Congress made certification judicially reviewable in a single instance, without providing for court review in other cases, and specifically limited review to the circuit courts of appeals, indicates that Congress intended to permit no other review. In *American Federation of Labor v. National Labor Relations Board*\(^11\) the Supreme Court seemed to indicate that this propo-

---

\(^8\) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country. (7) The term 'affecting commerce' means in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 49 Stat. 450 (1935), 29 U. S. C. § 152 (6), (7) (1940).


\(^10\) The testimony taken by such member, agent, or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged or is engaging in any such unfair labor practices, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint." 49 Stat. 454 (1935), 29 U. S. C. § 160 (c) (1940).

\(^11\) 308 U. S. 401 (1940).
sition was generally acceptable. Furthermore, in *Madden v. Brotherhood and Union of Transit Employees of Baltimore*\(^\text{12}\) the court stated:

"It is hardly possible that Congress should have intended to permit review by District Courts of 9 (c) proceedings while so carefully limiting review of such proceedings in the Circuit Courts of Appeals to cases in which an order under 10 (c) has been entered."

There is no doubt that the legislative history in the House and Senate lends support to the exclusive-review argument of N.L.R.B. counsel. The House Committee Report,\(^\text{18}\) in emphasizing the congressional intent to restrict review, reads:

"... the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to Section 9 (c)."

Furthermore, a discussion on the Senate Floor between Senator Walsh, Chairman of the Senate Committee, and Senator Couzens seems to clarify the Senate's position in the matter:

"**Mr. Couzens.** The Senator said that Resolution 44 was ineffective. Will he tell us before he concludes why Public Resolution 44 was ineffective?"

"**Mr. Walsh.** It was ineffective, as I think I stated, because of appeals to the courts. In cases where attempts have been made to hold elections the claim has been made that the Board had no legal authority; the cases have been brought into court, and they are in the courts and undecided.

"**Mr. Couzens.** Would the passage of the pending bill remove the appeals to the courts?

"**Mr. Walsh.** Yes; it would because it limits appeals. It provides for review in the courts only after the election has been held and the Board has ordered *the employer to do something predicated upon the results of the election.*" [Italics supplied.]\(^\text{14}\)

The limitations upon the exclusive review contentions advanced by the N.L.R.B. were emphasized by petitioner's counsel. They took issue with the Board's assumption that by not specifically providing for any other review, a conclusive congressional intent may be inferred to exclude resort to traditional equitable jurisdiction of courts of the United States; and they denied that it was the purpose of Congress to lodge

\(^{12}\) 147 F. (2d) 439, 442 (C. C. A. 4th, 1945).


\(^{14}\) 79 Cong. Rec. 7658 (1935).
finality in all acts and decisions of the Board in representation proceedings, even in matters relating to a judicial question of a constitutional nature.

A striking feature of Section 10(f) in providing judicial review for "Any person aggrieved by a final order of the Board . . . in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in . . ." [Italics supplied]\textsuperscript{15} is that in actuality no party other than the employer is afforded a judicial remedy; for the only unfair labor practice that can occur so as to warrant judicial review within this section of the Act must arise from the failure of the employer to comply with the final order of the Board. Consequently, if the employer is willing to comply with the Board order, no other party aggrieved can gain access to the court.

The dilemma brought about by this inadequacy of the Act is emphasized by the fact that the party seeking review of certification is rarely the employer, but most often an independent union or group of employees. In the Inland Empire case it was the A.F.L., an independent union, that sought judicial review, while in Reilley v. Millis the review was sought by a group of company employees. In both cases the opportunity for review under Section 10 (f) depended entirely on the willingness, or the refusal, of the employer to comply with the Board order. Counsel for the Board, while maintaining that adequate review is afforded to any person aggrieved after a final order, conceded in the Inland Empire case that no review was provided to the rival labor organization. They insisted that Congress apparently recognized that representation proceedings might involve rival unions and acted upon "the policy that the greater good is sometimes served by making certain classes of decisions final and ending litigation, even though in a particular case the individual is prevented by review from correcting some error which has injured him".\textsuperscript{16}

In the last analysis the Board's position was that the courts cannot by injunction or other proceedings assume jurisdiction over a subject matter with respect to which Congress has denied them direct statutory review. It was pointed out that it is for Congress to determine how the rights which it creates shall be enforced,\textsuperscript{17} and that where, as here, a

\textsuperscript{15}See note 5 supra.


\textsuperscript{17}Tutun v. United States, 270 U. S. 568, 577 (1926).
statute creates a right and provides a special remedy, that remedy is exclusive and other judicial relief may not be substituted therefor.\textsuperscript{18} In support of this reasoning the Government counsel relied heavily on the doctrine laid down in \textit{Switchmen's Union of North America v. National Mediation Board}.\textsuperscript{19}

That case arose upon a suit by the Switchmen's Union in the district court, under Section 2, Ninth, of the Railway Labor Act,\textsuperscript{20} to cancel the National Mediation Board's certification of a rival union, the Brotherhood, as the statutory representative of employees whom the Switchmen's Union claimed to represent as a separate unit. The Railway Labor Act, like the National Labor Relations Act, contains no provisions expressly authorizing judicial review of certifications \textit{per se}. The Court in its opinion declared:

"If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. . . ."\textsuperscript{21}

The Court proceeded to state, however:

". . . A review by the federal district courts of the Board's determination is not necessary to preserve or protect that 'right.' Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. . . ."\textsuperscript{22}

That Congress may, as a general rule, determine how the rights which it creates shall be enforced cannot be denied, but as the Court in the majority opinion wrote:

"Generalizations as to when judicial review of administrative action may or may not be obtained are, of course, hazardous. . . ."\textsuperscript{23}

The limitations upon Congress's ability to determine the method of enforcement of the rights it creates have been emphasized in Justice Reed's dissent in the \textit{Switchmen's case} and in the majority opinion of

\textsuperscript{18}United States v. Babcock, 250 U. S. 328, 331 (1919); Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 404 (1940).
\textsuperscript{19}320 U. S. 297 (1943).
\textsuperscript{22}\textit{Id.} at 301.
\textsuperscript{23}\textit{Ibid.}
Stark v. Wickard. In fact, a fundamental limitation on the proposition maintained by the Board is found in the majority opinion of the Switchmen’s case itself:

"... All constitutional questions aside, it is for Congress to determine how the rights it creates shall be enforced." [Italics supplied.]

In taking issue with the majority opinion of the Switchmen’s case, Justice Reed pointed out that the problem presented by that case was one of statutory interpretation as to whether or not Section 2, Ninth, of the Railway Labor Act gave discretion to the National Mediation Board to split the crafts of a single carrier into smaller units so that the members of such units might choose representatives of employees. Justice Reed stated:

"... This court bases its conclusion on the lack of power in any court to pass upon such an issue, and leaves the interpretation of the authority granted by § 2, Ninth, finally to the Board. With this denial of judicial power, I cannot agree."26

He later continued:

"Where duties are delegated, as here, to administrative officers, those administrative officers are authorized to act only in accordance with the statutory standards enacted for their guidance. Otherwise, we should risk administrative action beyond or contrary to the legislative will. . . ."27

Stark v. Wickard involved an action to enjoin the Secretary of Agriculture of the United States from carrying out an order dealing with the marketing of milk in Greater Boston. The primary argument of the petitioner was that the Secretary of Agriculture, in arriving at the “blended price”, had included a deduction not authorized by the statute. The district court had dismissed the suit for failure to state a claim upon which relief could be granted. The Supreme Court, after hearing the appeal, found that the statute and order created a right in the producers to avail themselves of protection of minimum prices afforded by the statute and that such a right was mandatory in character and obviously capable of judicial enforcement.

