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THREE-JUDGE COURT PRACTICE UNDER SECTION 2281  
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REPORTING REQUIREMENTS FOR EMPLOYERS AND LABOR RELATIONS CONSULTANTS IN THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

James R. Beaird*

Although the reporting requirements of the Landrum-Griffin Act apply to labor organizations as well as employers and labor relations consultants, this article discusses the law solely in its application to the latter two. Mr. Beaird's analysis of the legislative development of the statute supplies the background necessary for an understanding of the rationale behind this significant reform legislation. The author discusses the perplexing legal problems that have arisen, some of which possess substantial constitutional overtones, and seeks to provide answers to the questions of who should report, what should be reported and how broad the disclosure must be.

The Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) is the latest step in the development of our national labor policy. While it imposes requirements which affect the affairs of management, management middlemen and the relationships between them and labor, its special significance lies in those provisions regulating the internal affairs of labor unions. Prior to this act, conflicts arising out of the relationships between unions, their officers and members were adjudicated within the organizations themselves or by state courts in accordance with the general laws applicable to voluntary unincorporated

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associations, such as churches and social and fraternal benefit associations. With the passage of this act, the federal government for the first time entered the field of regulating these relationships.

Since the industrial revolution employees have sought, through group action, to gain equality of bargaining power with management in our industrial society. Through the early part of the twentieth century, however, employees were the economic underdogs. Lacking full protection for their freedom of association, their bargaining power was vastly inferior to that of their employers who were organized in corporate or other forms of ownership associations. To remedy this inequality, the National Labor Relations Act was passed in 1935. This act provided a legal foundation for the right of employees to organize and bargain collectively through representatives of their own choosing and imposed on employers the duty of good faith bargaining with respect to wages, hours and other terms and conditions of employment.

Given this statutory guarantee, labor unions grew and the process of collective bargaining spread rapidly. Between 1935 and 1947, however, public concern over a number of union practices developed to such a degree that Congress in 1947 enacted the Taft-Hartley Act which, among other things, classified certain union activities as unfair labor practices. While the need for federal regulation of internal union affairs had been voiced, the Taft-Hartley Act imposed restrictions only in the field of labor-management relations and did not reach the relationship between unions and their members or certain arrangements between employers,

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2 See Cox, Law and the National Labor Policy (1960); Rezler, Union Elections: The Background of Title IV of LMRDA, Symposium on LMRDA 475, 478-82 (Slovenko ed. 1961).
3 Ch. 372, 49 Stat. 449 (1935) [hereinafter cited as NLRA].
7 American Civil Liberties Union, Democracy in Trade Unions (1943); Hearings on Bills to Amend and Repeal the National Labor Relations Act Before the House Committee on Education and Labor, 80th Cong., 1st Sess. 3633-43 (1947).
8 LMRRA § 8(b)(1)(A), 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(1)(A) (1958), provides specifically that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." But cf. Civil Rights Act of 1964 § 703, 78 Stat. 241, 42 U.S.C.A. § 2000e-2 (Supp. 1964), which provides that "[c] It shall be an unlawful employment practice for a labor or-
employer middlemen and labor organizations. The seriousness of problems in this general area continued to arouse public concern.  

THE McCLELLAN COMMITTEE HEARINGS

Congressional investigations which produced, in part, the legislative basis for the LMRDA originated with the Subcommittee on Investigations of the Senate Committee on Government Operations. Initially, this subcommittee was confined to a study of the efficiency of government operations, particularly procurement. However, upon delving more deeply into these matters, the subcommittee found evidence of certain union-racketeer cooperation and false union reporting. Prompted by these revelations, in 1957 the Senate created a new Select Committee on Improper Activities in the Labor or Management Field which, after the name of its chairman, became known as the McClellan Committee. The Committee was given additional authority for the conduct of investigations in the labor-management area; particularly, it was authorized and directed to conduct an investigation and study of the extent to which criminal or other improper practices or activities are, or have been, engaged in the field of labor-management relations or in groups or organizations of employees or employers to the detriment of the interests of the public, employers or employees, and to determine whether any changes are required in the laws of the United States in order to protect such interests against the occurrence of such practices or activities.

The life of the Committee was initially extended until January, 1959, and then until January, 1960, and finally, for the purpose of filing its final reports, until March, 1960. During 1957, 1958 and 1959, the Committee held 270 days of hearings during which it interrogated a total of 1,526 witnesses and compiled a total of 46,150 pages of testimony.

9 American Civil Liberties Union, Democracy in Trade Unions (1952).
10 The initial investigation in the union field was prompted by revelations that racketeers had invaded the field of supplying uniforms to the United States Government and that apparently certain local unions were cooperating with such racketeers. This led to an inquiry into the status of these unions and the reports filed by them with the Department of Labor and the National Labor Relations Board. S. Rep. No. 1139, 86th Cong., 2d Sess. 867-68 (1960).
12 This account of the operations of the Select Committee on Improper Activities in the Labor or Management Field [hereinafter referred to as the McClellan Committee] is based upon its final report. S. Rep. No. 1139, 86th Cong., 2d Sess. 867-68 (1960).
While inquiries into improper activities on the part of certain officials of labor organizations perhaps dominated the first stages of the Committee's investigations, it soon became apparent that management abuses also existed to an alarming extent. Among the abuses uncovered by the McClellan Committee in its hearings which had a direct bearing on the enactment of the statutory requirement for employer and consultant reporting were the following:

1. Management payoffs to high union officials, usually through middlemen, to obtain favored treatment through inferior contracts or to keep labor peace by refraining from organizing employees, striking, picketing or pressing bargaining demands;

2. Management hiring of middlemen to provide labor spies or to keep employees from organizing or to induce them to form or join company-favored unions through such deceptive devices as "spontaneous employee committees";

3. Management favors to union officers through companies in which they had an interest or with which they had other dealings;

4. Collusive practices between employers and unions through which the unions enforced employer monopolies, often to the benefit of associates of the union leaders who acted as employers, and through which the unions were assured membership of all the employees in the controlled fields, usually without their consent and without their receiving any benefits from such membership.

After its 1957 hearings, the McClellan Committee made five basic recommendations among which was the enactment of "legislation to curb activities of middlemen in labor-management disputes." With the enactment of the LMRDA the Committee stated that "the legislative purpose for which the Select Committee originally had been constituted had now been served."

Developments Through the Legislative Process

Prompted by the revelations of the McClellan Committee, a labor-management reform bill was introduced in the Senate in 1958, cospon-

13 The term "consultant" is used in this article to describe all persons covered by LMRDA § 203(b), 73 Stat. 527 (1959), 29 U.S.C. § 433(b) (Supp. V, 1964).
sored by Senators Kennedy and Ives. In its report on the Kennedy-Ives bill, which was reported without amendment, the Senate Committee on Labor and Public Welfare made the following comments on the problems of management reporting and middlemen controlled by management:

The McClellan committee reported that legislation was needed to control the activities of management middlemen who flitted about the country on behalf of employers interfering with restraining and coercing employees in the exercise of the right to organize and bargain collectively. Such middlemen set up front committees of employees to discourage unionization or to form company unions. They negotiate sweetheart contracts. Apparently they have been parties to bribery and corruption as well as unfair labor practices. The middlemen paid by management are acting in fact if not in law as management's agents yet an attorney for the National Labor Relations Board testified before the McClellan Committee that the present law is not adequate to deal with such activities.

The committee believes that employers should be required to report their arrangements with these union-busting middlemen. Further, the Committee on Labor and Public Welfare has received evidence in prior hearings showing that large sums of money are spent in organized campaigns on behalf of some employers for the purpose of influencing and affecting employees in the exercise of their rights under the National Labor Relations Act. Sometimes these expenditures are hidden behind committees or fronts. Sometimes they are made in the open. These expenditures may or may not be technically permissible under the National Labor Relations or Railroad Labor Acts or they may fall in a gray area. In any event, where they are engaged in on a large scale, they should be exposed to the light of publicity in the same fashion that all union financial disbursements will be exposed.

The Kennedy-Ives bill, S. 3974, according to the report of the Committee on Labor and Public Welfare, attacked these problems on three fronts. First, it made improper payments by management middlemen criminal offenses under section 302 of the Taft-Hartley Act. Second, it expanded section 302 to cover both payments made to employees for the purpose of influencing their organizational activities and payments made to union officials with intent to influence them in the performance of their duties. Third, S. 3974 relied upon a system of reporting and disclosure paralleling the conflict of interest reports required of union officers.

The Kennedy-Ives bill would have required employers to file reports with the Secretary of Labor if in any fiscal year they spent more than

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19 Id. at 8.
5,000 dollars for "activities intended to influence or affect employees in the exercise of rights guaranteed" by section 7 of the National Labor Relations Act, as amended,21 or the Railway Labor Act,22 or if they had agreements or arrangements with third persons for the performance of such activities or for the services of paid informants or other persons "engaged in the business of interfering with, restraining or coercing employees in the exercise of the rights" guaranteed by those statutes. These reports were to give detailed information on the expenditures, agreements and payments involved in such activities and on any payments to labor organizations or their officers or employees. A parallel report was required to be filed by persons engaged in providing labor relations consultant service to employers if they were engaged in the aforementioned activities.

S. 3974 passed the Senate by a vote of eighty-eight to one.23 In the House, however, considerable objection was raised to its broad employer reporting requirements. Representative Griffin in commenting on these provisions stated:

Section 103(b) of the Kennedy-Ives bill requires labor relations consultants, for example, of the Shefferman variety,24 to disclose their activities and file certain reports. This is an excellent provision and is fully justified by the McClellan committee hearings.

But section 103(a) goes far beyond any demonstrated need for regulation and, in broad and indefinite terms, requires employers to file detailed financial reports if they undertake "to influence or affect employees in the exercise of their rights guaranteed by section 7 of the Taft-Hartley Act."

This provision would severely cripple existing free speech rights and would be almost impossible to enforce, as written. Serious criminal penalties are provided for noncompliance.

Which "undertakings" by any employer actually "influence or affect" employees in their decision to join, or not to join, a union? How about the following: (1) giving Christmas hams; (2) providing coffee breaks; (3) publishing company newspapers; (4) providing uniforms for employee baseball team, and so forth.

If there is justification for further limitations on employer free speech, surely

24 The reporting requirements applicable to labor-relations consultants and other independent contractors stem largely from the findings of the McClellan Committee, which briefly and somewhat lightly scrutinized the activities of so-called "middlemen." Nathan W. Shefferman and his firm, Labor Relations Associates of Chicago, Inc., seem to have been the principal scapegoats for a much larger and still relatively anonymous class of individuals and firms similarly employed.
such limitations should be spelled out in more precise and meaningful language than is set forth in section 103(a) of the Kennedy-Ives bill.26

Essentially, the same objections were voiced by Representatives Rhodes and Halleck.26 The opposition to these provisions together with the legislative atmosphere under which the vote was taken played a substantial part in the defeat of the bill in the House.27

After the 86th Congress convened in 1959, several labor-management reform bills were introduced. Senators Kennedy and Ervin introduced S. 505 on January 20, 1959. This bill followed the Kennedy-Ives bill of 1958 in many respects, but contained some important differences with respect to the employer and consultant reports.28 S. 505 replaced the phrase “to influence or affect employees” with the phrase “to persuade employees”; it changed the language regarding paid informants and other persons “engaged in the business of interfering with, restraining or coercing employees in [their protected] rights” to language relating to the supplying of “information concerning the activities of employees or a labor organization in connection with a labor dispute”; it contained a 2,500 dollar rather than a 5,000 dollar limit on unreportable employer expenditures; and it created exceptions from the reporting requirements for adjustments in wages or other employee benefits, for expenditures incurred in the publication of house organs or similar publications of employers, for expenditures to obtain information for use solely in conjunction with a judicial, administrative or arbitral proceeding, and for payments to regular officers, supervisors or employees of an employer. Additionally, with respect to payments or loans to labor organizations or officers or employees thereof, it excepted from the reporting requirements certain payments normally arising out of the employer-employee relationship or a collective bargaining agreement, as well as payments and loans

26 105 CONG. REC. 18269 (1958).
27 The vote in the House was taken under a “suspension of the rules” in which no amendments were permitted and in which debate was strictly limited. In order to have passed, the bill would have needed two-thirds approval. Instead, it was defeated 198-190. Id. at 18260.
28 In introducing S. 505 Senator Kennedy stated:
The Kennedy-Ives bill of 1958, even after it passed the Senate by a vote of 88 to 1, was subject to fantastic distortion by extremists on both sides. Fears of its effects, particularly among businessmen, were unnecessarily aroused by the misinterpretation of isolated sections. To allay such fears and prevent further distortion, the bill has been revised to make it clear that the employer reporting section cannot possibly interfere with normal personnel relations or communications, and that the section on bribes by employers cannot possibly include wage or other normal payment.
105 CONG. REC. 884 (1959).
made by banks or other credit institutions. With respect to the consultant reports, S. 505 made similar changes, employing the concept of "persuading" employees in regard to their protected rights and of supplying information concerning employee or union activities in connection with a labor dispute.

Within the next few weeks several other bills were introduced. Senator Goldwater introduced S. 748 which was supported by the Administration. This bill would have required employers to file reports on their participation in transactions with labor organizations or their officers and representatives, of which such organizations or persons would have to file a report, such as payments, loans, investments, or other interests or transactions which might give rise to a conflict of interest. Furthermore, it would have required employers to report payments to employees and other persons except as compensation for or by reason of regular service as an employee, for the performance of acts which restrain, coerce or interfere with employees in their protected rights or whereby information with respect to the exercise of such rights is obtained or sought to be obtained from employees without their knowledge and consent. This bill made no provision for reporting by labor relations consultants who performed services for employers except to the extent they were themselves employers.

Representative Barden introduced H.R. 4473 which, with respect to payments to labor organizations and their officers and employees, did not differ materially from S. 505, except that it contained no exception for bank payments or loans. But H.R. 4473 contained some very fundamental differences in other respects. While S. 505 required employer and consultant reports on the "persuasion" of employees in their protected activities, H.R. 4473 required such reports only if there were activities which "interfered, coerced, or restrained" employees in the exercise of those rights. Also, while under S. 505 reports were required if persuasion was "an" object of an employer's or consultant's activities, H.R. 4473 applied its reporting requirements only if interference, restraint or coercion was "the" purpose of the activities. H.R. 4473 also reintroduced the language regarding the services of persons "engaged in the business of interfering with, restraining or coercing employees." Furthermore, H.R. 4473 exempted attorneys outright from the reporting requirements, and it exempted their clients with respect to transactions and arrangements with an attorney in the course of an attorney-client rela-

tionship. It further expressly exempted all matters falling within section 8(c), the "free speech" proviso of the Taft-Hartley Act,\textsuperscript{81} from the reporting requirements. Like S. 505, it also contained exemptions for payments to regular officers, supervisors and employees as compensation for service as such.

Senator McClellan introduced S. 1137\textsuperscript{82} in the Senate. This bill was identical with H.R. 4473 in most respects, but contained several notable differences. Instead of the annual reports which H.R. 4473 and all previously discussed bills would have required, S. 1137 required reports from employers and consultants within thirty days after making or receiving the specified payments or their agreements to do so. While S. 1137 contained the exemption regarding payments to regular employees, it did not contain any attorney-client exception nor any free speech exception. Also, like H.R. 4473, it did not contain any express exception regarding the giving of advice, the representation of an employer before a court, administrative agency or arbitration tribunal, or the conduct of collective bargaining negotiations on behalf of an employer. However, since both S. 1137 and H.R. 4473 were couched in terms of interference, coercion and restraint, this latter exception would probably have been superfluous.

The Subcommittee on Labor of the Senate Committee on Labor and Public Welfare began hearings on January 28, 1959. In these hearings it considered S. 505, S. 748 and S. 1137, among others. During these hearings numerous representatives of labor, employer groups, government agencies and the public testified or submitted statements on these bills.

Professor Archibald Cox of Harvard University expressed the view that a way had to be found to require reports about truly shady payments without encumbering these reports with a mass of unnecessary routine information. He felt that the following payments fell within the shady area:

(1) All payments by an employer to a labor union or a labor union officer, except regular wages and employee benefits, contributions to a trust fund or union dues or similar periodic payments withheld from wages under a checkoff agreement. When other money passes the transaction is suspect.

(2) Expenditures to a labor relations consultant or similar middleman in exchange for his undertaking to influence employees in their exercise of the rights of self-organization and collective bargaining or to furnish information concerning their activities. Payments for advice are proper. If the employer acts on the advice

\textsuperscript{81} LMRA § 8(c), 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1958).