In reply to the Board’s argument that Congress had foreclosed resort to the courts for claims here asserted, the Court held that for an issue to reach the dignity of a legal right in the strict sense, it must appear

26 320 U. S. 297, 301 (1943).
25 Id. at 311 (dissenting opinion).
27 Id. at 312 (dissenting opinion).
from the nature and character of the legislation that Congress intended to create a statutory privilege protected by judicial remedy. However, Justice Reed, speaking for the Court, wrote:

"... But where, as here, the issue is statutory power to make the deduction... a mere hearing or opportunity to vote cannot protect minority producers against unlawful exactions which might be voted upon them by majorities. ...

"... There is no direct judicial review granted by this statute for these proceedings. The authority for a judicial examination of the validity of the Secretary's action is found in the existence of the courts and the intent of Congress as deduced from the statutes and precedents as hereinafter considered."28

The Court's reasoning may be summed up in this statement:

"The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. ... But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."29

In the decision of Stark v. Wickard the Court appeared to go beyond the problem of administrative action in excess of statutory provisions, when it stated:

"With this recognition by Congress of the applicability of judicial review in this field it is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue. ... When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. ..."30

Switchmen's Union of North America v. National Mediation Board and Stark v. Wickard are requisite for analysis of the Supreme Court's decisions in Inland Empire District Council v. Millis and Reilly v. Millis. As previously pointed out, the principal contenton of the A.F.L. in the Inland Empire case was that the A.F.L. was deprived of the hearing guaranteed both by the statute and by the due process clause of the

29 Id. at 310.
30 Id. at 309.
Fifth Amendment. Counsel for A.F.L. argued that where a new petition or case is filed before the Board, the requisite of a fair hearing cannot be satisfied by reopening a former case or adopting the record of a former hearing as a substitute for the hearing required by statute\textsuperscript{31} and, in fact, by the rules of the Board itself.\textsuperscript{32} Furthermore, counsel maintained that the statutory requirement for a hearing before the election for the purpose of introducing evidence regarding eligibility to participate in the election could not be fully satisfied by a hearing after the election. A.F.L. pointed out that it would be intolerable to give high judicial sanction to a premise that Congress may freely withdraw resort to judicial review on a question which involves the essential requisites of due process or other constitutional guaranty.

It seems beyond all doubt that even conceding a congressional intent to limit strictly the right of review under the National Labor Relations Act, the legislative body is not competent to suppress a judicial remedy and judicial relief when a \textit{bona fide} question is raised involving the constitutional guaranty of due process and a fair hearing. This proposition received support even from the majority opinion in the \textit{Switchmen's case}, so heavily relied upon by the Board, which affirms Congress's power to determine the method of enforcing the rights it creates.

In the opinion rendered by the Supreme Court in the \textit{Inland Empire


\textsuperscript{32}"Sec. 3. \textit{Same; investigation by Regional Director; definition of parties; notice of hearing; service of notice.} After a petition has been filed, if it appears to the Regional Director that an investigation should be instituted he shall institute such investigation by issuing a notice of hearing, provided that the Regional Director shall not institute an investigation on a petition filed by an employer unless it appears to the Regional Director that two or more labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the bargaining unit or units claimed to be appropriate. The Regional Director shall prepare and cause to be served upon the petitioners and upon the employer or employers involved (all of whom are hereinafter referred to as 'the parties'), and upon any known individuals of labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing upon the question of representation before a Trial Examiner at a time and place fixed therein, provided that when the petition is filed by an employer the Regional Director shall serve the notice of hearing on the employer petitioner and on the labor organizations named in the petition (all of whom are hereinafter referred to as 'the parties'), and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation. A copy of the petition shall be served with such notice of hearing." Rules and Regulations of National Labor Relations Board, Art. III, § 3; 29 Code Fed. Reg. § 203.3 (Cum. Supp. 1944).
the justices clearly recognized the existence of the limitations on congressional restriction of judicial review. In analyzing the petitioner's position, the Court noted:

"... Their claim is that they were denied the 'appropriate hearing' which § 9 (c) requires and that the effect was not only to deprive them of the statutory right to hearing but also to deny them due process of law contrary to the Fifth Amendment's guaranty. ..."33

After a review of the facts the Court concluded that the hearing granted by the Board was not contrary to the statutory requirements and did not deny due process of law as guaranteed by the Fifth Amendment. In summing up the opinion of the Court, Justice Rutledge wrote:

"We think no substantial question of due process is presented. The requirements imposed by that guaranty are not technical, nor is any particular form of procedure necessary. Morgan v. United States, 298 U. S. 468, 481. ... The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective.' Opp. Cotton Mills v. Administrator, 312 U. S. 126, 152, 153 ...; cf. Bowles v. Willingham, 321 U. S. 503, 519, 521. ..."34

It is the opinion of the authors of this note, however, that the Court over-emphasized the significance of the final order, while minimizing the effect of the election. The Court maintained that an election was only a preliminary determination of fact, and that the direction of election was merely an intermediate step eventually leading to "final and effective action." The Court further pointed out that the Board was not required to utilize the results of an election; however, the justices appeared to ignore the fact that, regardless of whether the Board utilized the results of the election, the very holding of the election followed by the publication of these results must have a determining effect upon the future position and strength of the rival labor organization. Furthermore, it is clear that a failure to grant an antecedent hearing can hardly be cured by granting one ex post facto, especially when numerous issues arising at the hearing must, from the very nature of the hearing, be determined prior to the election.

Apart from the question of constitutional due process, little doubt is left by the decision in Stark v. Wickard that the responsibility of determining the limits of statutory authority is peculiarly a judicial function which belongs to the courts by virtue of the very statutes which

3365 Sup. Ct. 1316, 1317 (1945).
34Id. at 1323.
establish them and mark their jurisdiction. As emphasized in *St. Joseph Stock Yards Company v. United States*:

"Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation . . . ."  

In other words, the administrative agency cannot be the ultimate judge of whether or not it has acted within the scope of the authority of the statute which created it, for, under Article III of the Constitution, courts were established to adjudicate claims of infringement of individual rights, whether those rights were violated by unlawful action of private persons or by assertion of unauthorized administrative power.

In *Reilly v. Millis* reliance was placed by petitioners on the argument that no question affecting commerce had arisen with respect to the bank's protective force so as to give the N.L.R.B. jurisdiction to certify any union as its bargaining representative. It has already been noted that the Board's reply to the effect that the petitioners would receive adequate review under Section 10 (f) is fictional.

Although the Supreme Court dismissed on June 18, 1945, the petition for certiorari, it is nonetheless the opinion of the writers that the petitioners had at least raised such a substantial constitutional question as to render proper the assumption of jurisdiction by the district court.

When the majority of the Court in the *Switchmen's case* decided that Congress has the power to foreclose, expressly, judicial review for the protection of rights which the legislative body has created, it laid down the specific limitation "all constitutional questions aside." In the event that a question of constitutional right or power has been raised as the result of administrative action, the ultimate determination has been placed by the Constitution in the judiciary, and Congress is not competent to oust this jurisdiction. To do so would be to "sap the judicial power as it exists under" Article III. From the standpoint of jurisdiction, it is of little aid to maintain simply that the question whether or not there exists an interstate commerce problem affecting a specific group of bank guards is a question of fact. Constitutional courts may certainly not be deprived in every case of the determination of facts,

---


298 U. S. 38, 52 (1936).

It is impossible to know whether the Supreme Court dismissed the petition for certiorari on the merits of the case or on the question of jurisdiction for judicial review.

even though a constitutional right may be involved, for in many cases "finality as to facts becomes in effect finality in law."\footnote{Ibid.}

As was pointed out in \textit{Crowell v. Benson}:

\begin{quote}
"... The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. . . ."\footnote{Id. at 56, 57.}
\end{quote}

The danger of allowing any agency to be the ultimate judge of its own jurisdiction is apparent.