\textsuperscript{82} 86th Cong., 1st Sess. (1959).
it may influence the employees. But where an employer hires an independent firm to exert the influence, the likelihood of coercion, bribery, espionage, and other forms of interference is so great that the furnishing of a factual report showing the character of the expenditure may fairly be required.

(3) In earlier hearings the committee has received ample evidence that large sums of money are spent by and on behalf of some employers for the purpose of inducing employees not to join a labor union. Some of the propaganda is an unconcealed appeal to hate and prejudice. Opinions may differ on whether these expenditures are against the public interest when the true authors of the propaganda are revealed, but there can be no public interest in permitting employers to hide their sponsorship of antiunion literature behind committees or front organizations. The result is deception of the employees and the public. Expenditures for this purpose should be exposed to the judgment of public opinion through regular reports.33

The AFL-CIO through the Director of its Department of Legislation, Andrew J. Biemiller, expressed agreement with the basic objectives of S. 505, but objected to "certain details on matters of drafting." Particularly, it took issue with the fact that a 2,500 dollar exclusion was given to employers but not to unions, and with the exception regarding "information for use solely in conjunction with a judicial, administrative or arbitral proceeding."34

The representatives of employer organizations who testified objected generally to the reporting requirements of employers and consultants which they characterized as curbs on the expression of opinions and an infringement on the right of free speech guaranteed by the Constitution and section 8(c) of the Taft-Hartley Act.35

Upon the conclusion of the committee hearing, the Committee incorporated forty-six amendments in S. 505, and, as thus amended, introduced this bill as S. 1555.36 The principal changes from S. 505 with respect to the employer and consultant reports were the elimination of the 2,500 dollar "free area" of unreportable expenditures, the addition of the provision exempting payments covered by Taft-Hartley section 302(c) from the reporting requirements and the addition of a provision requiring the reporting by employers of payments and other trans-

34 Id. at 63-65.
35 Id. at 171 (statement of Harry L. Browne, American Retail Federation); id. at 229 (statement of Gerald D. Reilly, Chamber of Commerce of the United States); id. at 442 (statement of Donald J. Hardenbrook, National Association of Manufacturers); id. at 151 (statement of Charles Tower, National Association of Broadcasters).
actions reportable by union officers and employees under other provisions of the bill.

S. 1555 was favorably reported by the Senate Labor Committee to the Senate on April 14, 1959. On the very next day, the Senate began a spirited debate on the reported bill. In the course of this debate, fifty-two amendments were proposed of which thirty-five were passed, fifteen rejected, and two withdrawn.\(^{37}\)

However, the amendments with respect to the employer and consultant reports which were accepted dealt primarily with the timing, rather than the substance, of these reports. Thus, while S. 1555, as reported, would have required one annual employer report and one annual consultant report, the bill passed by the Senate required the consultant report to be filed within thirty days after the making of a reportable agreement. It also required employers to file their reports on such agreements and on payments to unions and union officers and employees within thirty days after such agreement or payment. Furthermore, employers were still required to file an annual report on expenditures with an object of persuasion regarding protected rights and on payments and other transactions on which union officers or employees were required to report. The Senate also accepted an amendment to S. 1555 which stated that attorneys in good standing of the bar of any state were not required to include in any report under the act “any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.” However, unlike H.R. 4473, this provision did not exempt attorneys from reporting altogether, nor did it provide any exemptions for attorneys’ clients.\(^{38}\)

Even while the Senate Labor Subcommittee was still holding its hearings, the Joint Subcommittee of the House Committee on Education and Labor began its own hearings on Labor-Management Reform Legislation, considering among other bills, H.R. 3540, which paralleled S. 748, and H.R. 4473. Again numerous witnesses from labor and employer organizations, government agencies and the public appeared before the Subcommittee and testified or presented statements. With respect to the employer and consultant reports, the union witnesses contended primarily that since unions had to report all aspects of their finances, employers should be required to disclose at least their expenditures in the field of labor relations, and consultants should be required to file


\(^{38}\) S. 1555, 86th Cong., 1st Sess. § 611 (1959) (as passed by the Senate).
corresponding reports. These witnesses specifically opposed various exemptions and exclusions in the employer and consultant reporting section, such as the exclusion in connection with the publication of house organs and similar publications, the exemption for expenditures to obtain information for use solely in conjunction with judicial, administrative or arbitral proceedings, the exemption regarding payments to regular officers, supervisors and employees, and the special exclusion for attorneys. 39

On the other hand, employer representatives, who generally favored the Barden bill, H.R. 4473, or the McClellan bill, S. 1137, contended that labor organizations were not required to report expenditures to persuade people to join unions and therefore employers should not have to report monies spent to persuade people not to join unions. 40 They also contended that the requirement to report expenditures and agreements for "persuasion" infringed the constitutional and Taft-Hartley free speech privileges. 41 and that the term "persuasion" was incapable of an exact definition. 42

With respect to the provision giving effect to the attorney-client privilege, it was contended on behalf of the employers that the provision should be broadened along the general lines of the corresponding provisions in H.R. 4473 in accordance with the recommendation of the American Bar Association, 43 while the union witnesses concluded that attorneys should not be excluded from the reporting requirements. 44 With respect to the reporting requirements in general, one employer representative


40 Id. at 942 (statement of Owen Fairweather, Illinois State Chamber of Commerce). See also id. at 1603 (remarks of Senator Goldwater).

41 Id. at 299 (Gerald D. Reilly); id. at 550 (statement of Thomas Power, National Restaurant Association); id. at 680 (statement of Fred Fischer, National Retail Merchants Association); id. at 712 (statement of Robert Abelow, Commerce and Industry Association); id. at 940 (Owen Fairweather); id. at 1250 (statement of Charles Brooke, Texas Oil Company); id. at 1686 (statement of National Metal Trades Association). See also id. at 1603 (Senator Goldwater).

42 Id. at 712 (Robert Abelow); id. at 1250 (Charles Brooke).

43 Id. at 343 (Harry L. Browne).

44 Id. at 81 (George Meany); id. at 2219 (James B. Carey). See also id. at 1816 (Representative Shelley).
argued that the reporting requirements should cover only activities of persons pretending to be acting for employees and actually acting for employers, and the acquisition of confidential information through labor espionage.45

Upon conclusion of the hearings, the House Labor Committee adopted many amendments to S. 1555 and reported to the House H.R. 8342 which became known as the "Elliott bill." This bill followed H.R. 4473 with respect to the employer and consultant reporting requirements in virtually all material respects. Thus it required reports regarding activities and agreements only if they were intended "for the purpose of" interference with, or restraint or coercion of protected rights, entirely eliminating the concept of "persuasion" as a test for the applicability of the reporting requirements. H.R. 8342 also exempted all matters covered by the free speech section of the Taft-Hartley Act from the reporting requirements. While, unlike H.R. 4473, it did not exempt attorneys entirely from the reporting requirements, it conferred a much broader exemption on attorneys than did S. 1555 and extended a corresponding exemption to attorneys' clients.46

H.R. 8400, introduced in the House by Representatives Landrum and Griffin following the hearings of the House Committee, was identical to the Elliott bill with respect to the employer and consultant reporting requirements and the attorney-client privilege. Thus, when the House passed the Landrum-Griffin bill on August 13 and 14, 1959,47 it adopted the aforementioned employer and consultant reporting provisions of the Elliott bill.

In the resulting conference between the House and Senate conferees, the differences between the House and Senate bills with respect to the employer and consultant reporting provisions were compromised. In form, the bill agreed upon by the conferees followed largely the House bill, but a large part of the substance of the Senate bill was adopted. Concerning payments to unions and union officers and employees, the conferees adopted some provisions from both bills; thus, such payments are reportable except for payments of the kind referred to in Taft-Hartley section 302(c) and payments and loans by banks or other credit

45 Id. at 299 (Gerald D. Reilly).
institutions. With respect to expenditures to influence employees in their protected rights, the test for the applicability of the reporting requirements remained "interference, restraint and coercion" if the expenditures were made by the employer directly. However, with respect to activities performed by third persons, such as employees who act for the employer without the knowledge of the other employees and labor relations consultants, as well as with respect to agreements or arrangements with such third parties, the reporting requirements were made applicable if these activities or agreements involved persuasion of employees with respect to their protected rights. Consultants were required to file an initial report within thirty days after entering into a reportable agreement or arrangement. The initial report was to set out the terms and conditions of such agreements or arrangements, and detailed annual financial reports were also required.

As for the free speech provision, the Conference bill followed the Senate bill, stating only that the free speech section of Taft-Hartley was not to be construed as amended, and the rights protected thereby were not to be construed as modified. With respect to the attorney-client privilege, the Conference bill also adopted the narrower Senate provision. The Conference bill further reincorporated the provision of the Senate bill regarding the giving of advice, representation before courts, administrative agencies or arbitration tribunals and the conduct of collective bargaining negotiations. Finally, the Conference inserted a provision of its own making, under which expenditures and agreements for the obtaining of information regarding unions' and employees' activities in connection with a labor dispute were required to be reported by an employer only if he is involved in such labor dispute, and by a consultant only if the employer with whom he has his agreement is involved in such labor dispute.

The Conference bill was passed on September 3, 1959, by the Senate, and on September 4, 1959, by the House. It became law on September 14, 1959.

**The Employer and Consultant Reporting Requirements of the Act**

Generally speaking, sections 203(a) and (b) of the Labor-Management Reporting and Disclosure Act of 1959 contain the following employer and consultant reporting requirements.

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48 Id. at 17919-20.
49 Id. at 18153-54.
50 Id. at 19689.
EMPLOYER REPORTS

Employers report annually on:

(a) payments or loans of money or other things of value, and any promises or agreements therefor, to any labor organization or any officer, representative, or employee of any labor organization, except payments or loans by banks, other credit institutions and those of the type covered by Taft-Hartley section 302(c),\(^51\)

(b) payments to his employees or groups of his employees for the persuasion of other employees with respect to their protected organizing and bargaining rights, unless by the time such payments are made they are disclosed to such other employees,\(^52\)

(c) expenditures where a direct or indirect object is to interfere with, restrain or coerce employees in the exercise of their protected rights or to obtain information concerning the activities of employees or a union in connection with a labor dispute involving the employer, except insofar as such information is to be used solely in conjunction with a judicial, administrative or arbitral proceeding,\(^53\)

(d) arrangements with or payments to labor relations consultants or other third parties who undertake activities directly or indirectly aimed at persuading employees with respect to the exercise of their rights to organize and bargain collectively,\(^54\)

(e) arrangements with or payments to labor relations consultants or other third parties who undertake to furnish the employer with information concerning the activities of employees or a union in connection with a labor dispute involving the employer, except insofar as such information is to be used solely in conjunction with a judicial, administrative or arbitral proceeding.\(^55\)

CONSULTANT REPORTS

Consultants report within thirty days of entering into an arrangement or agreement to undertake activities directly or indirectly aimed at:

(a) persuading employees in the exercise of their right to organize and bargain collectively,\(^56\)

(b) supplying an employer with information concerning the activities

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\(^55\) Ibid.

of employees or a union in connection with a labor dispute involving the employer, except insofar as such information is to be used solely in conjunction with a judicial, administrative or arbitral proceeding.57

Consultants report annually if during the fiscal year payments were made as a result of an agreement or arrangement referred to in (a) or (b) above.58

EXEMPTIONS AND QUALIFICATIONS

Besides those mentioned above, sections 203 and 204 of the act contain the following exceptions or qualifications with respect to employer and consultant reporting:

(a) No employer or consultant is required to file a report if he has not made a payment or loan or been a direct or indirect party to an agreement or arrangement of the kind specified in section 203.59

(b) No reports are required from employers with respect to payments to regular officers, supervisors or employees of such employer as compensation for services as such.60

(c) No reports are required covering services by reason of giving advice to an employer; representing an employer before a court, administrative agency or arbitration tribunal; engaging in collective bargaining on behalf of an employer or negotiating agreements; or agreeing to perform any such activities.61

(d) Attorneys in good standing in any state are not required to include in any report information lawfully communicated to them by their clients in the course of a legitimate attorney-client relationship.62

(e) The free speech section of the NLRA,63 as amended, is not amended, nor are the rights protected thereby modified.64

(f) The definition of the term "interfere with, restrain or coerce" follows the NLRA definition of that term.65

LEGAL PROBLEMS RELATING TO THE EMPLOYER AND CONSULTANT REPORTING REQUIREMENTS OF THE ACT

After the passage of the LMRDA, the Department of Labor set about the task of prescribing the regulations and reporting forms required by the act and of advising affected persons of the positions that the agency charged with the responsibility of administering the act would take with respect to its various provisions. During this period many interesting legal questions were raised. Some were raised during meetings with the Public, Labor and Employer Advisory Committee appointed by the Secretary to advise on the act’s requirements, others by interested persons in requesting written interpretations from the Department, and still others in connection with government and private litigation under the act.

The following are some of the legal problems that have arisen which relate to sections 203 and 204.

LEGAL PROBLEMS RELATING TO BOTH THE EMPLOYER AND CONSULTANT REPORTING REQUIREMENTS

Constitutionality

Several cases have attacked certain provisions of the LMRDA as being in violation of the Constitution. Among the grounds for these attacks are that the act is an improper congressional exercise of the commerce power and that it is in violation of the first, fourth and fifth amendments to the Constitution. In rejecting these arguments, the courts have upheld the validity of the "Bill of Rights" section 101(a)(2), the union reporting requirements under section 201, the criminal provisions of 209(c), and section 501(c) of the act, which makes embezzlement of union funds a federal crime. The constitutionality of the employer and consultant reporting requirements has been challenged in four cases, but as yet no court has ruled on the constitutionality of sections 203(a) and (b).


70 Complaint, ¶ XIII, Douglas v. Wirtz, 232 F. Supp. 348 (M.D.N.C. 1964); Complaint,
In the only other case ruling on the constitutional question, the United States Court of Appeals for the Ninth Circuit held that section 504 in its imposition of criminal sanctions on Communist Party members conflicted with the first and fifth amendments and was therefore unconstitutional.71

Commerce Power

One argument as to the unconstitutionality of the LMRDA claims that Congress has attempted to legislate with respect to matters which are purely local in character and that this type of legislation, if sustained, would obliterate any meaningful distinction between federal and state authority. This argument has been met in Goldberg v. Truck Drivers Union72 in the following manner:

Congress has made detailed findings, based on extensive investigations, which were adopted as part of the Act (29 U.S.C.A. § 401). These findings, in substance, were "that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation"; that the Federal Government has a responsibility to protect the rights of the employees; that in order to accomplish the free flow of commerce, it is necessary that labor organizations, employers and their officials maintain the highest standards of responsibility and ethical conduct in the handling of their affairs particularly as they affect labor-management relations. Congress found from its recent investigations that these high standards had not been maintained but were breached and disregarded; that it was necessary to pass the Act to eliminate or prevent improper practices which defeated the policy of the Labor-Management Relations Act of 1947, as amended, and burdened and obstructed commerce.

These findings of Congress are binding on the courts. As recently stated by the Supreme Court in Communist Party of United States of America v. Subversive Activities Control Board, 367 U.S. 1 . . . :

"It is not for the courts to re-examine the validity of these legislative findings and reject them. See Harisiades v. Shaughnessy, 342 U.S. 580, 590 . . . . They are the product of extensive investigation by Committees of Congress over more than a decade and a half. Cf. Nebbia v. People of State of New York, 291 U.S. 502, 516, 530 . . . . We certainly cannot dismiss them as unfounded or irrational imaginings. See Galvan v. Press, 347 U.S. 522, 529

72 293 F.2d 807 (6th Cir.), cert. denied, 368 U.S. 938 (1961).
...; American Communications Ass'n., C.I.O. v. Douds, 339 U.S. 382, 388-89..."

Where, as here, the activities have a substantial effect on interstate commerce, it is not an objection that they are local in character. United States v. Darby, 312 U.S. 100...; Wickard v. Filburn, 317 U.S. 111...

The Commerce Clause does not inhibit Congress in selecting the means deemed necessary for bringing out the desired conditions in the channels of interstate commerce. American Power & Light Co. v. S.E.C., 329 U.S. 90, 100...

In our opinion, Section 201 of the Act does not offend against the Commerce Clause.73

The cases upholding the validity of the NLRA under the commerce clause74 and the above reasoning of the Sixth Circuit suggest that there should be little difficulty with respect to the constitutionality of the LMRDA under the commerce clause.

Self-Incrimination

Sections 203(a) and (b) require employers and middlemen who have made certain payments that may also constitute a criminal act under section 302 of Taft-Hartley to file a report with the Secretary of Labor. The requirement that such matters be reported raises a serious question with respect to the privilege against self-incrimination. Indeed, probably no other constitutional problem generated by the act has received more attention.75 The question was first raised by Senator Morse during Senate debate on the Conference bill.