It is the writers' opinion that, as laid down in \textit{Stark v. Wickard} and \textit{Switchmen's Union of North America v. National Mediation Board}, Congress's power to restrict judicial review under the National Labor Relations Act is limited where there is raised either a substantial question of constitutional law or a question involving administrative action in excess of statutory authority. Issues were raised in \textit{Inland Empire District Council v. Millis} and \textit{Reilly v. Millis} which fall within the sphere of federal jurisdiction belonging inherently to the judiciary; and within this sphere of jurisdiction the Congress of the United States is not competent to render final the findings of its own instrumentality, the National Labor Relations Board, and thereby preclude judicial review.

\textit{SUMNER M. REDSTONE
STANLEY M. ROSENBLUM}
RECENT DECISIONS

ADMINISTRATIVE LAW—Administrator of Wage and Hour Division, Department of Labor, Entitled to Court Order Enforcing Subpoena Duces Tecum Without Prior Court Determination of Coverage by Fair Labor Standards Act.

The Administrator of the Wage and Hour Division, Department of Labor, petitioner here, sought to examine the records of respondent newspaper publisher to determine whether it was conforming to the Fair Labor Standards Act. 52 Stat. 1060 (1938), 29 U. S. C. § 201 (1940). Respondent refused to produce its records, and the Administrator then petitioned the district court to enforce a subpoena duces tecum ordering respondent to produce the records sought. The petition alleged on information and belief that respondent was engaged in interstate commerce within the meaning of the Act. Respondent filed an answer to a rule to show cause in which it alleged that it was not covered by the Fair Labor Standards Act and that to compel it to produce its records would deprive it of the protection guaranteed by the First, Fourth, and Fifth Amendments to the Federal Constitution. The district court held that the issue turned on the matter of coverage; and since petitioner had not argued that point sufficiently, the rule was discharged. 49 F. Supp. 659 (1943). On appeal to the Circuit Court of Appeals, Third Circuit, held, the Administrator is entitled to an order enforcing a subpoena duces tecum without prior determination of whether the Fair Labor Standards Act applies to a newspaper publisher, where the Administrator asserts, on information and belief, that the publisher was engaged in interstate commerce within the meaning of the Act. Discretion in granting enforcement of the subpoena should be exercised in favor of the Administrator. Walling v. News Printing Co., 148 F. (2d) 57 (C. C. A. 3d, 1945).

The opinions in both the district court and the circuit court of appeals were chiefly concerned with the amount of coverage the Administrator must show by the Fair Labor Standards Act in order to have his subpoena enforced. Section 11 (a) of the Act gives the Administrator power to conduct investigations. The relevant portions of that section follow:

"The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act . . . and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."

Section 9 of the Act makes the provisions of §§ 9 and 10 of the Federal Trade Commission Act, 38 Stat. 722, 723 (1914), 15 U. S. C. §§ 49, 50 (1940), applicable to the enforcement of the investigating powers of the Administrator. The relevant portions of § 9 of the latter Act are as follows:
"... the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. ... And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. ... Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

There has been a considerable number of cases in the circuit courts of appeals on the point of how much showing of coverage under the Fair Labor Standards Act the Administrator will have to make before his subpoena will be enforced. The following decisions in the circuit courts of appeals bear on substantially the same issue as is presented in the principal case: *Martin Typewriter Co. v. Walling*, 135 F. (2d) 918 (C. C. A. 1st, 1943); *Walling v. Standard Dredging Corp.*, 132 F. (2d) 322 (C. C. A. 2d, 1943), cert. denied, 319 U. S. 761 (1943); *Mississippi Road Supply Co. v. Walling*, 136 F. (2d) 391 (C. C. A. 5th, 1943); *Walling v. La Belle S. S. Co.*, 148 F. (2d) 198 (C. C. A. 6th, 1945); *Fleming v. Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7th, 1940); *Walling v. Benson*, 137 F. (2d) 501 (C. C. A. 8th, 1943); *Oklahoma Press Pub. Co. v. Walling*, 147 F. (2d) 658 (C. C. A. 10th, 1945). While there is not complete uniformity among the circuits, it may be said that in general, *proof* of coverage is not prerequisite to enforcement of the subpoena duces tecum. This does not mean that the Administrator may have his subpoena enforced against every employer. A test of enforceability set forth in *Walling v. Benson*, *supra*, is whether the Administrator has reasonable grounds to believe that the company he proposes to investigate is covered by the Act. The following quotation from that case will make clear the position and the reasoning which supports it:

"As the language of the Act stands, we are of the opinion that the Administrator is not entitled to an order for the enforcement of an investigatory subpoena as to any industry which he knows is wholly outside the coverage of the Act or as to which he has no reasonable ground to believe that it is subject to the Act.

"By reasonable ground to believe that an industry is subject to the Act, we mean that which would be equivalent relatively, in the nature and circumstances of the situation, to what in other legal situations is referred to as probable cause. For investigatory purposes under the Act, it would amount
simply to a justifiable basis for believing that a certain state of facts probably exists, derived from reasonable inquiry or other credible information.” *Walling v. Benson*, *supra* at 505.

This position has been supported by the Circuit Court of Appeals for the Tenth Circuit, in *Oklahoma Press Pub. Co. v. Walling*, *supra*.

The Circuit Courts of Appeals for the First and Second Circuits have upheld the right of the Administrator to have his subpoena enforced when he merely alleges reasonable grounds to believe there is coverage. *Martin Typewriter Co. v. Walling* and *Walling v. Standard Dredging Corp.*, both *supra*. The ruling in both these cases was on the authority of *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501 (1943).

The latter case arose, not under the Fair Labor Standards Act, but under the Walsh-Healey Public Contracts Act, 49 STAT. 2036 (1936), 41 U. S. C. § 35 (1940). Certiorari was granted, however, because of probable conflict with the holding of the Sixth Circuit in *General Tobacco & Grocery Co. v. Fleming*, 125 F. (2d) 596 (C. C. A. 6th, 1942).

The *General Tobacco case* was a proceeding by the Administrator of the Wage and Hour division, in which it was alleged, on information and belief, that the company was engaged in interstate commerce. The answer asserted that the company was not in interstate commerce at all, and that there could be no reasonable ground on which the Administrator could allege it was in violation of the Act. Thus, the circuit court of appeals held, the fact question of jurisdiction under the interstate commerce provisions of the Fair Labor Standards Act was presented. The district court had held that the Administrator might have his subpoena enforced without a showing that the employer was covered under the Act. The circuit court of appeals, reversing, held that the Administrator must show, on the fact issue presented, that the company was in interstate commerce before his subpoena would be enforced.

Although the *Endicott Johnson case* may be distinguished on the facts, and on the procedure set up in the Walsh-Healey Act, it would nevertheless appear that the Supreme Court, in deciding it, was cognizant of the similar questions arising under the Fair Labor Standards Act, and was attempting to set up a rule broad enough to include cases arising under the Fair Labor Standards Act. Mr. Justice Jackson, delivering the opinion of the court, indicated that the matter of coverage was an essential element in determining violations, since there could be no violation without coverage. Coverage was to be investigated in an administrative proceeding. He also pointed out that there is no provision for investigation of coverage as such, but that coverage is to be investigated as an incident to a determination of violations. The district court was not authorized to decide coverage, but in effect it did so when it did not execute the subpoena. In this regard, it may be noted that there is a significant difference between the Walsh-Healey Public Contracts Act and the Fair Labor Standards Act. Under the former act, the Secretary’s determination of cover-
age is binding on procurement officers of the government in letting public contracts; under the latter, coverage is ultimately a matter for the courts to decide.