Section 202(a)(6) of the conference committee bill requires officers and employers to report any payments of money or other things of value, "including reimbursed expenses" received by them directly or indirectly, from an employer or any person who acts as a labor relations consultant to an employer, except payments of the kinds referred to in section 302(c) of the Taft-Hartley Act, as amended. Failure by any such officer or employee to report any such payment is a criminal offense, punishable by fine of up to $10,000, or imprisonment of up to 1 year, or both. Payments of the type described in section 202(a)(6) are also made criminal offenses under section 302(b) of the Taft-Hartley Act, as amended. In these circumstances, Section 202(a)(6) seems to me to be plainly unconstitutional since it is an express violation of the protection against self-incrimination which is guaranteed to all citizens under the fifth amendment to the Constitution of the United States.

73 Id. at 815-16.
74 E.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936).
I also have serious doubts, for the same reason, about the constitutionality of section 203(a)(1) of the conference committee bill, which requires employers to report payments to union officers and employees, which are made criminal offenses under section 302(a) of the Taft-Hartley Act, as amended.78

On close analysis the problem does not seem quite as great as it first appears. It has long been established that the self-incrimination privilege is not available to corporations77 or to unions,78 nor is it available to individuals with regard to corporate or union records even though these records may tend to incriminate them personally.79 This leaves for consideration the cases of individual employers or consultants reporting on their own personal activities.80

As early as 1927 the Supreme Court decided in United States v. Sullivan81 that the privilege against self-incrimination does not excuse a complete failure to file a report. In that case, a defendant who derived his income from an illegal business refused to file an income tax return. The Court, while not deciding whether the defendant would have been justified in refusing to answer certain questions in the return, held that he was, in any case, not justified in refusing to file one altogether. A similar result was reached by the Supreme Court in 1953 where a defendant refused to file the return required of persons engaged in gambling.82

Cases subsequent to Sullivan indicated that the privilege did not excuse the omission of any information from required returns and reports or the keeping of records required by law. During the early 1940's the courts held that papers, records and reports, required by law to be made

77 Hale v. Henkel, 201 U.S. 43 (1906).
80 In Motion to Dismiss, filed June 6, 1964, Wirtz v. Brunton, Civil No. 64-2-EC, S.D. Cal., the defendant contends that if the court orders him to file an amended Labor Organization Officer Report under LMRDA § 202(a)(3), 73 Stat. 526 (1959), 29 U.S.C. § 432(a)(3) (Supp. V, 1964), which indicates that he received indirect benefits or income which were not reported originally, the filing of such report would subject him to criminal prosecution under LMRDA §§ 209(c)-(d), 73 Stat. 529 (1959), 29 U.S.C. §§ 433(c)-(d) (Supp. V, 1964). The defendant argues that he is thereby compelled to make incriminating statements against himself in violation of his privilege and therefore § 202(a)(3) is unconstitutional.
81 274 U.S. 259 (1927).
and kept on transactions which are appropriate subjects of governmental regulation, are not private but quasi-public records and therefore are not covered by the privilege against self-incrimination.88

In 1948, the Supreme Court further elaborated on this “required records doctrine” in *Shapiro v. United States*.84 This case arose out of the Emergency Price Control Act85 which required the keeping of certain records. These records were subpoenaed from Shapiro by the Administrator of the Office of Price Administration and were then introduced in a criminal case against him. The Court gave its approval to this practice, holding that the constitutional bounds were not overstepped so long as “there is sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally require the keeping of particular records, subject to inspection by the Administrator.”86

It has been suggested that the reporting requirement for incriminatory information is constitutional because section 601(b) of the act, which deals with investigations, makes applicable certain sections of the Federal Trade Commission Act,87 which contain an immunity provision.88 It is clear from *Shapiro*, as well as from *Bowles v. Amato,*89 that the filing of these reports will not confer an immunity from prosecution, in spite of an immunity provision. In both of these cases the statute involved contained a similar immunity provision and the courts held such provisions inapplicable to records which were required by law to be kept.

While the “quasi-public records doctrine” was not followed in a recent district court case,90 it has been discussed with regard to the

88 United States v. Darby, 312 U.S. 100 (1941) (record keeping requirements of the Fair Labor Standards Act); Rodgers v. United States, 138 F.2d 992 (6th Cir. 1943) (defendant refused to file certain reports required under the Agricultural Adjustment Act); Bowles v. Amato, 60 F. Supp. 361 (D. Colo. 1945), *aff’d sub nom.* Amato v. Porter, 157 F.2d 719 (10th Cir.), *cert. denied,* 329 U.S. 812 (1946) (certain records kept pursuant to the Emergency Price Control Act could be subpoenaed and introduced in evidence against the person who kept them).
84 335 U.S. 1 (1941).
86 Ch. 26, 56 Stat. 23 (1942).
85 335 U.S. at 32.
88 See Aaron 884-86.
90 United States v. Ansani, 138 F. Supp. 451 (N.D. Ill. 1955), *aff’d on other grounds,* 240 F.2d 216 (7th Cir.), *cert. denied sub nom.* Milner v. United States, 353 U.S. 936 (1957). The district court decided that the records required by the statute were private records, not public ones as in *Shapiro*.
reporting and record keeping requirements of the LMRDA in one case.\textsuperscript{91} One author suggests that this application is correct, on the basis of the legislative history and language of the statute.\textsuperscript{92}

Free Speech

It has been urged that in enacting section 203(f)\textsuperscript{93} Congress intended to exempt from the reporting requirements of section 203 all activities protected by section 8(c), the so-called "free speech proviso" of the Taft-Hartley Act. The following are some of the arguments urged in support of this position.

(1) The express language of section 203(f) requires such a construction. 203(f) provides that nothing contained in section 203 shall be construed as an amendment to, or modification of the rights protected by section 8(c) of Taft-Hartley. "If an employer can exercise those rights only if he reports their exercise or runs the risk of fine and imprisonment if he does not report, clearly these rights are modified."\textsuperscript{94}

(2) A requirement to report payments or expenditures for free speech activities would abridge the constitutional guarantees of the first amendment.\textsuperscript{95}

(3) The legislative history supports this view. S. 1555\textsuperscript{96} as reported to and passed by the Senate contained an express exemption for expenditures incurred in connection with the publication of house organs or similar communications. This exemption was considered too narrow.

\textsuperscript{91} Goldberg v. Truck Drivers Union, 293 F.2d 807, 814 (6th Cir.), cert. denied, 368 U.S. 938 (1961). The issue of the case was whether the subpoenas \textit{duces tecum} were too broad. The court in reaching its conclusion that the subpoenas were not too broad said that quasi-public records were involved. However, since a union does not possess a privilege against self-incrimination, as was held in United States v. White, 322 U.S. 694 (1944), it was not necessary for the court to pass upon this doctrine in making its decision.

\textsuperscript{92} See Aaron 885-86.

\textsuperscript{93} LMRDA § 203(f), 73 Stat. 528 (1959), 29 U.S.C. § 433(f) (Supp. V, 1964), states: "Nothing contained in this section shall be construed as an amendment to, or modification of the rights protected by, section 8(c) of the National Labor Relations Act, as amended."

\textsuperscript{94} Iserman, \textit{The Secretary of Labor's Regulations for Employers}, SYMPOSIUM ON LMRDA 404, 405 (Slovenko ed. 1961) [hereinafter cited as Iserman].

\textsuperscript{95} "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend. I. In Memorandum of Law for Plaintiff, p. 49, filed Nov. 7, 1963, Fowler v. Wirtz, Civil No. 608-62, S.D. Fla., the plaintiff alleges that to require the filing of reports concerning activities which are neither unlawful nor illegal violates his right to free speech as guaranteed by the Constitution.

by the House since the bill reported to and passed by the House con-
tained an express exemption from the reporting requirements of all
matters covered by section 8(c) of Taft-Hartley.97 It cannot be as-
sumed, it is argued, that the Conference eliminated the exemptions con-
tained in both the Senate and House bills.

The Department of Labor has arrived at a conclusion contrary to
the one suggested above98 for the following reasons.

(1) In addition to the present language in section 203(f) the bill
as passed by the House contained the following: "nor shall any person
be required to file a report with the Secretary in regard to any matter
protected by section 8(c) of such Act."99 While the Conference report
did not comment on the deletion of this language by the Conference,
this omission has obvious significance.

(2) The bill as passed by the House contained another term not now
contained in the act. Section 203(f) said not only that nothing contained
in section 203 shall be construed as an amendment to or modification
of the rights protected by 8(c) of Taft-Hartley but also that nothing
therein shall be construed as a "limitation upon" such rights.100 The
Conference eliminated the words "or limitation upon." While the Con-
ference report does not comment on this omission, it would appear that
the conferees thought that the requirement to report activities protected
by 8(c) might be considered "a limitation upon" rights protected by
that section and therefore deleted those words.

(3) Section 203 of the bill as passed by the Senate covered activities
having as an object the persuasion of employees. This section in the
House bill would not have covered activities aimed at persuasion short
of interference, restraint or coercion. Wherever an object was specified
in the House bill it was interference, restraint or coercion. The Con-
ference restored some provisions which required the reporting of activi-
ties aimed at persuasion.101 This would have been meaningless if
activities protected by 8(c) of Taft-Hartley had been exempted since
8(c) protects substantially all, if not all, persuasion which falls short
of interference, restraint or coercion.102

98 29 C.F.R. § 405.7 (1964).
100 Ibid.
101 See generally pp. 279-80 supra.
102 It should be noted, however, that although activities protected by § 8(c) will not
be considered unfair labor practices, they may furnish grounds for setting aside an election
The argument that to require reporting on the exercise of free speech rights constitutes a deprivation of those rights was treated by the Supreme Court in United States v. Harris,\(^\text{103}\) which involved the reporting requirements of the Lobbying Act.\(^\text{104}\) In that case the Court said with respect to the claim that to require reports of lobbying expenditures amounted to a deprivation of free speech rights:

Hypothetical borderline situations may be conjured up in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the [Lobbying] Act. But even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws. The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.\(^\text{105}\)

_Advice, Representation and Collective Bargaining Negotiations_

It has been suggested that section 203(c) should be construed as providing a complete exemption from the reporting requirements of section 203 for advice to employers, representing employers before certain tribunals and engaging in collective bargaining on behalf of employers.\(^\text{106}\) It is argued that both the wording and legislative history of the applicable statutory provisions require this result. The Department of Labor, however, has taken a different position. In its published instructions on employer reporting only those agreements or arrangements which relate _exclusively_ to the giving of advice or the other activities specified in section 203(c) are exempted from the reporting requirements.\(^\text{107}\) If an agreement or arrangement covering these activities also covers activities which are reportable under section 203, the exemption does not apply and full information regarding the entire agreement or arrangement, including activities listed in section 203(c), must be reported.\(^\text{108}\)

by the NLRB. General Shoe Corp., 77 N.L.R.B. 124 (1948); see Hicks-Hayward Co., 118 N.L.R.B. 695 (1957).


\(^{105}\) 347 U.S. at 626.

\(^{106}\) Iserman 408.


\(^{108}\) 29 C.F.R. § 405.7 (1964).
The Department’s position is based upon the following considerations:

(1) The language of section 203(c) requires such a construction. The key part of that section provides, "Nothing in this section [203] shall be construed to require any employer or other person to file a report covering the services of such person by reason of”109 the activities enumerated in section 203(c), such as the giving of advice. This is certainly not a statement that the enumerated activities are, as such, to be exempt from the reporting requirements under any and all circumstances. It is simply a statement that the filing of a report under section 203 is not required "by reason of" the enumerated activities. Thus, if, "by reason of" other activities, such as attempts to persuade employees with respect to organizational or collective bargaining rights, a report must be filed, the activities enumerated in section 203(c), such as the giving of advice, are not excluded from the reporting obligation and must be included in the report.

(2) Even if the language of section 203(c) itself were considered too ambiguous to require this construction, further support for it may be found in section 203(b). That section provides for reports from every person who, pursuant to an agreement or arrangement with an employer, undertakes the type of activities specified in section 203(b). One report must be filed within thirty days after entering into such agreement or arrangement, and the other, an annual report, must contain, among other things, a statement of “receipts of any kind from employers on account of labor relations advice or services . . . .”110 It is clear that this requirement cannot be reconciled with a construction excluding from the reporting provisions, under any and all circumstances, such information insofar as it may relate to the giving of advice. Since the requirement specifically calls for information relating to advice, it can hardly be said that a total advice exemption was contemplated by the statute.

It has been urged that while there is concededly an inconsistency between the consultant reporting requirements of section 203(b) and the complete exemption construction of section 203(c), this provides no justification for rejecting this construction with respect to the employer reports required by section 203(a).111 However, if this construction with respect to the employer reports were accepted, the result would be that section 203(c) would be given a different construction in its application

111 Iserman 409.
to the employer reports than in its application to the consultant reports. Such a result is clearly unwarranted since section 203(c) deals not only with "other persons," meaning the persons covered by section 203(b), but also with employers, who are covered by section 203(a). Since it deals with both in the very same words, it is not reasonable that the words contained in section 203(b) should have different meanings with respect to their application in two subsections of the very same section.

(3) The legislative history of the section supports the conclusion reached by the Department.112 While the bill reported to and passed by the House did not contain a section on this subject, the bill reported to and passed by the Senate contained the same provision which now appears in section 203(c). In its report on S. 1555 the Senate Committee made the following significant statement:

An attorney or consultant who confines himself to giving legal advice, taking part in collective bargaining and appearing in court or administrative proceedings would not be included among those required to file reports under this subsection.113

The same report states further:

The committee did not intend to have the reporting requirements of the bill apply to attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations and do not engage in activities of the types listed in section 103(b).114

Thus, it was clearly the legislative intent to make the reporting requirements inapplicable only to those persons who do not engage at all in any of the reportable activities. This becomes doubly clear from yet another statement in the Senate Committee's report relating to this section:

The committee in drafting section 103 was particularly desirous of requiring reports from middlemen masquerading as legitimate labor relations consultants. The committee believes that if unions are required to report all their expenditures, including expenses in organizing campaigns, reports should be required from employers who carry on, or engage such persons to carry on, various types of activity, often surreptitious, designed to interfere with the free choice of bargaining representatives by employees and to provide the employer with information concerning the activities of employees or a union in connection with a labor dispute.115

112 See pp. 277, 280 supra.
114 Id. at 40. (Emphasis added.) Section 103(b) of the Senate Committee bill was the equivalent of LMRDA § 203(b), 73 Stat. 527 (1959), 29 U.S.C. § 433(b) (Supp. V, 1964).
The inference seems inescapable that Congress contemplated the filing of full reports both by employers who engage persons to carry on the types of activities referred to and by persons who actually carry them out. It is also clear that Congress intended to exempt from the reporting requirements only those transactions and arrangements between employers and other persons under which the only types of activities performed were those enumerated in section 203(c).

Scope of Advice

One of the most difficult problems that has confronted the Department of Labor in interpreting the LMRDA has been where to draw the line between activities which should be considered "advice" under section 203(c) and activities which constitute "direct or indirect persuasion" under section 203(b)(1). Although the act does not define the term "advice," the legislative history does shed some light on its meaning.

The "advice" exemption to the section 203 reporting requirements first appeared in the Kennedy-Ives bill. In its report to the Senate on this bill the Labor Committee made the following statement on this exemption:

Since attorneys at law and other responsible labor-relations advisers do not themselves engage in influencing or affecting employees in the exercise of their rights under the National Labor Relations Act, an attorney or other consultant who confined himself to giving advice, taking part in collective bargaining and appearing in court and administrative proceedings nor [sic] would such a consultant be required to report. Although this would be the meaning of the language of sections 103(a) and (b) in any event, a proviso to section 103(b) guards against misconstruction.117

In commenting on the types of expenditures which should be publicized through compulsory reporting, Professor Archibald Cox made the following statement to the Senate Labor Committee regarding advice:

Second, any payment made by an employer to an independent firm to have it influence or affect employees in the exercise of rights guaranteed by the National Labor Relations Act, or to have it obtain information about how the employees are exercising those rights, seems to me to be exceedingly questionable. I am not now talking about payments for advice, following which the employer himself takes some action which may influence employees, but if he goes to an outside consultant, an independent person not connected with him, and then pays that person to influence employees in the exercise of rights guaranteed by the

National Labor Relations Act, there is certainly very great reason to ask questions about why he resorted to this form of transaction.\textsuperscript{118}

It seems clear from the legislative history that one of the basic purposes behind the enactment of section 203 was to further ensure an employee’s freedom of choice by revealing to him the real source of propaganda activity designed to persuade him in the exercise of his protected rights. Also, it is apparent that the situation causing the most concern was where a middleman operating under a deceptive arrangement with an employer attempted to persuade employees directly or through an agent or through some other indirect means.\textsuperscript{119}

Considering, therefore, the purpose of section 203 and the kind of conduct which gave rise to its enactment, it has been suggested that a reasonable definition of the term “advice” would include the activities of a consultant in which it is contemplated that the employer would be the ultimate implementing actor and in which the employer retained the power to accept or reject the activities of the consultant. This position would not classify as advice activities in which the consultant or his agent implement the activity by interposition between the employer and his employees.\textsuperscript{120}

The advice problem has been raised with the Department particularly with respect to the drafting or revision of an employer’s speeches, letters and other written material which are to be delivered or disseminated by the employer to employees for the purpose of persuading them with regard to their organizational or bargaining rights. In the initial period following the enactment of the statute, the Labor Department took the position that the action of a lawyer, consultant or other independent contractor which consisted of drafting or revising such material could not be viewed merely as advice but must be regarded as an affirmative act to undertake activities with a direct or indirect object of persuading employees in the exercise of their rights. However, upon reconsideration, the Department has taken the position that such activity can reasonably be considered as a form of written advice and therefore not reportable where it is carried out as part of a bona fide undertaking which contemplates the giving of advice.\textsuperscript{121} A critical factor in determining whether


\textsuperscript{119} See text accompanying note 14 supra.

\textsuperscript{120} Bernstein & Sullivan, supra note 116, at 414.

\textsuperscript{121} Donahue, Some Problems Under Landrum-Griffin, 1962 Proceedings of ABA Labor Relations Law Section 45.
such undertaking was to give advice is whether the employer has retained the right to accept or reject the materials prepared or revised by the consultant. The Department has also taken the position that the placing of orders for persuasive material which is to be shipped to the employer does not constitute a reportable activity when it is incidental to the giving of advice and is not connected to any reportable activity.

Meaning of "Persuade"

Under section 203 persuasion is made the test of reportability with regard to various instances of the employer and the consultant reporting provisions. The word "persuade" is not defined in the act and consequently there may be many situations in which a question arises whether a certain activity may be considered as having as an object the persuasion of employees with respect to their protected rights. In determining this question specific evidence of intent to persuade is not necessary. "Some conduct may by its very nature contain the implication of the required intent; the natural, foreseeable consequences of certain action may warrant the inference."\textsuperscript{122}

In a sense, it might be said that almost every benefit received by employees may have the effect of persuading them in the exercise of their protected rights. However, the reporting requirements do not apply in all cases where such persuasion is the effect of an employer's or consultant's activities but only where the persuasion is an object of these activities. In addition the Labor Department has taken the position that activities intended to improve labor-management relations are not per se to be considered as having as an object the persuasion of employees with respect to their protected rights. Thus, the Labor Department has held that an agreement or arrangement for the publication and distribution of an employer manual or a similar communication is not necessarily to be considered as having as an object the kind of persuasion which is contemplated by the statute merely because it is intended to improve employer-employee relations.\textsuperscript{123}

On the other hand, an arrangement for the publication of newspaper advertisements stating the employer's position on the issues involved in a labor dispute has been held to require the filing of a report, particularly where the parties have reached an impasse in negotiations. Such advertisements must be considered as serving not only the purpose of publicizing

\textsuperscript{122} Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 675 (1961) (finding no such implication on the facts).

\textsuperscript{123} \textit{Technical Assistance Aid} No. 4, at 15; \textit{Technical Assistance Aid} No. 6, at 7.
the employer’s views but as also having the purpose of persuading employees as to the manner of exercising their rights to engage in collective bargaining. An employer who arranges to advertise publicly his position undoubtedly expects to create or encourage public opinion favorable to his views with the hope that the pressure of public opinion will force the other side to modify its own position. It also tends to influence the employees involved to exert pressure in this direction on their bargaining representative. The reporting requirement would therefore be applicable regardless of whether such activity constitutes an unfair labor practice and regardless of whether it is legal or illegal under any other law.

The question of the scope of the term “persuasion” in section 203 has also arisen with respect to strikebreaking activities. The word “strike-breaking” is, of course, not a precise term, and the particular situation must be examined to determine the sense in which it is used. The Byrnes Act,124 entitled “Transportation of Strikebreakers,” refers to persons hired “for the purpose of obstructing or interfering by force or threat with” peaceful picketing or “the exercise by employees of any of the rights of self-organization or collective bargaining.” An arrangement for the furnishing of such persons would, of course, come within the reporting requirements of sections 203(a) and (b) since it would clearly meet the test of persuasion. This test could also be met even in the case of replacements who are not strikebreakers covered by the Byrnes Act, for example, replacements hired to perform duties not involving force or threat, but aimed at persuading employees to abandon a strike. A strike is an exercise of the right to organize and bargain collectively since bargaining is intrinsically a contest of opposing economic pressures and striking is the traditional and accepted method of applying economic pressure by the union. Thus, the furnishing of men to perform direct or indirect missionary work among the strikers, as part of their work, would have the object to persuade employees as to the exercise of the right to organize or to bargain collectively and would therefore be within the reporting requirement.125

125 Of course, the furnishing of men to perform espionage or reporting work in connection with the strike, as part of their duties, would have to be reported under LMRDA § 203(b)(1), 73 Stat. 527 (1959), 29 U.S.C. § 433(b)(1) (Supp. V, 1964), and the second test of LMRDA § 203(a)(4), 73 Stat. 527 (1959), 29 U.S.C. § 433(a)(4) (Supp. V, 1964). Both sections are concerned with undertakings to supply the employer with information about the activities of employees or the union in a labor dispute involving him. The employer would also be required to report under § 203(a)(3) any expenditure an object of which was to obtain information concerning activities of his employees.
On the other hand, the mere furnishing of replacements for the strikers is not in itself sufficient to require reporting if the object of the replacements is solely to keep the business going. However, if an additional object of the replacements is directed toward persuading the employees to discontinue the strike, the arrangement would be reportable. The duties performed by or assigned to these replacements would, of course, be evidentiary. Thus, if these duties were limited to those of the persons replaced, that could be an indication of a purpose other than persuasion; but if they in fact included violence, missionary work and the like, this could be an indication that the original arrangement was within the reporting requirements.126

The reporting requirements of sections 203(a)(4) and (5) and section 203(b) come into effect where there are agreements or arrangements between an employer and a third person pursuant to which the third person "undertakes" activities with one of the specified objects. The Department of Labor has interpreted this to mean that the reporting requirements apply not only when a person performs such activities but also when he agrees to perform them or to have them performed. This interpretation is based primarily on the accepted meaning of the word "undertake"127 which connotes the assumption of an obligation to do something rather than merely the performance of that act. Furthermore, section 203(b) itself makes it clear that this is the construction intended by Congress since this section requires the submission of the initial report "within 30 days after entering into such agreement or arrangement," a time when possibly none of the covered activities may yet have been performed pursuant to the agreement or arrangement.

Signatures on Reports

Sections 203(a) and (b) contain the requirement that the reports to be filed must be signed by the president and treasurer of the reporting organization "or corresponding principal officers."128 In response to the

126 Under § 203(a)(2) the employer would have to report regardless of the original object of the arrangement for the furnishing of the men, if the men were in fact used to do missionary work or otherwise to persuade the employees to abandon the union or the strike, unless the fact that they were being paid for such duties was contempo-

raneously disclosed to the employees.

127 See Towe v. Poole, 235 Ala. 441, 179 So. 536 (1938); People v. Moss, 33 Cal. App. 2d 765, 87 P.2d 932, 933 (1939); Torelle v. Temple, 94 Mont. 149, 21 P.2d 60 (1933).

initial publication of several of the reports prescribed by the statute, various persons have suggested that the term "corresponding principal officers" should be construed as authorizing officers other than those specified to sign the report not only in cases where officers bearing the specified titles do not exist but also in cases where other officers perform the duties normally associated with these specified titles. Originally, the Labor Department took the position that officers other than those specified in the statute could sign the reports only if the reporting organization did not have such officers. However, upon reconsideration of this matter the Department came to the conclusion that it is permissible under certain circumstances for reports to be signed either by the named officers or by those principal officers whose duties most nearly correspond to those normally associated with the named officers, without regard to titles. This conclusion was reached due to the fact that in many organizations officers bearing the titles specified in the statute have little knowledge regarding the matters required to be reported. However, other officers with different titles do possess such knowledge and thus are in a much better position to prepare these reports and certify to their correctness. In addition, while the language of the act shows clearly the intent of Congress not to leave to the reporting organizations a complete option as to the principal officers by whom the reports are to be signed, it also indicates that Congress did not intend to preclude the signing of the reports by officers performing the duties normally associated with the officers designated in the statute.

LEGAL PROBLEMS RELATING TO THE EMPLOYER REPORTING REQUIREMENTS

Problems under Section 203(a)(1)

Section 203(a)(1) requires employers to report annually on payments or loans of money, or other things of value, including promises or agreements therefor, to any labor organization or any officer, representative or employee of any labor organization. Exception is made for payments or loans by banks or other credit institutions and payments of the types covered by Taft-Hartley section 302(c). The legal problems which have been encountered most frequently in interpreting this subsection have concerned the exceptions contained in section 302(c). Some of these problems are outlined below.


129 29 C.F.R. § 405.1(b) (1964). See also 29 C.F.R. § 405.8 (1964) (personal responsibility of signatories).
Dues Deductions

One of the more troublesome problems involves the payment by employers to unions of union dues deducted from the wages of supervisors who are also union members. Taft-Hartley section 302(c)(4) contains an exemption for "money deducted from the wages of employees in payment of membership dues in a labor organization," provided that the deduction is authorized by the employee's written assignment. This provision would seem to raise a problem since the definition of employee in the Taft-Hartley Act does not include supervisors\(^{130}\) while the definition of employee in the LMRDA is broad enough to cover them.\(^{131}\) Thus, using the definition of employee in the LMRDA, payments to unions of deductions from supervisors' wages would be excluded from reporting, but under the definition in the Taft-Hartley Act such payments would not be excluded.

In view of the different considerations which motivated Congress with respect to the treatment of supervisors in the two acts, and upon consideration of pertinent principles of statutory construction, it was concluded that the broad definition of employee in the LMRDA, rather than the narrower definition of LMRA, should be applied to the exemption in section 203(a)(1). As a result, payments to unions of deductions from supervisors' wages for membership dues are not required to be reported.

It should also be noted that such payments of dues deductions are exempted from the reporting requirements only if they are made in accordance with all of the requirements of section 302(c)(4) of the Taft-Hartley Act. Thus, if the payments are made from the employer's own funds or if they are made without a written assignment meeting the statutory requirements, they must be reported by the employer.

Deductions for Initiation Fees and Assessments

In response to the initial publication of the proposed regulations of the employer reporting form, various persons suggested the incorporation of exceptions which, with a greater or lesser degree of certainty, may fall under the exceptions of section 302(c). For example, section 302(c) covers specifically the deduction and remittance of membership dues. However, the Department of Justice has long held that initiation fees and assessments, being incidents of union membership, should be considered as falling within the meaning of the term "membership dues."\(^{132}\) The


National Labor Relations Board has also adopted this interpretation of the Department of Justice with respect to the impact of dues deduction clauses in collective bargaining contracts on the legality of such contracts for contract-bar purposes. Therefore, it was concluded that the same construction should be given to this clause of section 302(c) for the purposes of the reporting requirements in section 203(a)(1). Thus the Department does not require reporting by employers of initiation fees and assessments withheld from the wages of an employee and paid to a union.

Loans

A third question which arose with respect to section 203(a)(1) concerned loans made by an employer to an employee who is also a union officer or union employee, under an employer's loan program which is available to other employees on terms unrelated to their union status. In the Department of Labor's view such loans would fall under the exception in section 302(c)(1) regarding "any money or other thing of value payable by an employer to . . . any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." It is recognized that an argument can be made that loans do not fall within this exception, since the reporting requirements in section 203(a)(1) cover payments and loans, while the exception in clause (B) of that section refers only to payments of the kind referred to in section 302(c). Furthermore, while section 302(a) of the Taft-Hartley Act was expressly amended to cover loans within its prohibition, section 302(c) was not similarly amended to contain an express exception for loans. However, because nondiscriminatory loans to union officers and employees by their employer fall clearly within the spirit, if not the letter, of the exception, a specific exception was provided in the reporting form for such loans.


134 Technical Assistance Aid No. 4, at 10-11.


Lost Time Payments and Related Benefits

A question has also arisen as to what extent “lost time” payments and related benefits fall within the exception for payments “as compensation for or by reason of . . . service . . . as an employee.” Under the Fair Labor Standards Act the Department of Labor has ruled that payments for time spent in adjusting grievances must be considered as compensation for employment. Employees must be paid under certain circumstances for time spent in adjusting grievances between the employer and employees. On the other hand, the NLRB has held that the payment of wages by employers to employees for time spent on union business, including the handling of grievances, without conferring with the employer, was a violation of section 8(a)(2) of the NLRA, since this section exempts from the unfair labor practice provisions only conferences with the employer during working hours without loss of time or pay. However, it is to be noted that in all cases in which a violation was found on this basis, the payment of wages for time spent on union business was not the only factor, but just one of many giving rise to the finding that an unfair labor practice had been committed.

It has been concluded that Congress could not have intended to require the reporting of payments which employers are already required to make under other law. It was also concluded that the language in section 302(c) was broad enough to cover “lost time” payments in some cases even if the time paid for was spent outside the presence of the employer. As a result an exception is provided in the employer reporting form, covering payments such as compensation for, or by reason of, service as an employee for time spent in activities other than productive work. Payments fall within the exception if they are required by law or bona fide collective bargaining agreement. If they are made pursuant to custom or practice under such an agreement, or pursuant to a nondiscriminatory policy,

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141 But see Dwyer, Employer-Paid “Union Time” Under the Federal Labor Laws, 12 Lab. L.J. 236 (1961). Dwyer concludes that payments of “wages” to union officials devoting full time on union business are unlawful and should be reported by employers under § 203(a).
custom or practice adopted unilaterally by the employer, the payments are also excluded.\textsuperscript{142}

This exception covers not only lost time payments in the strictest sense, but also payments for insurance premiums, payments to pension funds or similar payments for employees who are on leave of absence as union officials if they otherwise meet the specified condition of the exceptions.\textsuperscript{148} However, the exception has been held not to cover payments to employee-union representatives for travel, hotel expenses and per diem in connection with contract negotiations, or the payment by the employer of telephone bills for telephones used by the union representing the employer's employees.

It should be noted that the reporting form makes it clear that the fact that a particular payment, transaction or arrangement is or is not required to be reported does not indicate whether it is or is not subject to any legal prohibition.\textsuperscript{144} This must be tested by provisions of laws other than those prescribing the report.

Interest and Dividends

In preparing the employer reporting form, it was apparent that the language of section 203(a)(1) would require employers to report payments of interest or dividends on securities held by an officer or employee of a labor organization. However, it was obvious that for many employers, particularly large corporations, it would be virtually impossible to ascertain which of the stockholders or bondholders to whom dividends or interest were paid were officers, agents or employees of unions. While such payments do not clearly fall within any of the exempted categories of payments provided by Taft-Hartley section 302(c), it was felt that they could be so considered either because payments of this nature may be considered as payments in adjustment, settlement or release of any claim in the absence of fraud or duress within the meaning of section 302(c)(2),\textsuperscript{148} or because they may be considered as falling within the general kind or type of payments covered by section 302(c). The exemption in section 203(a)(1) offers some latitude in that it refers to "payments \textit{of the kind} referred to in section 302(c)."\textsuperscript{146} On the basis of these

\textsuperscript{142} Employer Report Part B, exception (c).

\textsuperscript{143} Technical Assistance Aid No. 4, at 11.

\textsuperscript{144} Employer Report 1 (instructions).

\textsuperscript{145} This theory is also advocated in Loomis, \textit{Employer and Consultant Reporting Requirements}, Symposium on LMRDA 396 (Slovenko ed. 1961).

considerations, an exemption of such interest or dividend payments was inserted in the employer reporting form and was made applicable to other payments which may fall into the same category. In part, therefore, the instructions in the reporting form which are concerned with section 203(a)(1) provide an exemption for "payments made in the regular course of business to a class of persons determined without regard to whether they are or are identified with, labor organizations and whose relationship to labor organizations is not ordinarily known to or ascertainable by the payer . . . ."147

De Minimis

Shortly after enactment of the LMRDA, questions arose as to whether the new law required reporting of the exchange of Christmas gifts between employers and labor organization officers or employees. The Secretary of Labor therefore issued a news release stating that he saw no basis for thinking that Congress intended to discourage the traditional exchange of Christmas gifts and that there was nothing in the law which prohibits the holding of Christmas parties for employees where gifts and entertainment are provided by an employer or a labor organization.148

In the light of decisions in which the courts have consistently refused to concern themselves with trifles under the de minimis principle,149 and in the interest of preventing the filing of innumerable insignificant reports, the Labor Department found it necessary to incorporate a de minimis exception in the employer reporting form. While it was suggested by some sources that payments falling below a certain definite amount should be exempted from the reporting provision, the Department did not accept this suggestion at that time because the courts have never defined the de minimis principle in terms of definite monetary amounts, but have determined the application of that principle on the basis of the pertinent circumstances in each particular case.150 Therefore, in incorporating a

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147 Technical Assistance Aid No. 4, at 9.