There is a dissent in the *Endicott Johnson* case by Mr. Justice Murphy, in which Mr. Justice Roberts joined. Justice Murphy holds that the district court is not to be a rubber stamp for the enforcement of the Secretary's orders. It is entitled to look into the question of coverage to protect the employer from unwarranted interference. The court should assist the administrative agency when it is proceeding within the law but not when it has clearly exceeded the scope of its authority. The district court should be satisfied that there is probable cause for the administrative proceeding before it enforces a subpoena. It should be noted that the dissent does not say that the district court should, in such a proceeding as this, try the issue of coverage. The position of Mr. Justice Murphy in the *Endicott Johnson* case, *supra* at 516, summarized as follows:

"Just how much of a showing of statutory coverage should be required to satisfy the district court, and just how far it should explore the question, are difficult problems, to be solved best by a careful balancing of interests and the exercise of a sound and informed discretion. If the proposed examination under the subpoena or the proceeding itself would be relatively brief and of a limited scope, any doubt should ordinarily be resolved in favor of the agency's power. If it promises to be protracted and burdensome to the party, a more searching inquiry is indicated. A formal finding of coverage by the agency, which the Secretary did not make here, should be accorded some weight in the court's deliberation, unless wholly wanting in either legal or factual support, but it should not be conclusive. In short, the responsibility resting upon the court in this situation is not unlike that of a committing magistrate on preliminary examination to determine whether an accused should be held for trial."

The Supreme Court, in that decision, did not specifically mention the *General Tobacco* case, which therefore cannot be said with certainty to have been overruled. In the principal case, the minority and majority opinions differ on this point. The majority declare that the Supreme Court, in the *Endicott Johnson* case, took cognizance of the Fair Labor Standards Act, while the minority hold that the case is to be confined to the facts which were there presented.

However, in the instant case, the circuit court appears to have taken a middle ground in its ruling. It does not go so far, on the authority of the *Endicott Johnson* case, as some of the other circuits have. It states that *Endicott Johnson* was "persuasive" in settling the issues raised here. It bases its decision on the fact that the Administrator has made a sufficient showing of reasonable grounds to believe respondent is under the coverage of the Fair Labor Standards Act. Respondent's own brief shows that a small part (less than 1%) of its circulation moves in interstate commerce, which would bring
it under the Act. *United States v. Darby*, 312 U. S. 100, 123 (1941). It would appear that the showing made here would have been sufficient even under the test set forth in the *General Tobacco case*, *supra*. In that case there was a flat denial of the company’s engagement in interstate commerce. Here, the respondent’s own exhibits showed that it was engaged in interstate commerce, and there were reasonable grounds for belief that it would be covered under the Act.

The court in the principal case held that the showing made was sufficient, and no further proof was required at this stage of the proceedings. It should be noted that this is only the preliminary state of the investigation. It is not regulation without coverage which the court is permitting. It is an investigation to determine whether regulation is warranted. If the Administrator brings further action for violation of the Act, he will have to prove coverage. Many of the objections raised by the company would be valid at a later stage in the proceedings if an action for violation were instituted.

Summarizing, it may be said that the position of the circuit courts of appeals on this issue is that the Administrator need not prove coverage. The exception is the Sixth Circuit, which insisted on proof of coverage in the *General Tobacco case*. However, the same Circuit, in *Walling v. La Belle S. S. Co.*, *supra*, granted enforcement of a subpoena although there was no proof of coverage of the particular employees involved. The *General Tobacco case* was distinguished on the ground that there was no showing at all of coverage there, whereas in the *La Belle case* the company admitted it was in interstate commerce, but claimed that the particular employees were not covered.

The question which remains undecided is how far the Supreme Court actually intended the *Endicott Johnson case* to go. The interpretation of that decision accounts for much of the variety in the shadings of circuit court opinions. However, the question may be settled at the next term of the court, since certiorari has been granted in the principal case.

RICHARD R. BROWNSTONE

CONFLICT OF LAWS—A Divorce Decree Granted by a Court of One State on Substituted Service is Not Entitled to Full Faith and Credit in Another State Which Finds that Neither Spouse at the Time of the Decree had a Bona Fide Domicile in the First State.

Petitioner, O. B. Williams, and petitioner, Lillie Shaver Hendrix were separately married in North Carolina, and lived there most of their lives. On May 15, 1940, they left North Carolina for the State of Nevada, where on June 26, 1940, six weeks after their arrival, they instituted suits for divorce from their respective spouses by publication of summons. A decree of divorce was granted to petitioner Williams on August 26, 1940, and to petitioner Hendrix on October 4, 1940, both decrees reciting that the Nevada court had
found the petitioners to be bona fide residents of the State of Nevada. On October 4, 1940, the petitioners married each other in Nevada and immediately returned to North Carolina where they lived as husband and wife.

Soon thereafter the petitioners were convicted of bigamous cohabitation under a North Carolina statute which provides in part that:

"If any person, being married, shall marry any other person during the life of the former husband or wife every such offender . . . shall be guilty of a felony. . . . If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage." N. C. Gen. Stat. (1943) § 14-183.

On appeal to the Supreme Court of North Carolina, their convictions were sustained. 220 N. C. 445 (1941). They then petitioned the United States Supreme Court for a writ of certiorari, which was granted in 1942. 315 U. S. 795. That Court reversed the convictions of the petitioners and said that where Nevada's finding of domicile is not challenged, North Carolina must grant full faith and credit to Nevada's decree even though the defendant spouse had neither appeared nor been personally served within Nevada. Williams v. North Carolina, 317 U. S. 287 (1942).

Following this decision, the case was remanded to the county court of North Carolina for a new trial; and again a jury convicted the petitioners, this time based on a finding that the petitioners did not acquire domiciles in Nevada, and therefore that Nevada had no jurisdiction to grant the petitioners a decree of divorce binding in North Carolina. The convictions were upheld on review by the North Carolina Supreme Court. 224 N. C. 183 (1944).

The United States Supreme Court again granted certiorari. 322 U. S. 725 (1944). Held, that a divorce decree granted by a court without personal jurisdiction over both spouses is not entitled to the protection of the Full Faith and Credit Clause of the Constitution in a state which has found that neither spouse at the time of the decree had a bona fide domicile in the state of the court granting the divorce. Williams v. North Carolina, 65 Sup. Ct. 1092 (1945).

The extra-territorial force and effect of judgments rendered against non-domiciliaries without benefit of personal service of process upon them or their voluntary appearance has been the subject of frequent consideration by the Supreme Court of the United States.

To introduce a discussion of the part played by that Court in the consideration of this subject, it is appropriate to begin with Pennoyer v. Neff, 95 U. S. 714 (1878). In that famous case, the court, speaking through Mr.
Justice Field, laid down two well-accepted principles regarding jurisdiction of state courts over persons and property. The first of these is that each state possesses exclusive jurisdiction over persons and property within its borders. The second principle, which is the converse of the first, is that no state has jurisdiction over persons and property not within its geographical limits. Broad as this independence of state jurisdiction is, it is not absolute, for Article IV, § 1 of the Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

Originally it was thought that this requirement compelled every state to give the same effect to each judgment as it had in the state where rendered. *Mills v. Duryee*, 7 Cranch 481, 482 (U. S. 1813); *Hampton v. McConnell*, 3 Wheat. 234, 235 (U. S. 1818); *Cheever v. Wilson*, 9 Wall. 108, 123 (U. S. 1869).