148 News Release USDL-3027, Dec. 10, 1959. The same news release also stated that the fiduciary requirements of the LMRDA do not restrict the right of labor organizations to contribute to whatever charities the members choose to assist, so long as such expenditures are made in accordance with the particular organization's constitution and bylaws.


150 However, the Department has provided in the Labor Organization Officer and Employee Report, Form LM-30, that no report is required concerning holdings of, or transactions in securities not exempted by LMRDA § 202(b), 73 Stat. 526 (1959), 29 U.S.C. § 432(b) (Supp. V, 1964), involving $1000 or less, and that no report is required concerning the receipt of income of $100 or less in any one such security.
de minimis exemption in the employer reporting form, the Department used language which the Supreme Court had used in describing matters of insignificance.\textsuperscript{151} Thus the form refers to “sporadic or occasional” gifts, or those of “insubstantial” value and adds the requirement that such gifts, gratuities or favors must be given under circumstances and terms unrelated to the recipient’s status in a labor organization.\textsuperscript{162}

However, in response to repeated suggestion from various sources, the Labor Department is presently considering the advisability of framing the de minimis exception in terms of a definite monetary amount. The question of whether the nonreportability of insignificant gifts must be made conditional on their being given under circumstances and terms unrelated to the recipient’s status in a labor organization is also under reconsideration at this time.\textsuperscript{163}

Payments to Trust Funds Which Are Not Jointly Administered

Another question relating to the coverage of section 203(a)(1) arose with respect to payments to certain trust funds. Taft-Hartley section 302(c) exempts from the prohibitions contained in sections 302(a) and (b), among other things, payments to certain trust funds if such funds are jointly administered by employers and unions with equal representation and if they meet certain other requirements. In addition, section 302(g) of the Taft-Hartley Act exempts from the prohibition payments to certain trust funds which are not jointly administered, if such funds were established by collective bargaining agreements prior to January 1, 1946. However, section 203(a)(1) of the LMRDA contains an exception for payments of the kind referred to in section 302(c) but makes no mention of section 302(g). Thus it was concluded that Congress, while not wishing to prohibit payments to funds covered by section 302(g), did not intend to relieve employers from reporting contributions to funds which do not meet the conditions of section 302(c) regarding equal employee-employer representation. Since it does appear that Congress wished employer contributions to such trust funds to be open to public

\textsuperscript{162} Employer Report Part B, exception (e).
\textsuperscript{163} Since the exceptions which have been discussed above do not expressly come within the purview of § 302(c) of the Taft-Hartley Act, and since in some circumstances it may appear that disclosure of the payments may be a matter of interest to members of a labor organization or other persons, a provision was inserted in Employer Report Part B, reserving the right to the Secretary to require the submission of special reports.
scrutiny, the Labor Department ruled that such payments are required to be reported under section 203(a)(1).

The Question of Indirect Employer Payments

Another inquiry regarding the applicability of section 203(a)(1) concerned a proposal to finance the purchase of a building for a union with a loan from a union health and welfare fund to which employers were making payments. The question was raised whether such a transaction would constitute an indirect payment to a labor union by the contributing employers. Adopting the reasoning of the Supreme Court in Lewis v. Benedict Coal Corp., the Department expressed the opinion that such a loan should not be considered an indirect loan by an employer to a labor organization if it is made as a legitimate investment of the trust fund without any purpose to circumvent any provision of the act, and if the employer contributions to the fund are made irrevocably so that they become the property of the fund.

Problems Under Section 203(a)(2)

Section 203(a)(2) makes reportable employer payments, including reimbursed expenses, to employees or groups of employees for the purpose of persuading other employees with respect to the exercise of their rights, except where such payments were contemporaneously or previously disclosed to such other employees. As yet few questions have arisen under this section. With respect to the question as to what disclosure methods are considered adequate to meet the requirements of section 203(a)(2), any method of actual disclosure would be regarded as sufficient compliance if it may reasonably be expected to succeed in providing all of the affected employees with the necessary information prior to or at the time the payment in question is made.

155 361 U.S. 459 (1960). The Lewis Court held that a welfare and retirement fund which was jointly administered by the union and the contributing employers "is in no way an asset or property of the union." Id. at 465. It seems to follow that such a fund also is not an asset or property of the contributing employers.
156 In Wirtz v. Ken-Lee, Inc., Civil No. 8690, N.D. Ga., the Department is seeking an order compelling the defendant employer to file a report under § 203(a)(2). At issue in this case is whether the Department can, in moving for summary judgment, rely upon the findings of the NLRB, affirmed by the United States Court of Appeals for the Fifth Circuit, that the employer made a payment which is required to be reported under
Problems Under Section 203(a)(3)

It should be noted that expenditures covered by section 203(a)(3), unlike those covered by section 203(a)(2), do not become nonreportable upon previous or contemporaneous disclosure to the affected employees.

The question has been raised whether the exemption in 203(e) regarding payments to regular employees of an employer is applicable to the first part of section 203(a)(3) which deals with expenditures having as an object interference with, restraint or coercion of employees with respect to their protected rights. In response to the initial publication of the proposed regulations on the employer report, employer representatives contended that the exception in section 203(e) was applicable to section 203 in its entirety and therefore should be given effect with respect to the first part of 203(a)(3) as well. However, since expenditures covered by this part of the section, under the definition contained in section 203(g), would involve the commission of unfair labor practices under the National Labor Relations Act, the Department has taken the position that activities of that nature cannot be regarded as "service as a regular officer, supervisor or employee" within the meaning of section 203(e). Therefore the exception of 203(e) is not applicable to this part of 203(a)(3). Further support for not applying the 203(e) exemption indiscriminately to all parts of section 203 is found in section 203(a)(2) which specifically covers payments to employees, including groups or committees of employees. If section 203(e) were construed to exempt all payments to all employees, section 203(a)(2) would be rendered meaningless and its effect and purpose would be completely vitiated.

Inasmuch as the term "interfere with, restrain, or coerce," as used in section 203(a)(3), is the same as that used in the Taft-Hartley Act, decisions of the National Labor Relations Board are vital factors in determining whether a report will be required from an employer under


157 Aaron 890.


159 TECNICAL ASSISTANCE AID No. 4, at 15.

160 LMRDA § 203(g) states:

The term "interfere with, restrain, or coerce" as used in this section means interference, restraint, and coercion which, if done with respect to the exercise of rights guaranteed in section 7 of the National Labor Relations Act, as amended, would under section 8(a) of such Act, constitute an unfair labor practice.
this section. In situations where the Board has found that the employer did interfere with, restrain or coerce its employees in the exercise of their protected rights, it is the Department’s position that such employer would be required to report the expenditures made in connection with such activity.  

It is also the Department’s position that in an action brought to compel the filing of such report, the employer is estopped from denying the facts established by the Board’s decision. The Department reasons that the doctrine of collateral estoppel applies in such a case since (1) the matters involved in the action under the LMRDA were decided by the NLRB; (2) the doctrine applies to final decisions rendered by quasi-judicial agencies such as the Board; and (3) the Secretary of Labor is in privity with the Board, enabling him to rely conclusively on its final decision.

Problems Under Sections 203(a)(4) and (5)

With respect to sections 203(a)(4) and (5) and also section 203(b), it should be pointed out that an agreement or arrangement need not necessarily be confined to the furnishing of the services which are specified in those sections, nor need it expressly mention those services in order to be reportable. Thus, where such services are performed by an employer association under its general charter of activities or authority rather than pursuant to any agreement or arrangement specifically entered into, the charter of the association which ordinarily provides for the furnishing of assistance or advice regarding labor relations matters may suffice as an agreement or arrangement. Where there is doubt whether the membership agreement necessarily embraces performance of persuasive activities, it is the Labor Department’s policy to key reporting demands to evidence of actual persuasive acts. To the extent that such activities have taken place, the employer association and the members whose employees have been subjected to persuasion must report. Other employer members of the association need not report.

Legal Problems Relating to the Consultant Reporting Requirements of the Act

Attorney-Client Communications

Section 204 permits attorneys who are members of the bar of any state to exclude from a report required to be filed "any information

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161 Technical Assistance Aid No. 4, at 15.
162 This question is present in a pending case. Memorandum of Law for Plaintiff, filed March 5, 1964, Wirtz v. National Welders Supply Co., Civil No. 1725, W.D.N.C.
which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." It should be noted that this section does not relieve an attorney of the obligation to file a report, but simply excuses him from including certain information in a report otherwise required. Moreover, the exclusion is available only to lawyers and does not extend to consultants generally or to the clients, as does the exemption in section 203(c).

The exclusion granted in the act is considerably narrower than the one contained in section 204 of the House bills, and the position advocated by the American Bar Association. The House bills were applicable to both attorneys and their clients and covered any information which is confidential between the attorney and the client in the course of a legitimate attorney-client relationship, including but not limited to the existence of the relationship of attorney and client, the financial details thereof or any information obtained, advice given, or activities carried on by the attorney within the scope of the legitimate practice of law.

Had the House version been accepted the exemption granted might well have gone beyond the traditional attorney-client privilege insofar as it covered the existence of the attorney-client relationship and the financial details thereof.

It has been suggested that section 204 is virtually meaningless since there apparently is no requirement to disclose under section 203(b) that which is exempted from disclosure under section 204. This is so, it is argued, since section 204 only excludes from reporting communications made by the client to the attorney, while section 203(b) requires reporting on such things as receipts, disbursements and the terms and conditions of agreements or arrangements. On the other hand it has

164 At the mid-winter 1959 meeting of the American Bar Association its House of Delegates passed the following resolution:

Resolved, That the American Bar Association urges that in any proposed legislation in the labor-management field, the traditional confidential relationship between attorney and client be preserved, and that no such legislation should require report or disclosure, by either attorney or client, of any matter which has traditionally been considered as confidential between a client and his attorney, including but not limited to the existence of the relationship of attorney and client, the financial details thereof, and any advice or activities of the attorney on behalf of his client which fall within the scope of the legitimate practice of law; be it further

Resolved, That the officers and councils of the sections of labor relations law and corporation, banking and business law be directed to bring the foregoing resolution to the attention of the members of the proper committees of Congress in connection with any proposed legislation in their field and to oppose legislation contrary to the principles urged in said resolution.

166 See MCCORMICK, EVIDENCE § 94 (1954).
been contended that receipts of attorneys for explaining the application of labor laws to employees are exempted from the reporting requirements by section 204 even though the object of such activity may be, directly or indirectly, to persuade employees.\textsuperscript{167} The Department has taken the position, however, that section 204 exempts neither the identity of the client nor the attorney fees paid from the reporting requirements of section 203(b). A comparison of section 204 of H.R. 8342, quoted above, as it passed the House, with section 204 as finally enacted indicates that facts relative to the relationship and the financial details thereof would have been excluded from the reporting requirements by the bill. However, the section as it appears in the statute does not exempt such information from the reporting requirements. The great weight of authority dealing with the attorney-client privilege also supports the position of the Department.\textsuperscript{168}

Another objection has been raised concerning section 204. It is argued that if the Secretary's interpretation is correct to the effect that attorneys who have entered into reportable agreements or arrangements must also make public reports of their confidential arrangements, agreements, receipts, disbursements and undertakings in relation to the practice of labor law, then the LMRDA infringes upon the attorney-client privilege in violation of the due process requirements of the Constitution. This argument seems to have little merit since the report required does not call for the disclosure of any communications from the client to the attorney which may be protected by the common-law privilege.\textsuperscript{169} Certainly it is questionable whether receipts and disbursements can qualify as information communicated by the client.

Although there is authority, both statutory and decisional, that the traditional attorney-client privilege covers the advice given by the attorney in response to communications from the client,\textsuperscript{170} the policy behind

\textsuperscript{167} Motion for Summary Judgment of Plaintiff, filed January 25, 1964, Price v. Wirtz, Civil No. CA-4-63-84, N.D. Tex.


\textsuperscript{169} In re Colton, 201 F. Supp. 13, 17-18 (S.D.N.Y. 1961), aff'd sub nom. Colton v. United States, supra note 168 (general description of the type of legal services rendered does not come within the privilege); In re Wasserman, 198 F. Supp. 564 (D.D.C. 1961) (fact of employment and the amount of fees paid do not come within the privilege). See also McCormick, Evidence § 94 (1954); 8 Wigmore, Evidence §§ 2306-10 (McNaughton ed. 1961).

\textsuperscript{170} E.g., United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (1950); Sovereign Camp of Woodmen of the World v. Ward, 196 Ala. 327, 71 So. 404 (1916); Missouri K. &
the privilege does not justify such an extension.\(^{171}\) Though advice is exempted from the reporting requirements under section 203\((c)\) of the act, it is not exempted under all circumstances.\(^{172}\) If it is otherwise reportable, the question then is to what extent advice is excludable under section 204.

It has been suggested that the traditional attorney-client privilege may be applicable to advice where information concerning the advice is sought to show circumstantially the client's own communication.\(^{173}\) The same test may well be applicable under the act. However, except for those circumstances, it would appear that any advice which is reportable by nonlawyers would also be reportable if given by lawyers since the exemption in section 204 relates only to information communicated by the client and not to communications from the lawyer to the client.

Section 204 also contains the qualification that to be exempt the information must be lawfully communicated by the client to the attorney in the course of a legitimate attorney-client relationship. This seems to correspond to the rule under the traditional attorney-client privilege that the privilege does not apply to communications made to enlist assistance for the commission of an intended crime or fraud.\(^{174}\) Thus, if an employer relates to his attorney his plans for a union busting campaign through the use of violence and asks him to find someone to carry out these plans and the attorney agrees, the employer's communication to the attorney might well be regarded as part of the terms and conditions of the agreement and, in such case, would not be exempted from the reporting requirements by section 204.\(^{175}\)

The reference to "in the course of a legitimate attorney-client relationship" makes it clear that the communication must be made by one person in the capacity of a client to another in the capacity of an attorney. Thus, if an employer asks a friend who happens to be an attorney to talk to one of his employees in order to induce him not to join or vote for a union, section 204 would not apply. It is recognized, of course,

\(^{171}\) McCormick, Evidence §§ 91, 93 (1954).


\(^{173}\) See note 168 supra.


\(^{175}\) Aaron 891.
that the mere fact that the attorney performs his services without compensation does not negate the attorney-client relationship. 176 Whether the communication was made in the course of the attorney-client relationship or between friends is, therefore, a question of fact which must be resolved upon consideration of the particular circumstances of each case.

Two additional questions arise as to whether principles applicable under the traditional attorney-client privilege apply also under section 204. To be included under the traditional privilege, the communication must be made in confidence. Thus, it is not privileged if, when it is made, third persons other than the client's agent or the attorney's clerk or secretary are present. 177 Section 204 contains no express provision that the communication must be confidential; whether such a provision is implied is a question which the courts may eventually have to decide. The second question involves the waiver of the privilege. The traditional privilege can be waived by the client, for example, if he testifies about the communication itself, even if in a different suit. 178 The exemption in section 204 is not expressly made inoperative in case of waiver, so that the question whether such a provision is implied is also one which the courts may have to deal with at some time in the future.

Consultant Annual Report Requirements

One of the most controversial issues presented under the consultant reporting requirements involves the duty under section 203(b) of such person to file an annual report which includes a statement "(A) of its receipts of any kind from employers on account of labor relations advice and services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the purposes thereof." It has been argued that section 203(c) when read together with section 203(b) exempts from the reporting requirements receipts from and disbursements made on behalf of employers in con-


177 Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582 (1934) (secretary); In re Busse's Estate, 332 Ill. App. 258, 75 N.E.2d 36 (1947) (client's agent); Sibley v. Wopple, 16 N.Y. 180 (1857) (law clerk); In re Quick's Estate, 161 Wash. 537, 297 Pac. 198 (1931). See also 97 C.J.S., Witnesses § 290 (1957); 8 WIGMORE EVIDENCE § 2311 (McNaughton ed. 1961).

nection with activities specified in section 203(c). When a consultant enters into a reportable agreement or arrangement with an employer, it is contended, a report is required only regarding the receipts and disbursements made on behalf of that employer.