Since that time, however, numerous decisions of the Supreme Court have frequently expressed in clear and decisive language that the Full Faith and Credit Clause does not extend to judgments granted by a court lacking proper jurisdiction. *Rose v. Himely*, 4 Cranch 241, 269 (U. S. 1808); *Thompson v. Whitman*, 18 Wall. 457, 462 (U. S. 1873); *Haddock v. Haddock*, 201 U. S. 562, 573 (1906).

The court in the instant case upheld these decisions. "A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits. . . ." *Williams v. North Carolina*, *supra* at 1095. In fact, both dissenting opinions in this case intimate that there is no question about the right of North Carolina to challenge Nevada's jurisdiction. Cf. *Davis v. Davis*, 305 U. S. 32 (1938). The point of difference seems to be more along the line as to whether North Carolina did, in fact, impeach the "constitutional validity" of Nevada's decree. See Mr. Justice Rutledge dissenting in *Williams v. North Carolina*, *supra* at 1109.

Thus, the issue presented by the instant case is mainly one of selecting a criterion to determine whether a divorce decree should have extra-territorial effect. As to the state requirements, the general rule is that jurisdiction over the subject matter of divorce rests on domicile. *Ryder v. Ryder*, 2 Cal. App. (2d) 426, 37 P. (2d) 1069 (1934); *Reik v. Reik*, 112 N. J. Eq. 234, 163 Atl. 907 (1933); *Miller v. Miller*, 200 Iowa 1193, 206 N. W. 262 (1925).

Nevada has a similar requirement:

"The law of Nevada relating to residence necessary to confer jurisdiction in divorce cases is well established. In this case it was necessary for the plaintiff to satisfy the jury that his physical presence in this state for the whole statutory period . . . was accompanied by the intent to make Nevada his home, and to remain here permanently, or at least for an indefinite time." *Lamb v. Lamb*, 57 Nev. 421, 430, 65 P. (2d) 872, 875 (1937). See also *Presson v. Presson*, 38 Nev. 203, 147 Pac. 1081 (1915).
The opinion of the Court in the instant case, however, makes it clear that apart from the self-imposed requirements of states, domicile also is an indispensible prerequisite if a state court is to have jurisdiction to grant a divorce decree entitled to the protection of the Full Faith and Credit Clause.

"Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile." Williams v. North Carolina, supra at 1095. Mr. Justice Murphy, in his concurring opinion, agreed with this proposition when he said "this requirement of domicile is not merely a matter of state law." Williams v. North Carolina, supra at 1100. See also Andrews v. Andrews, 188 U. S. 14, 41 (1903); Bell v. Bell, 181 U. S. 175, 177 (1901).

Mr. Justice Black, in a separate dissenting opinion, was critical of the policy of making domicile a constitutional requirement of jurisdiction. The Justice was critical of the idea chiefly because he thinks of it as resulting in an "expansion of federal power and the consequent diminution of state power over marriage and marriage dissolution." See Mr. Justice Black dissenting in Williams v. North Carolina, supra at 1114.

The majority of the Court, however, did not feel this to be the effect of the decision. The supervision of the faith and credit which states are to accord to the decrees of sister states "does not make of this Court a court of probate and divorce. Neither a rational system of law nor hard practicality calls for our independent determination, in reviewing the judgment of a State court, of the rather elusive relation between person and place which establishes domicile." Williams v. North Carolina, supra at 1097.

As to the concept of matrimonial domicile, the decision in the instant case in no way changed the status accorded it in the first Williams case, supra at 300. Even a casual reading of the Court's opinion in the instant case demonstrates that it was not because of any supposed wrong-doing on the part of the petitioners that they did not establish a bona fide domicile in Nevada. Nowhere does the Court enter into a discussion as to whether the petitioners' departure from North Carolina was or was not justified.

No discussion of Williams v. North Carolina would be complete without mentioning the companion case of Esenwein v. Commonwealth, 65 Sup. Ct. 1118 (1945), handed down by the Supreme Court on the same day and involving much the same problem. Mr. Justice Frankfurter delivered the unanimous opinion of the Court, which upheld the right of Pennsylvania to find that a Nevada divorce decree lacked the jurisdictional prerequisite of a bona fide domicile.

The Esenwein case contained one important distinction, however, for the petitioner in that case sought to use his Nevada divorce decree as a basis for foreclosing a previous support order obtained by his spouse in a Pennsylvania court.

Mr. Justice Douglas, in a concurring opinion, stressed the fact that there was involved in this situation a problem of support which necessarily required considerations somewhat different from those presented in the Williams case.
While an ex-parte divorce based on a *bona fide* domicile may be entitled to extra-territorial effect yet "... it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him a divorce decree. It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served. ... But I am not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children." See Mr. Justice Douglas concurring in *Esenwein v. Commonwealth*, *supra* at 1119. With these views both Mr. Justice Black and Mr. Justice Rutledge concurred.

HENRY BISON, JR.

CONSTITUTIONAL LAW—Imported Goods Still in their Original Package, Awaiting Processing, in the Warehouse of One Who Is Both an Importer and Manufacturer Are Immune from State Taxation.

Petitioner imported hemp and other fibers—to be manufactured principally into cordage and related products—which fibers, at the time of an attempted state ad valorem tax, were in their original packages stored in petitioner's warehouse at its factory in Ohio. The importer contended that the state tax, under the circumstances, ran counter to U. S. Const. Art. I, § 10, which provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. ..." The highest court of Ohio decided in favor of the propriety of the tax on the grounds (either of which would be sufficient) that petitioner was not the importer, but a vendee from the importer, and that the fibers, by being stored in the warehouse at petitioner's factory, became a part of the common mass of property and were therefore no longer an import immune from state taxation. 142 Ohio St. 235, 51 N. E. (2d) 723 (1943). The Supreme Court, in reversing the state court, held (1) that petitioner was an importer, and (2) that goods, while in their original packages and unsold, retain their immunity as imports from state taxation even when stored in the importer's warehouse awaiting manufacture. *Hooven & Allison Co. v. Evatt*, 65 Sup. Ct. 870 (1945).

The majority, speaking through Mr. Chief Justice Stone, recognized that the intent of the constitutional prohibition of state taxation of imports would be thwarted if the states could tax imports before they were put to the use for which they were brought into the country. The circumvention of this prohibition would make it possible for the seaboard states to tax imports at the expense of the interior states. The Court quoted approvingly from a celebrated precedent, *Brown v. Maryland*, 12 Wheat. 419, 441-2 (U. S. 1827):
"It is sufficient for the present to say, generally, that when the importer has
so acted upon the thing imported, that it has become incorporated and mixed
up with the mass of property in the country, it has, perhaps, lost its dis-
tinctive character as an import, and has become subject to the taxing power of
the state; but while remaining the property of the importer, in his warehouse,
in the original form or package in which it was imported, a tax upon it is
too plainly a duty on imports, to escape the prohibition in the constitution."

Thus, the immunity of imports from state taxation continues until they are
either sold, Waring v. The Mayor, 8 Wall. 110, 122 (U. S. 1868), or removed
from the original package, Low v. Austin, 13 Wall. 29 (U. S. 1871), or put
to the use for which they were imported, Gulf Fisheries Co. v. MacInerney,
276 U. S. 124 (1928). Significantly, each of the foregoing steps materially
alters the character of the goods as imports. Thus, the protection from state
taxation of imports, while retaining their character as imports, is achieved,
and still the appropriate taxation of the goods by the states is permitted after
the commingling of the imports with the other goods in the country. As a
consequence, the exclusive power of the Federal Government to tax imports
is observed. U. S. Const. Art. 1, § 8.