The Department, however, takes the position that once a consultant enters into a reportable arrangement, he must include not only receipts and disbursements directly related to the reportable activities but also receipts and disbursements regarding all other employers for whom labor relations services were performed. The first sentence of section 203(b) states that "Every person who pursuant to an agreement or arrangement with an employer shall file a report. Use of the plural forms of the words "employer" and "source" in the second sentence can only be explained by the interpretation of the Secretary. If Congress had intended the reporting only of receipts from employers for whom reportable activities were performed, the words "employers" and "sources" in the second sentence would not have been used in a section requiring a person to report by virtue of his agreement or arrangement with a single employer.

Reference to the language of section 203(b) further supports the position taken by the Department. The inclusive term "labor relations advice and services" is used without qualification, and as such cannot be said to be a reference to reportable agreements and arrangements. Again, the inclusive terms "receipts of any kind from employers" and "disbursements of any kind" are also used without limitation. In plain terms, then, this section demonstrates that Congress wanted full disclosure by persons who, pursuant to agreements or arrangements, undertake reportable activities.

Section 203(c) itself cannot be construed as providing a complete exemption from the section 203(b) reporting requirements. Section 203(b) still requires reports on the advice given to employers or the engaging in other activities as specified in section 203(c). That section

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179 Complaint, filed July 8, 1963, Price v. Wirtz, Civil No. CA-4-63-84, N.D. Tex.
180 In Douglas v. Wirtz, 232 F. Supp. 348 (M.D.N.C. 1964), the court rejected the Department's position, holding that § 203(c) excludes receipts and disbursements regarding the giving of advice and services from the § 203(b) reporting requirements. The court was of the opinion that a report which set out fees paid for services would constitute a report covering services and was therefore not required by the act. This decision is being appealed by the Department.
exempts certain persons, not certain activities. The Department has interpreted this section to exempt only those consultants who confine themselves to the giving of advice and the other activities specified therein. If a person engages in section 203(c) activities and also engages in section 203(b) activities, the exemption does not apply and the information called for by the statute must be reported regarding all labor relations advice and services for employers.

Section 203(c) provides that "Nothing contained in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of" the activities enumerated in 203(c) such as the giving of advice. This certainly is not a statement that the enumerated activities are, as such, exempt from the reporting requirements under any and all circumstances. It is simply a statement that the filing of a report under section 203(b) is not required "by reason of" the enumerated activities. Thus, if "by reason of" other activities, such as attempts to persuade employees with respect to organizational or collective bargaining rights, a report must be filed, the activities enumerated in section 203(c) are not excluded from the reporting obligation and must be included in the report.

Furthermore, section 203(c) cannot be interpreted without reference to section 203(b). Since the latter section expressly calls for information with respect to "advice," to exclude advice completely would read an inconsistency into these sections. The Secretary's construction reconciles the two sections and leaves each meaningful.

Conclusion

Many of the problems discussed in this article are the subject of pending litigation. Due to the complexity of the issues raised by the provisions of sections 203(a) and (b), it will be several years before authoritative judicial criteria for construing these sections are established. I am confident that the future will prove that these provisions, as interpreted and applied by the Department, are reasonable and fully carry out the basic disclosure purposes of the act.
THE CITIZEN AND THE STATE: POWER OF CONGRESS TO EXPATRIATE AMERICAN CITIZENS

Charles Gordon*

The author first presents an historical survey of the nature and extent of congressional power to expatriate American citizens. This survey reveals the fluctuation between the doctrine of immutable allegiance and an emphasis on the federal government's right to terminate citizenship for actions detrimental to the national interest. The opposing "absolute" and "qualified" views regarding the power of Congress to enact expatriation laws are presented, and in this context are discussed various elements considered in debates on expatriation statutes—voluntariness, punishment, reasonableness and automatic effect. After an analysis of the present status of expatriation provisions, Mr. Gordon concludes that the major issues are still largely unsettled, and although the balance favors the "qualified" view, no firm guidelines exist concerning the extent to which Congress can in the national interest terminate the citizenship of an individual who does not wish to relinquish it.

In this era of deep concern with the rights of citizenship it is not surprising that attention has been focused on the solidity of citizenship status. Such inquiries are not uncommon in most civilized societies and are not new in the United States. In this country debates have flared and subsided in changing historical settings. But the past decade has seen the controversy enter a new dimension as the courts have probed the limits of congressional power to expunge the ties of citizenship.

In large measure this controversy is merely one aspect of the perennial joust between Big Government and Little John Citizen. Arrayed on one side are those, including some members of the present Supreme Court of the United States, who are determined to defend the right of Little John to pursue his own destiny, wisely or foolishly, in his own way. On the other side are those who believe the Government should have the power to curb Little John when his meanderings may imperil or offend others in the community. There have been no final answers to the question posed in this debate, and the conclusions have varied as the times and the complexion of the Supreme Court have changed. At the present moment, the

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scales appear to be tilted to favor proponents of the libertarian view of individual rights.

Citizenship is a somewhat nebulous term, with roots deep in antiquity. It is a generalization which denotes full membership in the clan, the state or the society. To most of us such membership is a proud and comforting possession; to others it is a badge of profit and convenience; to a few it is a burden to be shed. Citizenship confers a status which summons rights, privileges and obligations, and in a society as powerful and beneficent as that of the United States, this may be a status of inestimable value. The manner in which such status can be lost, or in which the citizen can be deprived of it, obviously is a matter of crucial concern to all of us.

The loss of citizenship traditionally has been designated comprehensively as expatriation, although it is possible to differentiate between the voluntary surrender of citizenship and denationalization pursuant to legislative edict. The power of Congress to legislate in this area is still being debated. This article will explore the historical development of this controversy and its present posture in the light of recent Supreme Court decisions.

1 In modern times the more comprehensive term “nationality” has been widely used. See American Soc'y of International Law, Research in International Law, 23 AM. J. Int'l L. 23 (Supp. 1929). Nationals are persons owing permanent allegiance to a state and include both citizens and noncitizen nationals. Ibid.; Immigration and Nationality Act §§ 101(a)(21)-(22), 66 Stat. 169 (1952), 8 U.S.C. §§ 1101(a)(21)-(22) (1958). Since most noncitizen nationals have been granted full citizenship rights in the United States this is now an insignificant group in the total nationality structure. Therefore, this article will refer to citizens and citizenship of the United States, instead of to nationals and nationality.

2 See American Soc'y of International Law, supra note 1, at 23; Boudin, Involuntary Loss of American Nationality, 73 HARV. L. REV. 1510, 1530 (1960) [hereinafter cited as Boudin]; Hurst, Can Congress Take Away Citizenship?, 29 ROCKY Mt. L. REV. 62, 64 (1956) [hereinafter cited as Hurst].

3 It is the right to be here; to stay in the United States, a country where constitutional limitations make a person free from the oppressive hand of an arbitrary and tyrannical government, that gives United States citizenship its real and abiding value. This right to belong, this right to stay, connotes a permanent membership in a state composed of free people.

Hurst 64.


5 See generally Roche, The Expatriation Cases: “Breathes There the Man With Soul So Dead . . . ?,” in THE SUPREME COURT REVIEW 325 (Kurland ed. 1963); Appleman, The Supreme Court on Expatriation: An Historical Review, 23 FED. B.J. 351 (1963); Boudin 1510; Goostree, The Denationalisation Cases of 1958, 8 ASH. U.L. REV. 87 (1959); Hurst 62; Maxey, Loss of Nationality: Individual Choice or Government Fiat?, 26 ALBANY L. REV.
HISTORICAL BACKGROUND
PRIORITY TO 1868

In a nation founded by rebellious colonists and developed largely by immigrants escaping from oppression and deprivation in their native lands, expatriation obviously was a topic of importance. Yet our national policies long remained remarkably uncertain and undefined.6 The Constitution was silent and no statutes provided guidance; the attitudes of the courts and the executive were hesitant and unstable. Mr. Justice Jackson described this situation aptly in pointing to the "conflict in precept and confusion in practice on this side of the Atlantic, where ideas of nationality and expatriation were in ferment during the whole Nineteenth Century."7

During this early era issues kept arising in which the possibility of expatriation was presented. Generally, these concerned the status of colonists who had remained loyal to the British Crown during the Revolution,8 of Americans who became involved in the affairs of foreign nations,9 or of naturalized citizens whose former countries still claimed their allegiance.10 Yet there was a singular reluctance, on the part of Congress,11 the executive12 and the courts13 to provide definitive answers. On a number of occasions Congress was urged to recognize and define a right of expatriation. It took no such action.14

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9 See The Santissima Trinidad and The St. Ander, 20 U.S. (7 Wheat.) 283 (1822); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); Talbot v. Jansen, 3 U.S. (3 Dall.) 133 (1795); Tsiang 29.

10 See Roche, supra note 5, at 328; Tsiang 44, 52.

11 See Tsiang 44, 52; Roche, supra note 6, 25.

12 See Borcherd, op. cit. supra note 6, § 315, at 675, § 318, at 679; Tsiang 44, 52, 69, 70, 73; Liddell, supra note 6, at 326.


14 See Roche, supra note 5, at 329; Tsiang 37, 55.
This reluctance was attributable to a number of causes. In the first place, the English common law had proclaimed a doctrine of perpetual allegiance, born of feudalism, which denied the citizen's right to sever his allegiance to his place of birth. 15 Many Americans, including the early legal writers, 16 believed that this doctrine had been adopted into our jurisprudence with the assimilation of the English common law. Another unsettling factor behind the reluctance was the lack of a national consensus regarding the nature of American citizenship. Many believed that national citizenship emerged only from state citizenship and that it was improper for the federal government to attempt to define its incidents. 17 Still another source of dispute concerned the political status of the Negro slaves. 18

Of those willing to face the issues of expatriation, there were some who disputed the dogma of immutable allegiance in Congress 19 in the executive 20 and in the courts, 21 relying on the concept of "inalienable rights" proclaimed in the Declaration of Independence. They believed that a right of expatriation existed which was a necessary aspect of human liberty. They felt that it was proper for the federal government to recognize and implement that right, suggesting the incongruity of denying the existence of a right of expatriation when our nation was accepting increasing numbers of immigrants who eventually were naturalized as American citizens. 22 To some extent this debate reflected factional diversions in the young Republic. Hamilton and his followers argued that allegiance to the nation was indissoluble and that expatriation would

15 BLACKSTONE, COMMENTARIES 154-55 (Gavit ed. 1941); 1 COKE, LITTLETON § 198 (1st Am. ed. 1853). Under Roman law the individual had an absolute right to renounce his allegiance. MAXEY 153.

16 See BORCHARD, op. cit. supra note 6, § 315, at 674 (survival of theory of indissoluble allegiance regarded as an anachronism which the states of the world were slow in ending); 2 KENT, COMMENTARIES 49 (Lacy rev. ed. 1889); Moore, op. cit. supra note 6, at 273; VAN DYNE, CITIZENSHIP OF THE UNITED STATES 269 (1904); Flournoy, supra note 6, at 709.

17 Roche, supra note 5, at 329, 335; TSANG 27, 34, 41, 69, 110.

18 Roche, supra note 5, at 328.

19 See TSANG 39.

20 See id. at 71. The executive authorities were concerned with protecting the rights of naturalized citizens. See BORCHARD, op. cit. supra note 6, § 318, at 679; 2 WHARTON, INTERNATIONAL LAW DIGEST 310 (1887).

21 See Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 162 (1795); TSANG 62; Liddell, supra note 6, at 326.

22 See American Soc'y of International Law, supra note 1, at 46-47; Flournoy, supra note 6, at 719.
encourage subversion. Jefferson, the apostle of democracy, supported a right of expatriation.

The executive branch of our Government was confronted with realities rather than theories in the disputes which led to the War of 1812. The British Government, claiming that the allegiance of its subjects was indelible, was boarding American ships to impress into military service American seamen serving on those ships. The American Government reacted vigorously, although it has been contended that its primary objection was to the boarding of American ships rather than the impressment of American citizens. Later disputes arose as to the right of various governments to exact military service from their nationals who had become naturalized citizens of the United States. Influenced by the prevailing irresolution involving nationality status, the attitude of the executive also vacillated.

Equally inconclusive was the attitude of the Supreme Court in those early years. The right of expatriation was debated in a number of cases involving property rights. The first of these was Talbot v. Jansen, decided in 1795, shortly after the Republic was launched. At issue was the title to a ship captured by a privateer owned by two native Americans who had purported to renounce their American citizenship. The Court found their renunciations ineffective because they were designed to evade President Washington's neutrality proclamation. Each member of the Court wrote an opinion; those of Justices Patterson and Iredell are particularly noteworthy. Mr. Justice Patterson pointed to the difficulties caused by the absence of any statute dealing with expatriation and by the existence of concurrent state and federal citizenship. He commented that a "statute of the United States, relative to expatriation, is much wanted." Mr. Justice Iredell found it unnecessary to resolve "the great question as to the right of expatriation." However, he expressed the following sentiments, which anticipated much of the subsequent debate on this issue:

23 Tsiang 28, 34. Mr. Chief Justice Marshall was also apparently opposed to a right of expatriation. See id. at 45.
24 Id. at 25, 35, 47.
25 Id. at 71; Borchard, Decadence of the American Doctrine of Voluntary Expatriation, 25 AM. J. INT'L L. 312, 313 (1931); Liddell, supra note 6, at 326.
26 Borchard, op. cit. supra note 6, § 315, at 675; Liddell, supra note 6, at 326.
27 3 U.S. (3 Dall.) 133 (1795).
28 Id. at 154 (separate opinion).
29 Id. at 161 (separate opinion).
That a man ought not to be a slave; that he should not be confined against his will to a particular spot, because he happened to draw his first breath upon it; that he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere, much less when he must starve in one country, and may live comfortably in another; are positions which I hold as strongly as any man, and they are such as most nations in the world appear clearly to recognise.

The only difference of opinion is, as to the proper manner of executing this right. Some hold, that it is a natural, inalienable right in each individual; that it is a right upon which no act of legislation can lawfully be exercised, inasmuch as a legislature might impose dangerous restraints upon it; and of course, it must be left to every man's will and pleasure, to go off, when, and in what manner, he pleases. This opinion is deserving of more deference, because it appears to have the sanction of the constitution of this state, if not of some other states in the Union. I must, however, presume to differ from it, for the following reasons:

1. It is not the exercise of a natural right, in which the individual is to be considered as alone concerned. As every man is entitled to claim rights in society, which it is the duty of the society to protect; he, in his turn, is under a solemn obligation to discharge all those duties faithfully, which he owes, as a citizen, to the society of which he is a member, and as a man, to the several members of the society, individually, with whom he is associated. Therefore, if he has been in the exercise of any public trust, for which he has not fully accounted, he ought not to leave the society, until he has accounted for it.30

The next case to come before the Supreme Court was *Murray v. Schooner Charming Betsy*,31 which involved the title to a prize ship captured by a native American who had become a naturalized citizen of Denmark, after having been taken to a Danish possession during his infancy. The Court, speaking through Mr. Chief Justice Marshall, again found it unnecessary to decide whether a citizen could expatriate himself. It concluded that the statute in question had no application to a person in this situation, even if it were deemed that he had not lost his American citizenship.

Some years later the Supreme Court was confronted with *M’Ilvaine v. Coxe’s Lessee*.32 In issue was the title to an estate claimed by a native of New Jersey who had joined the British forces during the Revolution. The question was whether he thereby had lost his citizenship under the laws of New Jersey. The Court again declined to express an opinion on the right of expatriation but found that expatriation had not occurred.

The next decision was *The Santissima Trinidad*,33 another case in-

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30 Id. at 162 (separate opinion).
31 6 U.S. (2 Cranch) 64 (1804).
32 8 U.S. (4 Cranch) 209 (1808).
33 20 U.S. (7 Wheat.) 283 (1822).
volving title to a prize ship captured by an American who claimed that he had renounced his American citizenship. The Court again found that expatriation had not been accomplished by a person seeking to evade his citizenship obligations. Mr. Justice Story spoke for the Court.

Assuming, for the purposes of argument, that an American citizen may, independently of any legislative act to this effect, throw off his own allegiance to his native country, as to which we give no opinion, it is perfectly clear, that this cannot be done without a bona fide change of domicil, under circumstances of good faith. It can never be asserted, as a cover for fraud, nor as a justification for the commission of a crime against the country, or for a violation of its laws, when this appears to be the intention of the act. It is unnecessary to go into a further examination of this doctrine; and it will be sufficient to ascertain its precise nature and limits, when it shall become the leading point of a judgment of the court.34

This cycle of early Supreme Court decisions was completed by two cases decided in 1830. The first was Inglis v. Trustees of Sailor’s Snug Harbor,35 involving the title to real estate which in turn depended on plaintiff’s citizenship. His father was a loyalist during the Revolution and under the Treaty of Peace opted British citizenship. The Court was divided, the majority holding that “allegiance may be dissolved by the mutual consent of the government and its citizens or subjects,”36 that the child’s citizenship followed the father’s, and that he was no longer a citizen. The minority, relying on the doctrine of perpetual allegiance, declared that the child’s citizenship had not been lost.