The Court saw no significant distinction between goods imported for manu-
facture and goods imported for sale, so far as immunity from state taxation
is concerned. "We do not perceive upon what grounds it can be thought
that imports for manufacture lose their character as imports any sooner or
more readily than imports for sale." Hooven & Allison Co. v. Evatt, supra
at 878. Also, "unless the immunity survives to some extent the arrival of
the merchandise in the United States, the immunity itself would be destroyed."
Hooven & Allison Co. v. Evatt, supra at 877. The Court implied, however,
that the fibers in their original packages in the importer’s warehouse would be
taxable by the state should they constitute a necessary working inventory of
the importer-manufacturer. The obvious discrimination in favor of imported
over domestically-produced goods, the Court felt, was implicit in the constitu-
tional provision prohibiting states from taxing imports. The Court thought
that the distinction between imports for sale and imports for use was not of
consequence in maturing the state’s right to tax. Instead, the controlling
question would be whether or not the goods were devoted to the purpose for
which they were imported.

In passing, it is noteworthy that the Court considered the petitioner to be
the importer rather than a purchaser from the importer. If the individual
deemed to be the importer sells the goods, the imports perforce lose their
immunity from state taxation. Waring v. The Mayor, supra. In the instant
case, the circumstances surrounding the importation, as well as the essential
nature of the transaction and trade custom, were analyzed by the Court to
ascertian that the petitioner was the actual importer rather than a vendee from
the importer. The petitioner purchased the goods abroad on credit, with no
reservation of even a security lien or title by the foreign vendor. The price
paid was a "landed price", including the agreed price of the goods at point of origin plus the usual marine transportation and insurance costs. Title to the goods, with the attendant risk of loss, clearly rested with the petitioner. Even if the foreign vendor had reserved a security lien or title to help insure the payment of the purchase price, the petitioner, held the Court, still might have been the importer. The test to be applied is whether or not the petitioner was the "efficient cause" of the importation of the goods. Hooven & Allison Co. v. Evatt, supra at 876.

The majority recognized that "articles brought from the Philippines into the United States are imports in the sense that they are brought from territory, which is not a part of the United States, into the territory of the United States, organized by and under the Constitution, where alone the import clause of the Constitution is applicable." Hooven & Allison Co. v. Evatt, supra at 881. The Court concluded that goods brought into the United States from the Philippines (which, concededly, is not a "foreign" country) are imports constitutionally immune, while retaining their character as imports, from state taxation so far as U. S. Const. Art. I, § 10 is concerned. Mr. Justice Reed, dissenting in part, took issue with the majority holding on this point, whereas Mr. Justice Murphy, concurring in part, sided with the majority view.

Mr. Justice Black, voicing the dissent of four justices, felt that the Brown v. Maryland case specifically denied the right of an importer to "bring in goods . . . for his own use, and thus retain much valuable property exempt from taxation." Brown v. Maryland, supra at 443. The minority concluded that "neither the rule nor the reasoning in Brown v. Maryland . . . support[s] the Court's holding that one who imports an article for his own use or consumption can enjoy the full benefits of ownership, and simultaneously claim an immunity from state taxation on the ground that it is still an import." Hooven & Allison Co. v. Evatt, supra at 888. Consequently, goods imported for use should be taxable by the states because the purpose of the importation has been fulfilled. Furthermore, such a state tax could in no way effect the main evil the import clause was designed to prevent—i.e., the taxing of imports by the seaboard states to the economic detriment of the interior states. In the instant case, the minority argued, the fibers were at rest in the manufacturer's plant, awaiting processing—consequently, the relationship of the fibers to the process of importation was at an end.

The majority view in the principal case is a reasonable one. The import clause of the Constitution as well as the holding (as distinguished from the dicta) of Brown v. Maryland, is silent on the distinction between imports for use and imports for sale. The portions of Brown v. Maryland selected by the majority and minority support, in part, their respective positions. As a practical matter, however, the enforcement of state taxes on goods originally imported would be facilitated and rendered more intelligible if imports for use and imports for sale were given the same state tax immunity. The state's right to tax, according to the majority holding in the instant case, would
therefore mature not when the original packages reached the importer's manufacturing plant but when the goods were sold, or the original packages broken, or the goods otherwise intermingled with the common mass of property within the state. It should also be noted that if this discrimination in favor of imported goods is too inequitable, Congress has the discretion to permit the states to tax the imports to the extent deemed appropriate by the Congress. U. S. Const. Art. I, § 10. The majority's analysis of the entire transaction, in its substance, to determine the identity of the importer, is, of course, eminently fair.

EDWIN R. FISCHER

HABEAS CORPUS—Refusal to Appoint Counsel for One Charged with a Capital Offense Is Denial of a Constitutional Right unless the Refusal Is Shown To Be Properly Grounded in State Law.

The petitioner, one Charles Williams, had pleaded guilty without aid of counsel when arraigned on an indictment for robbery with a deadly weapon. He received a fifteen-year sentence in May 1940, and in April 1944 he applied to the Supreme Court of Missouri for a writ of habeas corpus, alleging that upon his arraignment he was without funds; that he was unable to employ counsel; that he had requested the court to appoint him counsel; and that upon the court's refusal to do so, he was forced to plead guilty to the indictment. The Missouri Supreme Court, in a decision without opinion, denied the petition on the ground that there was "no cause of action shown", neither requiring the state to answer nor allowing the petitioner an opportunity to prove his allegations. Because of the substantial nature of the question involved, the United States Supreme Court granted certiorari. Held, the right to counsel in cases involving capital offenses is a right protected by the Fourteenth Amendment to the Federal Constitution, and where there is no showing from the record that the case was decided on separate state grounds, the Supreme Court will take jurisdiction when a constitutional question of a substantial nature is involved. Williams v. Kaiser, 323 U. S. 471 (1945).

A companion case was similarly decided on the same day. Petitioner therein was convicted of murder in the first degree, and a life sentence was imposed. This petition was substantially the same, except that it alleged no request for counsel but that the court had made an ineffective appointment of counsel and that petitioner was ignorant of his right to demand counsel in his own behalf. Tomkins v. Missouri, 323 U. S. 485 (1945).

In order that the United States Supreme Court may reverse a decision of a state court, there must affirmatively appear from the record that a federal question was decided. Lynch v. New York, 293 U. S. 52 (1934). If the decision might be based upon either of two grounds, one a federal and the
other a state ground, and the latter is sufficient in itself to sustain the decision, then the Supreme Court will not take jurisdiction. *Klinger v. Missouri*, 13 Wall. 257 (U. S. 1872). But where the state ground is not substantial or sufficient, the Court will take jurisdiction on the presumption that the judgment was based on the law raising the federal question. *Klinger v. Missouri*, supra. In the *Williams* case the Supreme Court searched the record, failed to find any substantial state ground for denying the writ of *habeas corpus*, and therefore concluded that if the petitioner could prove his allegation, the writ should be granted. From the opinion it is apparent that the Court based this decision on the failure of the state court to write an opinion.

Had this petitioner been denied a constitutional right? An authority on the subject maintains that "With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel." Cooley, *Constitutional Limitations* (7th ed. 1903) 477. One of the leading cases on the subject is *Powell v. Alabama*, 287 U. S. 45, 71 (1932). In that case a criterion for the appointment of counsel by a court is set out in the following passage:

"All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, *whether requested or not*, to assign counsel for him as a necessary requisite of due process of law...."

[Italics supplied.]

That case held that the assignment of counsel without adequate time for trial preparation was equivalent to no assignment at all. It did not impose an absolute duty upon the court to appoint counsel, but clearly made that duty circumstantial.

In *Betts v. Brady*, 316 U. S. 455 (1942), a Maryland court denied *habeas corpus* to the petitioner, convicted of robbery. In the trial court the accused had requested appointment of counsel, which was denied because his crime was not murder or rape, and statutes of the state provided for appointment of counsel only in those cases. Since the accused could not retain counsel himself, he was forced to enter his own plea and conduct his own defense. On certiorari, the United States Supreme Court held that while want of counsel in a particular case may result in a conviction lacking in fundamental fairness, it still cannot be said that the Fourteenth Amendment embodies an express command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant unless he is represented by counsel. Thus, due process in state criminal proceedings is not governed by any fixed rules but is rather a matter determined by the interest of fundamental fairness, as well as by the laws and decisions of the state.

The Missouri statute involved in the instant cases provides:

"If any person about to be arraigned upon an indictment for a felony be without counsel to conduct his defense, and be unable to employ any, it shall
be the duty of the court to assign him counsel, *at his request*, not exceeding
two, who shall have free access to the prison or at all reasonable hours.”

On the face of that statute it appears that it is not the court's duty to
appoint counsel unless the defendant be without counsel, unable to retain
one, and makes a specific request. State decisions hold that if the accused
fails to request, he waives his right to the appointment of counsel. *State v.
Terry*, 201 Mo. 697, 100 S. W. 432 (1907); *State v. Miller*, 292 S. W. 440
(1927). In *Skiba v. Kaiser*, 352 Mo. 424, 178 S. W. (2d) 373 (1944), the
petitioner for *habeas corpus* had pleaded guilty to a charge of robbery with
a deadly weapon and was sentenced to thirty-five years. The Missouri Supreme
Court perceived that the petitioner was a man of average intelligence; that
he had not contended that his plea of guilty was obtained by fraud, duress, or
oppression; and that he had failed to request counsel upon arraignment; and
it held that there was no denial of due process. The writ was dismissed as
an attempt to procure a lighter sentence, instead of an attack on the validity
of the sentence.

In the *Tomkins case*, *supra*, in which petitioner had failed to request appoint-
ment of counsel because of ignorance of the right, the Supreme Court relied
heavily on the rule laid down in *Powell v. Alabama*, *supra*. The decision indi-
cates that the statutory requirement of a request for counsel is a denial of a
constitutional right, at least as to those who are ignorant of their right to
demand counsel.

A dissenting opinion by Justice Frankfurter in the *Williams case*, con-
curred in by Justice Roberts, maintained that nothing significant was indicated
by the fact that the Missouri Supreme Court denied the petition for the writ without an opinion, because during the judicial year 1942 that court had disposed of 217 cases without opinion. The minority agreed that denial of a
request for representation by counsel in capital criminal cases does involve a
federal question but pointed out that in order to find that there was such a
denial here, the Supreme Court must necessarily assume that the state was
unmindful of its own procedural requirements as well as the due process clause
of the Fourteenth Amendment. Missouri had provided for appointment of counsel by request while it was yet a territory. The dissenting Justices
would sustain the state court rather than assume disobedience by that court
to both the Constitution and its own statutes. In their opinion, another
*habeas corpus* petition to the Missouri Supreme Court by the able counsel
now representing the petitioner would be the proper proceeding.

Less than a month after the decisions in the *Williams* and *Tomkins cases*,
the Supreme Court was again called upon to decide a case involving the
deprivation of counsel. In *House v. Mayo*, 324 U. S. 42 (1945), the petitioner
had requested time to communicate with his counsel, then absent from the
city, before pleading in the trial court to an information charging burglary.
Upon the denial of the request he, being in his twenties, uneducated, and a stranger in town, pleaded guilty and was sentenced. Almost twenty years later, he filed petitions for certiorari and for habeas corpus in the United States Supreme Court, alleging that he had exhausted all remedies in the Florida courts and had also been denied relief in the federal district and circuit courts on the ground that no meritorious question was presented by the petition. The Supreme Court, granting certiorari though denying habeas corpus, reversed the order of the circuit court of appeals and the judgment of the district court, maintaining that the Williams and Tomkins cases support the contention that a plea of guilty, after the denial of a request for time to consult with counsel, cannot subsequently operate to deprive a party of his constitutional right to counsel. The Court, then, would not infer, from a plea of guilty under such circumstances, that there was a waiver of the right to counsel.

For the Supreme Court to reverse decisions of state courts where there is a bare allegation of a denial of a federal right would tend to promote a conflict between the federal and state jurisdictions. On the other hand, to assume that one charged with a capital offense received all the assistance of counsel to which he is entitled, when the record on its face indicates otherwise, would possibly result in the deprivation of liberty to many who are unjustly incarcerated or forced to serve longer sentences than their crimes merit.

Whether the record in the instant cases clearly indicates failure to provide counsel, where the accused was too ignorant or too impecunious to do so for himself, is a debatable point. The record only shows lack of counsel; it in no way indicates that this deprivation was a denial of due process based on the criterion of Powell v. Alabama. Silence on the part of the state court is here considered equivalent to an admission by that court that it failed to consider the usual requirements of fundamental fairness to the accused. As Mr. Justice Frankfurter points out in his dissent, the Supreme Court, in effect, was reversing the state court on the rather flimsy ground that that court handed down no opinion. The dissent goes on to show that the Supreme Court itself disposes of many cases without opinion. Is it then to be presumed that either the state court or the Supreme Court disregarded the law and the Constitution in such decisions? Merely stating this question demonstrates its absurdity.

That the reversal of a state court because it denied the petitioner the right of competent and adequate counsel should be based on considerations of fundamental fairness to the accused as well as respect for state laws and the decisions of state courts is undeniable. It has long been the law that the duty of a court to appoint counsel is a circumstantial one. But to reverse the highest tribunal of a state on the ground that it has denied due process merely because it failed to buttress its decision with an opinion is an unwarranted insult to the integrity of state courts.

Probably the only result that can be expected from these decisions is an
increased precision in the action taken by state courts. Greater care will be exercised in preparing a record, and waiver of counsel by the accused will be shown with unquestionable clarity.

GERALD L. ENRIGHT
BOOK REVIEWS


The author, a distinguished jurist and judge of the Permanent Court of International Justice, suggests that the problem of international organization is one of the great responsibilities attendant upon winning the war. He describes the development of international arbitration and the culmination of the international judicial process in the creation of the Permanent Court of International Justice (1920). The author does not undertake to give a history of international tribunals, nor does he present a treatise on the pacific settlement of international disputes. He does, however, endeavor to summarize past experience in order to reach a conclusion as to the most practicable method of adjudicating international disputes.

Judge Hudson develops his subject in four major parts, which are entitled: “I—Introduction”, “II—General Problems of International Tribunals”, “III—Specific Problems of the Future”, and “IV—Conclusions”. In his introduction, the author discusses some of the significant arbitrations which occurred during the past century and a half, emphasizing the success of the Alabama Claims Arbitration which gave new impetus to international arbitration. He stresses the work of the Hague Peace Conference and the establishment of a Permanent Court of Arbitration. Reminiscent of the comment made about the Holy Roman Empire, Judge Hudson remarks that the Permanent Court of Arbitration was not a permanent court nor even a court, but rather a method and a procedure of arbitration. A major part of the discussion is devoted to a description of the Permanent Court of International Justice and its functions in the International Order.