The second 1830 case was Shanks v. DuPont,37 which likewise involved the title to land and depended in turn on the citizenship of a South Carolinian who married a British officer in 1781, and in 1782 left for England, where she remained with her husband. Speaking for the Court, Mr. Justice Story stated that Mrs. Shanks’ American citizenship was not affected by the British occupation or by her marriage to an alien. However, he ruled that under the Treaty of Peace Mrs. Shanks had a right of election and had opted British citizenship. He also stated that “the general doctrine is, that no persons can, by any act of their own, without the consent of the government, put off their allegiance, and become aliens.”38

These decisions manifestly had settled nothing, and “the great question

34 Id. at 347-48.
36 Id. at 125.
37 28 U.S. (3 Pet.) 242 (1830).
38 Id. at 246 (dictum).
as to the right of expatriation" was unresolved. Matters remained in this unsatisfactory state, and there was no further consideration of this issue by the Supreme Court for another eighty-five years. As will be demonstrated, the most intense scrutiny by the Supreme Court has appeared only in the past six years.

During the years following 1830 the issue of expatriation remained unsettled but was by no means forgotten. Recurring disputes with other nations brought it frequently to the attention of the executive branch of our Government;\(^{39}\) public interest mounted as increasing numbers of immigrants arrived and were naturalized as American citizens.\(^ {40}\) In 1859 Attorney General Black wrote an opinion in the case of Christian Ernst proclaiming in sweeping terms the right of expatriation as a "natural right of every free person."\(^ {41}\) Consideration of this issue abated during the Civil War. However, interest was revived with the termination of hostilities, and eventually engendered tangible action.

1868-1907

The year 1868, an important milestone in the course of events, produced three significant occurrences. One of these was the approval of the fourteenth amendment, which declares that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."\(^ {42}\)

A second occurrence was the inauguration of the Bancroft Treaties in which many countries eventually joined, which recognized naturalization as a means of effecting expatriation.\(^ {43}\) Even Great Britain, the arch exponent of the principle of indissoluble allegiance, joined this movement and executed such a treaty with the United States in 1870.\(^ {44}\) The same year, acting upon the recommendation of a royal commission, Great Britain enacted a statute recognizing the dissolution of allegiance upon naturalization in a foreign state.\(^ {45}\)

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39 See authorities cited note 25 supra.
40 Borchard, supra note 25, at 313; Flournoy, supra note 6, at 702, 710.
41 9 Ops. Att'y Gen. 356, 357 (1859).
42 This provision of the fourteenth amendment was preceded by a similar declaration in the Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.
43 Perez v. Brownell, 356 U.S. 44, 48 (1958); Treaty With the King of Prussia, Feb. 22, 1868, art. 1, 15 Stat. 615, T.S. No. 261 (effective May 9, 1868); Borchard, op. cit. supra note 6, § 315, at 676; Tsiang 88.
44 Treaty With Great Britain, May 13, 1870, 16 Stat. 775, T.S. No. 130 (effective August 10, 1870); Borchard, op. cit. supra note 6, § 315, at 676; Tsiang 90.
45 See American Soc'y of International Law, supra note 1, at 47.
Finally, on July 28, 1868, Congress adopted a statute dealing with expatriation. The motivating force of this legislation appears to have been public indignation aroused by the treatment of naturalized Irish-Americans who were arrested in Ireland for participation in the Fenian movement. The 1868 act proclaimed in sweeping language that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness." However, it did not define the manner in which such expatriation could take place.

The primary aim of the 1868 act undoubtedly was to safeguard the status of aliens who had become American citizens. However, in 1873 Attorney General Williams ruled that the statute's sweeping language also recognized the right of American citizens to cast off their citizenship. The Attorney General indicated that it was the duty of executive officers to determine if such expatriation had taken place and suggested renunciation and foreign naturalization as two methods of expatriation.

Thereafter the Department of State assumed the responsibility, in the absence of statute, of determining whether such expatriation occurred. Its authority to do so has been doubted by some scholars. However, the exercise of such authority seems to have been unavoidable for our foreign-affairs agency in performing its functions. In any event, its authority to make such determinations does not appear to have been challenged.

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47 Borchard, op. cit. supra note 6, § 315, at 676; 3 Moore, A Digest of International Law § 439, at 579 (1906); Tsiang 85; H.R. Doc. No. 326, 59th Cong., 2d Sess. 161 (1906); Liddell, supra note 6, at 333.


49 14 Ops. Att'y Gen. 295, 296 (1873).

50 Perez v. Brownell, 356 U.S. 44, 49 (1958); Mandoli v. Acheson, 344 U.S. 133, 136 (1952); Borchard, op. cit. supra note 6, § 319, at 680; Tsiang 98-103; H.R. Doc. No. 326, 59th Cong., 2d Sess. 162 (1906); Liddell, supra note 6, at 359; Maxey 162; Roche, supra note 6, at 25.

51 See Borchard, op. cit. supra note 6, § 324, at 689.

52 See authorities cited notes 50 & 51 supra.

53 Ibid.
Another milestone was reached in 1907. Before then Presidents Grant, Cleveland, Harrison and Theodore Roosevelt had urged legislation to define the manner in which an American citizen would lose his American citizenship. In 1906 a Citizenship Board composed of State Department officials was designated by Secretary of State Root, upon the direction of Congress, to study problems relating to citizenship, expatriation and protection of citizens abroad. The Board in its comprehensive report recommended legislation to define the acts which would cause expatriation. Congress substantially adopted these recommendations and enacted the Act of March 2, 1907. The 1907 act, largely a codification of prior executive interpretations, specified that loss of citizenship would occur by naturalization in or oath of allegiance to a foreign state, that an American woman who married a foreigner would take the nationality of her husband, and that when a naturalized citizen lived in a foreign state for certain periods it was presumed that he ceased to be an American citizen. In spelling out the grounds for expatriation the act made provisions for effectuating the citizen’s apparent wishes. In addition, it introduced a new concept by prescribing situations in which citizenship could be lost without regard to such desires.

In 1915 the Supreme Court, in Mackenzie v. Hare, upheld the 1907

55 H.R. Doc. No. 326, 59th Cong., 2d Sess. 1-2 (1906). The Citizenship Board was composed of the Solicitor of the State Department, the Minister to the Netherlands and the Chief of the Passport Bureau. See Perez v. Brownell, supra note 54, at 50; Tsiang 104; Roche, supra note 6, at 25.
57 Ch. 2534, 34 Stat. 1228.
58 Roche, The Expatriation Cases: “Breathes There the Man With Soul So Dead . . . ?,” in The Supreme Court Review 325, 331 (Kurland ed. 1963); see Developments in the Law—Immigration and Nationality, 66 Harv. L. Rev. 643, 732 (1953).
60 239 U.S. 299 (1915). Since 1922, a wife’s citizenship under federal law is not governed
act's provision for loss of citizenship by an American woman who married a foreigner. The Court rejected a contention that expatriation was valid only if it effectuated the conscious will of the citizen and pointed out that the statute was rooted in both domestic and international policy. In answer to a challenge based on the absence of an express constitutional grant of power the Court stated:

Plaintiff . . . bases her contention upon the absence of an express gift of power. But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. . . . This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies.61

The Mackenzie case appeared to settle several basic issues: (1) that in prescribing expatriation, Congress was exercising "powers implied, necessary or incidental to the expressed powers";62 (2) that while a change of citizenship cannot be arbitrarily imposed, the statute in question dealt with "a condition voluntarily entered into, with notice of the consequences";63 (3) that the legislation was a reasonable exercise of government power, designed to avoid embarrassments and controversies in the conduct of foreign affairs.64

In 1938 a Cabinet committee, consisting of the Secretary of State, the Attorney General and the Secretary of Labor, completed a five-year study, pursuant to an Executive order of President Roosevelt,65 and recommended codification of the nationality laws.66 The Nationality Act of 1940,67 a result of their recommendations, considerably enlarged the grounds for expatriation. In addition to naturalization in or oath of allegiance to a foreign state, the enumerated acts of expatriation were

by that of her husband, this provision of the 1907 act having been repealed by Act of Sept. 22, 1922, ch. 411, § 7, 42 Stat. 1022.
60 239 U.S. at 311-12.
61 Id. at 311.
62 Id. at 312.
63 Ibid.
64 Ibid.
65 Exec. Order No. 6115, April 25, 1933.
67 Ch. 876, 54 Stat. 1137.
extended to include military or government service for a foreign government, voting in a foreign political election, formal renunciation of citizenship, deserting the armed forces in time of war, treason, and specified residence in foreign countries by naturalized citizens. The enumerated acts of expatriation were again expanded in a further codification in the Immigration and Nationality Act of 1952, which resulted from a four-year study by the Senate Judiciary Committee.

Despite this enlargement of the statute's scope, the power of Congress remained virtually unchallenged for over forty years. Mackenzie was deemed to have settled the matter. Several expatriation cases were considered by the Supreme Court but in none of them was the power of Congress disputed. The numerous decisions rendered by the lower courts usually turned on issues of voluntariness or statutory construction. The general attitude of quiescence in this period is epitomized in the 1950 observation of a leading commentator that any effort to doubt the power of Congress would be "windmill tilting."

1958-1964

This apparent consensus was resoundingly shattered in 1958. Previously there had been some preliminary skirmishing. In 1949 a divided United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of the statutory provision prescribing loss of citizenship for certain residence abroad by naturalized citizens, and the Supreme Court denied certiorari. In 1951 in two cases decided on the same day the United States District Court for the District of Hawaii declared unconstitutional the statutory provisions for loss of nationality through service in the armed forces of a foreign country and voting in a foreign

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69 Ch. 876, §§ 401-09, 54 Stat. 1168.
72 See Scharf 251.
political election.\textsuperscript{75} The Supreme Court avoided confronting the issue by remanding the cases without hearing oral argument for determination of the voluntariness of the voting and military service. These litigations lapsed when the lower court found that the citizen’s actions had been performed under duress.

The day of reckoning was March 31, 1958, when the Court decided three cases in which reargument had been directed after argument during the previous term had failed to produce decisions. The first case was \textit{Perez v. Brownell},\textsuperscript{76} which concerned primarily the loss of citizenship by a native born American who had voted in a political election in Mexico. The constitutionality of the statute was upheld, but only by a five to four vote. The majority opinion written by Mr. Justice Frankfurter extensively reviewed the historical background, finding that the power to prescribe expatriation emerged from the power to conduct foreign affairs and the necessary and proper clause of the Constitution.\textsuperscript{77} However, since Congress cannot act arbitrarily, there had to be a “rational nexus” or “relevant connection” between such power and the means chosen to effectuate it.\textsuperscript{78} Expatriation was found to conform to this standard of reasonableness, inasmuch as the termination of the citizenship of a person who becomes involved in the political affairs of a foreign nation reasonably implemented the Government’s power to conduct foreign affairs. Mr. Justice Frankfurter said:

The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose. The critical connection between this conduct and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem. Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.\textsuperscript{79}

\textsuperscript{76} 356 U.S. 44 (1958).
\textsuperscript{77} \textit{Id.} at 57-62.
\textsuperscript{78} \textit{Id.} at 58.
\textsuperscript{79} \textit{Id.} at 60-61.
Mr. Chief Justice Warren, joined by Justices Black and Douglas, dissented. They found that "under our form of government, as established by the Constitution, the citizenship of the lawfully naturalized and the native-born cannot be taken from them." The Chief Justice recognized that citizenship could be lost by voluntary renunciation or "by other actions in derogation of undivided allegiance to this country." When this occurs the Government "is not taking away United States citizenship to implement its general regulatory powers," but rather "is simply giving formal recognition to the inevitable consequence of the citizen's own voluntary surrender of his citizenship."

Another dissenting opinion filed by Mr. Justice Douglas, with Mr. Justice Black concurring, declared that citizenship "may be waived or surrendered. But I see no constitutional method by which it can be taken from him."

In still another dissenting opinion Mr. Justice Whittaker agreed with the majority that Congress had power to specify situations in which expatriation would occur but felt that the statute prescribing such a consequence for voting exceeded his estimation of the reasonable need.

The delicate balance in the Supreme Court was again displayed in its second decision that day, *Trop v. Dulles*, which invalidated, by a bare majority, the statutory provision for expatriation upon conviction for desertion during time of war. Mr. Chief Justice Warren, speaking for the other three dissenters in *Perez*, reiterated his view that Congress could not expatriate, but asserted that even if such power existed, the statute in question was invalid. He found that the statute was intended to impose additional punishment upon conviction for the crime of desertion, and since it resulted in statelessness, it entailed "the total destruction of the individual's status in organized society" which was an infliction of cruel and unusual punishment contrary to the eighth amendment's prohibition.

A concurring opinion of Mr. Justice Black, joined in by Mr. Justice Douglas, objected to placing the power to denationalize a citizen in the hands of military authorities. In another concurring opinion Mr. Justice

80 *Id.* at 66 (dissenting opinion).
81 *Id.* at 68-69.
82 *Id.* at 83-84.
83 *Id.* at 84.
85 *Id.* at 91-104 (opinion of Warren, C.J.).
86 *Id.* at 101.
87 *Id.* at 104 (concurring opinion).
Brennan, whose vote swung the balance to a holding of unconstitutionality, adhered to his finding in *Perez* that Congress possessed power to expatriate but concluded "that the requisite rational relation between this statute and the war power does not appear."\(^{94}\)

The four dissenters, led by Mr. Justice Frankfurter, concluded, as they had in *Perez*, that Congress had the power to expatriate, denied that the statute imposed cruel and unusual punishment merely because its consequences were severe, and found the necessary relevant connection between the war power and the provision for expatriation upon conviction for desertion.\(^{89}\)

The final decision of that momentous day was *Nishikawa v. Dulles*,\(^{90}\) which involved loss of citizenship through service in the armed forces of a foreign state. The majority led by Mr. Chief Justice Warren found it unnecessary to reach the issue of the constitutionality of the statute, and ruled that the Government had not satisfied its burden of showing by clear, unequivocal and convincing evidence that the expatriating conduct was voluntary. In concurring, Mr. Justice Black, joined by Mr. Justice Douglas, reiterated his view that Congress "cannot involuntarily expatriate any citizen"\(^{91}\) and favored overruling *Mackenzie* to the extent that it was inconsistent with this view.\(^{92}\) Mr. Justice Frankfurter concurred, joined by Mr. Justice Burton, agreeing that the Government had not met its burden of proof, but not sharing the majority's view as to the nature of that burden.\(^{93}\) In dissenting, Mr. Justice Harlan, with whom Mr. Justice Clark concurred, deemed the constitutionality of the statute settled by *Perez* and found that the majority had imposed a "well-nigh impossible task" on the Government in requiring it to establish by clear, unequivocal and convincing evidence that the expatriating conduct was voluntary.\(^{94}\)

The close divisions in the Supreme Court and the clashing views of its members foreshadowed new conflicts in the future. Having delivered these three trail-blazing decisions the Court tarried briefly as new cases climbed the judicial ladder. The next decision, five years later, was *Kennedy v. Mendoza-Martinez*,\(^{95}\) which considered the constitutionality

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\(^{88}\) Id. at 105-07, 114 (concurring opinion).

\(^{89}\) Id. at 114 (dissenting opinion).

\(^{90}\) 356 U.S. 129 (1958).

\(^{91}\) Id. at 138 (concurring opinion).

\(^{92}\) Id. at 139 (concurring opinion).

\(^{93}\) Id. at 139-42 (concurring opinion).

\(^{94}\) Id. at 146 (dissenting opinion).