Thereafter, Judge Hudson considers the structure, personnel, administration, financing, jurisdiction, and procedure of international tribunals, and concludes Part II with an examination of the law applicable by international tribunals, decisions rendered, and the execution of these decisions.

In the third part, the writer scrutinizes the future of various existing judicial and arbitral bodies; he also examines numerous proposals for the establishment of international tribunals and commissions.

In the last part of his work, Judge Hudson presents his conclusions. Therein he discusses the functions of these international bodies and the prospects for the immediate future. He recognizes fully the necessity
of having judicial action which is independent of political exigencies of the moment; likewise, he points out that the judicial process is necessarily time-consuming and does not afford an immediate solution to problems which may arise. The limitations which generally attend the functioning of an international judicial body are clearly pointed out in this work. Writes the author: "If the course is to be wisely plotted for future developments, care must be taken to safeguard international tribunals in the discharge of their primary responsibility. A permanent international court, especially, must be in a position to adjudicate disputes between States, and to do this successfully it must have both jurisdiction and authority. Not only must it be scrupulously impartial, it must also gain and hold a reputation for impartiality in its decisions."

In his concluding chapter, the author criticizes the suggestion that the entire world be divided into judicial districts to be served by a permanent district court subordinate to the Permanent Court of International Justice. He opposes strongly the grant of political functions to that tribunal and suggests that other agencies of the international organization will have to assume political responsibility.

A review and revision of existing treaties contemplating the adjustment of disputes appears desirable, according to the author. Judge Hudson appears to take some comfort in the fact that the usual essentials of the judicial process—notice to every party; opportunity for each party to be heard; limitation of deliberations to the issues raised; and judgments directed only to the issues involved—are universally accepted. Finally, the distinguished author expresses his view that international law will be revitalized and strengthened by the further development of the conventional law of the world community. Under those circumstances international tribunals can be more useful in the future than they have been in the past, and they can help to build on solid foundations a world order based on law.

WALTER HENRY EDWARD JAEGER*

RES IPSA LOQUITUR—PRESUMPTIONS AND BURDEN OF PROOF—

Every first-year law student is familiar with the statement made by Pitney, J., speaking for the Supreme Court of the United States in

1Hudson, International Tribunals (1944) 248.

*Professor of Law, Georgetown University.
Sweeney v. Erving, 228 U. S., 233, 240 (1913) to the effect that:

"In our opinion, res ipso loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for an explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by jury, not that they forestall the verdict. Res ipso loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff."

It might serve as an adequate review of this book merely to say that the author does not agree with this statement but believes that where res ipso is applicable the jury should be required to find for the plaintiff unless the defendant affirmatively shows the absence of negligence on his part. This is the central theme of the book and is repeated so many times in it that the book comes to have a monotony like that of a cracked phonograph record.

In fairness to the author the reviewer should state that he disagrees with the author and agrees with the decision in Sweeney v. Erving. But in fairness to the reviewer it should be stated that he is willing to be persuaded of the unsoundness of any given legal proposition, including that contained in Sweeney v. Erving. This book, however, has fallen far short of persuading him.

The book contains some 486 pages, of which 359 comprise the principal text, an addendum and several appendices thereto, 51 contain the table of authorities cited, 12 constitute an index-digest to the text and 59 contain a reprint of an article on the same subject by the author in (1944) 17 So. CALIF. L. REV. 187. It is quite apparent from the length of the table of authorities cited and the copious footnotes in the book (many of which are humorously invective in character) that Mr. Shain has done a prodigious amount of research on the subject of res ipso loquitur. He cites everything from Alciatus Tractatus de Praesumptionibus to 38 American Jurisprudence. This reviewer believes, however, that the author's research has left him with a severe case of mental indigestion.

The work was not undertaken from an objective viewpoint. It is the work of one who is so imbued with a zeal for the destruction of the prevailing doctrine that his efforts appear to be Quixotic. In the earlier portion of the book it would appear that the author believes that American courts should follow, without deviating therefrom in
any particular, the nineteenth century English decisions on the subject. There is no doubt but that Baron Pollock, in *Byrne v. Boadle*, 2 H. & C. 722, 728 (Ex. 1863), said:

"... and in my opinion the fact of its falling is *prima facie* evidence of negligence, and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them."

One may also agree with the author's interpretation of *Scott v. The London and St. Katherine Docks Company*, 3 H. & C. 596 (Ex. 1865), as implying that under the English rule there enunciated, the defendant was under a duty of presenting an affirmative defense. But it is preposterous to assert that because the doctrine as originally developed in England shifted the burden of proof to the defendant, the American courts must forever follow that early English pattern. Such a doctrine would result in a codification of the first decision on a given subject and would prevent the courts from correcting their own errors. And when the author expresses himself as favoring the judicial correction of earlier judicial errors, it is difficult to ascertain exactly what his position is.

The author apparently is no votary at the shrine of Wigmore, and he blames Wigmore for the solecism which he sees in *Sweeney v. Erving*. All of Wigmore's competitors in the literary field are cited to show that the effect of *res ipsa loquitur* is to create a "presumption" of negligence, which shifts the burden of proof. This reviewer is not immediately concerned with the mechanistic approaches of these various writers on the law of Evidence. He does not believe that the courts are bound to determine that the rule developed by the courts must depend on whether the coin shows "heads for inference" or "tails for presumption". After all, these classifications of inference and presumption are merely attempted explanations of what the courts are doing. Any lawyer who has practiced negligence law will agree that the rule of *Sweeney v. Erving* merely provides that when certain necessary facts have been shown to exist, the court may decide that the jury could reasonably infer from the happening of those facts that the defendant has been guilty of negligence. The court then leaves it to the jury to determine whether the jury is going to infer that negligence existed. There is no presumption involved at all, and it is therefore useless to discuss the question as to whether the presumption is one of law or of fact.

The author seems to have difficulty with the expressions "*prima facie* case" and "*prima facie* evidence of negligence". He seems to have the impression that a plaintiff can never get his case to a jury (that is,
beyond the directed verdict stage) unless the jury would be required
to find a verdict for the plaintiff if the defendant should not make a
satisfactory and sufficient defense. This seems to assume that the
jury is bound to accept as true and to give full value to all of the evi-
dence introduced by the plaintiff. It suggests some sort of a screening
of the evidentiary facts by the judge. It also appears to ignore the
fact that many jurisdictions apply the "scintilla of evidence rule".

The scintilla rule is not in effect in the District of Columbia and, of
course, Sweeney v. Erving is a District of Columbia case. It is dis-
appointing, therefore, that the author cites no District of Columbia
case subsequent to 1917. Particularly noticeable by their absence are
538 (1925); Christie v. Callahon, 75 U. S. App. D. C. 133, 124 F. (2d)
825 (1941); and Washington Loan and Trust Co. v. Hickey, 78 U. S.

The opinion in the Christie case, supra, was written by Rutledge, J.,
who is now a member of the Supreme Court of the United States bench.
Quite reasonably he treats the doctrine of res ipsa loquitur as being
merely one phase of the law of circumstantial evidence. He says (75
U. S. App. D. C. at 147):

"Generally speaking, direct and positive testimony to specific acts of negli-
gence is not required to establish it. Circumstantial evidence is sufficient either
alone or in combination with direct evidence. . . . The limitation on its use
is that the inferences drawn must be reasonable."

As Justice Edgerton put it in Washington Loan and Trust Co. v.
Hickey, supra at 61, 137 F. (2d) at 679:

"There is nothing arbitrary or technical about the principle (of res ipsa
loquitur) except its name."

AL. PHILIP KANE*

*Professor of Law, Georgetown Law School.
BOOKS RECEIVED