\(^{95}\) 372 U.S. 144 (1963).
of statutes prescribing loss of citizenship for leaving or remaining outside the United States to evade military service in time of war. Before its day of judgment this case was remanded twice to the district court for further consideration, as the Supreme Court deferred a final confrontation.96

When the issue finally was faced the Court invalidated the statutes, again by a one vote margin. Mr. Justice Goldberg's majority opinion acknowledged that citizenship entailed both rights and responsibilities and that the latter included the obligation to perform military service when called. However, he found on the basis of the statute itself and its history that "Congress has plainly employed the sanction of deprivation of nationality as a punishment . . . without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments."97 Such a penalty "cannot be imposed without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses."98

Justices Douglas and Black, concurring, reiterated their view that "Congress has no power to deprive a person of the citizenship granted the native born by § 1, Cl. 1, of the Fourteenth Amendment."99 Mr. Justice Brennan, whose vote again was decisive, also wrote a concurring opinion in which he agreed "that Congress is constitutionally debarred from so employing the drastic, the truly terrifying remedy of expatriation, certainly where no attempt has been made to apply the full panoply of protective safeguards which the Constitution requires as a condition of imposing penal sanctions."100 He recorded "some felt doubts of the correctness of Perez, which I joined."101 However, he believed that in any event Congress had no power to expatriate "except where its exercise was intrinsically and peculiarly appropriate to the solution of serious problems inevitably implicating nationality."102

The dissenting opinion of Mr. Justice Stewart, joined by Mr. Justice White, did not agree "that the divestiture of citizenship which these statutes prescribe is punishment in the constitutional sense of that term."103 He found that the statutes reasonably employed expatriation for draft evaders as a means of dealing with military problems during

96 Id. at 148-49.
97 Id. at 165-66.
98 Id. at 167.
99 Id. at 186 (concurring opinion).
100 Id. at 187 (concurring opinion).
101 Ibid.
102 Ibid.
103 Id. at 202 (dissenting opinion).
time of war, under the war power. However, he found invalid a provision in the 1952 act that failure to comply with selective service requirements raised the presumption of a purpose to evade military service. In a separate dissenting opinion Mr. Justice Harlan, joined by Mr. Justice Clark, found the statutes constitutional since the presumption raised was not an unreasonable or unusual procedure.

The obliteration of two expatriation statutes in five years created a favorable climate for further assaults. These came quickly as two additional issues reached the Supreme Court the following year. They arose in Schneider v. Rusk and Marks v. Esperdy, both decided May 18, 1964.

Schneider involved the constitutionality of a statute providing for loss of citizenship by a naturalized citizen who had resided in his native country for three years. A majority of five Justices found the statute unconstitutional in an opinion written by Mr. Justice Douglas. In light of the length and number of the earlier opinions (five in Mendoza-Martinez, four in Trop, four in Perez, four in Nishikawa) and the sharp controversy they revealed, the opinion of Mr. Justice Douglas is surprisingly brief. After repeating his view "that the power of Congress to take away citizenship for activities done by the citizen is nonexistent absent expatriation by the voluntary renunciation of nationality," he conceded that this view "has not yet commanded a majority of the entire Court" and that under Perez the issue was whether the statute violated due process. He then concluded that the statute was an invalid discrimination against naturalized citizens since it "proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born."

Mr. Justice Brennan took no part in the decision, and his abstention may be significant because of his role as swing voter in the expatriation cases.

104 Id. at 212 & n 15.
106 Id. at 197 (dissenting opinion).
109 377 U.S. at 166.
110 Id. at 168.
Mr. Justice Clark's dissenting opinion, joined in by Justices Harlan and White, reviewed the history of the difficulties caused by the return of naturalized citizens to their native countries. He found that the Supreme Court had previously upheld statutes coping with similar difficulties on three occasions. He found no discrimination in the statute but rather a reasonable effort to deal with a troublesome problem affecting the conduct of relations with foreign nations.\textsuperscript{111}

On the day of the \textit{Schneider} decision the Supreme Court affirmed by an equally divided bench the lower court decision in \textit{Marks v. Esperdy}.\textsuperscript{112} This case involved a native American who joined the Castro armed forces in Cuba and served for almost a year and a half after Castro's accession to power in 1959, achieving worldwide notoriety as Castro's executioner. After his return to the United States, deportation proceedings were brought against him and he was found to have lost his United States citizenship through service in the armed forces of a foreign state. In affirming the court below the Supreme Court repulsed the challenge to the constitutionality of the expatriation statute. The equal division in the Court resulted from the abstention of Mr. Justice Brennan, who did not participate for unannounced reasons.\textsuperscript{113} In accordance with the Court's custom, the failure to attain a plurality of the voting members resulted in affirmance of the court below. Also traditional in such cases was the bare announcement of the equal division, unaccompanied by any written opinion or by a statement indicating how the individual Justices had voted. However, on the basis of past expressions one may reasonably speculate that Justices Clark, Harlan, Stewart and White voted for affirmance and Mr. Chief Justice Warren, with Justices Black, Douglas and Goldberg, voted for reversal.

The enigmatic action announced in \textit{Marks}, coupled with the decision the same day in \textit{Schneider}, reveals quite forcefully that the ultimate fate of most of the expatriation statutes is still unresolved. Although the edict for expatriation through foreign military service survived, it doubtless will have a new appraisal soon enough, with participation by the full

\textsuperscript{111} \textit{Id.} at 169 (dissenting opinion).


\textsuperscript{113} Contemporaneous newspaper accounts said that Mr. Justice Brennan did not participate in \textit{Schneider} because his son had been involved in counsel in the district court. N.Y. Times, May 19, 1964, p. 1, col. 6; The Washington Post, May 19, 1964, § A, p. 1, col. 5; see 28 U.S.C. § 455 (1958). However, no reason was suggested for his failure to participate in the \textit{Marks} decision. Petition for Rehearing, p. 4, \textit{Marks v. Esperdy}, 377 U.S. 214, \textit{rehearing denied}, 377 U.S. 1010 (1964).
Court. Moreover, the Perez holding, relating to voting in a foreign political election, likewise appears jeopardized, particularly in the light of Mr. Justice Brennan's "felt doubts" as to its soundness. And similar doubts reach every other provision of the expatriation statute, except those which effectuate voluntary renunciation of citizenship. The balance in the present Court appears to depend primarily on Mr. Justice Brennan's vote. And, of course, any change in the composition of the Court could dramatically alter the course of the decision.

**Survey of Opposing Views**

**Does Congress have any power in this area?**

The Constitution, of course, does not specifically confer upon Congress the power to prescribe grounds for expatriation. This silence has led many to contend that Congress has no such power, and that expatriation can result only from the conscious, deliberate action of the citizen in renouncing his citizenship.114 This view (which we designate the "absolute view") has the support of two members of the present Supreme Court, Justices Black and Douglas, with two others at least partially in accord.115 It has come full circle from the common-law doctrine that allegiance is immutable unless the sovereign ends it, to a conclusion that citizenship is impregnable against any action by the state, unless the citizen wishes to sever the tie.

The opposing view (which we designate the "qualified view") is that the silence of the Constitution does not necessarily negate the existence of legislative power implicit in national sovereignty or emerging from and implementing other areas of national concern, under the umbrella of the necessary and proper clause. Under this view, apparently supported by a majority of the present Supreme Court, the state is paramount and the status of the individual citizen, although it is precious and merits diligent protection, must yield to the reasonable exercise of government

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115 Mr. Chief Justice Warren indicated that he would support expatriation based on "actions in derogation of undivided allegiance to this country," even if the actor did not intend to surrender his American citizenship. Perez v. Brownell, supra note 114, at 68 (dissenting opinion). Mr. Justice Goldberg has not yet announced his view on the issue. However, his prevailing opinion supporting a finding of unconstitutionality in Kennedy v. Mendoza-Martinez, supra note 114, at 159, and his probable joinder with those voting against expatriation in Marks v. Esperdy, 377 U.S. 214 (1964), seem to suggest a position akin to that of the Chief Justice.
power. Of course, the qualified view still leaves considerable room to debate whether particular measures are reasonable.

The absolute view's reliance on the silence of the Constitution perhaps does not take fully into account that the Constitution, as originally adopted, did not attempt to define citizenship status. The only specific grant of power to Congress in this regard was to establish a uniform rule of naturalization. In several places the Constitution refers to citizens of the United States and of the states, without specifying who were to be included in those designations. As indicated previously, this reticence may have been attributable to a desire to avoid facing difficult problems such as the status of the Negro slaves and the relationship between state and federal citizenship.

In referring to citizens the framers of the Constitution may have believed they were using a universally understood term and that the status of such citizens could be defined by legislation and judicial decision. Possibly they intended to adopt the connotations of the common law, with modifications made necessary by changed circumstances and needs. Thus, the jus soli—citizenship status resulting from birth in the realm—became the basic criterion for acquiring citizenship without any constitutional or statutory directive. And, as the earlier discussion has shown, principles governing loss of citizenship became the subject of executive, judicial and legislative consideration, moving eventually from the common-law dogma of immutable allegiance to a recognition of the right of expatriation and to the specification of certain conduct as causing loss of citizenship. It does not seem unreasonable to suppose that

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119 U.S. Const. art. I, § 2 (qualifications for Members of House of Representatives—citizen of the United States); U.S. Const. art. I, § 3 (qualifications for Senators—citizen of the United States); U.S. Const. art. II, § 1 (qualifications for President—natural-born citizen of the United States or citizen at time of adoption of Constitution); U.S. Const. art. III, § 2 (judicial power extends to controversies involving citizens of different states); U.S. Const. art. IV, § 2 (citizens of each state entitled to equal privileges and immunities).

120 Roche, The Expatriation Cases: "Breathes There the Man with Soul So Dead...?" in The Supreme Court Review 325, 328 (Kurland ed. 1963); Tsiang 27, 34, 41, 69, 110.


122 See authorities cited note 6 supra.
expatriation was an area left open in the Constitution, possibly by design, in order to allow flexibility in shaping national policies. Of course, the supporters of this supposition must overcome the constitutional direction vesting in Congress the legislative powers "herein granted," and the tenth amendment's reservation to the states and the people of powers not expressly delegated to the federal government.

The supporters of the absolute view also cite two early Supreme Court expressions. The first is a statement of Mr. Chief Justice Marshall in *Osborn v. Bank of the United States*: "The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." Neither this language nor the *Osborn* case itself is concerned with the power of Congress to prescribe laws regarding expatriation. Mr. Chief Justice Marshall obviously was speaking of the equality of status under the Constitution of naturalized and native born citizens.

The second expression is found as dictum in Mr. Justice Gray's discursive opinion in *United States v. Wong Kim Ark*: "The power of naturalization, vested in the Constitution is a power to confer citizenship, not to take it away." *Wong Kim Ark* was truly a landmark case, which held that the birthright of citizenship was granted to all persons born in this country and subject to its jurisdiction. The observations in question were patently dicta, since the case involved no issue of expatriation and considered solely whether citizenship had been acquired at birth. Moreover, the Court's language referred only to the power of naturalization and its effect on the acquisition of citizenship at birth by Orientals.

On the other hand, four cases can be cited as upholding the power of Congress to legislate in regard to expatriation. So far as direct precedents are concerned, these obviously overbalance the dicta quoted above.

125 U.S. Const. art. I, § 1.
124 See Boudin 1526; Hurst 70-71.
125 22 U.S. (9 Wheat.) 738, 827 (1824).
126 169 U.S. 649, 703 (1898).
127 Mackenzie v. Hare, 239 U.S. 299 (1915); Savorgnan v. United States, 338 U.S. 491 (1950); Perez v. Brownell, 356 U.S. 44 (1958); Marks v. Esperdy, 377 U.S. 214 (1964). Mr. Chief Justice Warren expressed doubts as to the current force and validity of *Mackenzie* in Perez v. Brownell, *supra* at 69-74 (dissenting opinion). For a discussion of the limitations on the congressional power indicated by *Mackenzie*, see Hurst 68. In *Savorgnan*, although the Court found that expatriation had occurred, the power of Congress was neither directly challenged nor discussed. *Marks* upheld the finding of expatriation in the face of determined constitutional assault, but the equal division of the Court and Mr. Justice Brennan's abstention impair the value of this case as a precedent.
The followers of the absolute view also lean heavily on the first sentence of section 1 of the fourteenth amendment which declares that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." They argue that in the absence of any explicit limitation this language confers invulnerable citizenship status which cannot be dislodged by Congress.\(^\text{128}\)

But in focusing on this language alone, the argument appears to neglect vital elements of the entire pattern. The fourteenth amendment was adopted in 1868.\(^\text{129}\) It can hardly be said that persons born or naturalized in the United States before then were not citizens; as a sovereign nation the United States did have citizens and the fourteenth amendment merely confirmed the manner in which such citizenship was acquired.\(^\text{130}\) The fourteenth amendment was an aftermath of the Civil War and the language in question was fashioned to safeguard the citizenship rights of Negroes which previously had been questioned.\(^\text{131}\) In defining the manner in which citizenship status was acquired it was (except possibly as to Negroes) declaratory of existing law and recognized citizenship status which formerly existed.\(^\text{132}\) It was directed primarily at the states, and in effect prohibited their denial of citizenship rights to Negroes.\(^\text{133}\) There is no evidence that the fourteenth amendment was designed as a limitation on the powers of the federal government in imposing reasonable regulations on citizens.\(^\text{134}\) Indeed, the rest of section 1 of the amendment is devoted entirely to injunctions prohibiting state action in derogation of the rights of citizens and other "persons." And there likewise is no evidence to support a thesis that in recording the manner in which citizenship can be acquired the fourteenth amendment sought to with-
hold any authority from the federal government to define the manner in which it can be lost.136 Perhaps an analogy can be found in the given power to prescribe a rule for naturalization which clearly does not exclude authority to prescribe a rule for vitiating improper naturalization.136

Finally, the absolute view reasons that since ours is a government established by the people, it cannot take away the citizenship status of its component members without their consent.137 This is an interesting hypothesis, reminiscent of the philosophical debates of earlier days, which to some extent borrows support from the language of the tenth amendment.138 But the people long ago agreed to establish a national government with immense power to conduct public affairs and to regulate individual conduct. The individual citizen cannot withdraw from the national society except by surrendering his citizenship and leaving the United States. While he remains a member of the national society he is subject to reasonable regulations by the federal government which may affect his life, his liberty and his property. It seems plausible to suggest that a government which may take away life, liberty and property pursuant to due process of law may likewise make reasonable regulations which affect citizenship status.139

Of course, the qualified view of the power to expatriate likewise encounters some difficulties. In some formulations it departs from express grants in the Constitution and is supported expansively as a power inherent in national sovereignty.140 It is true that a similar concept of inherent power has been utilized to support statutes for the deportation of aliens.141 But the latter are actions "to terminate our hospitality."142

135 Ibid.
138 One commentator has found "nothing irresistibly compelling" in this thesis and stated that the "sovereignty of the people may be a fine oratorical flourish, but it is rather dubious constitutional doctrine." Maxey 174. But see Boudin 1518-22; Hurst 70.
The applicability of a similar concept to the rights of citizenship is quite a different matter. Ours is a government of limited powers, and suggestions of inherent power arouse uneasy fears of uncontrolled despotism.\(^{143}\)

Possibly because of such fears, recent decisions have tied the power to expatriate to other powers unquestionably residing in the national government, such as the power to conduct foreign affairs or the war power. The gap between the power and the means to effectuate it is bridged by the necessary and proper clause.\(^{144}\) It is surprising to find that the Constitution does not specifically grant to the federal government the power to conduct foreign affairs.\(^{145}\) However, all would agree that such power must exist, since no government could conduct its affairs in the modern world without it. Thus, in depending on the foreign affairs function the power to expatriate occupies the somewhat anomalous position of an implicit appendage to an inherent power. This is not an untenable situation but is a somewhat precarious one.\(^{146}\)

The support provided by the war power is even less secure. The two cases in which this power was invoked found a penal purpose in the expatriative measures which sought to effectuate it.\(^{147}\) It seems likely that a similar difficulty may confront other invocations of the war power.

**VOLUNTARINESS**

Expatriation frequently has been defined as “the voluntary renunciation or abandonment of nationality or allegiance.”\(^{148}\) Such definitions have a smooth and reasonable sound but are obviously inadequate to the extent that they do not take into account expatriation imposed upon one

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143 See Boudin 1531; Hurst 80.
145 See Kennedy v. Mendoza-Martinez, supra note 144, at 160; Perez v. Brownell, supra note 144, at 57.
146 Possibly some question may be raised concerning the power of Congress to participate in foreign affairs. This is a power which resides primarily in the President. However, Congress also has many responsibilities in this area, e.g., to ratify treaties, declare war and enact legislation implementing the foreign affairs function. The judiciary generally abstains from making judgments affecting conduct of foreign affairs. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Harisiades v. Shaughnessy, 342 U.S. 580, 587-88 (1952); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
who does not intend to abandon or renounce his citizenship. Yet, even though there never has been any such explicit statutory requirement, voluntariness has always been regarded as inherent in expatriation. And this unquestionably is still true, since loss of citizenship cannot arbitrarily be imposed upon one who has no freedom of choice. In this sense, voluntariness appears to be a constitutional requirement, stemming from due process. Consequently, expatriation statutes usually have been couched in terms of voluntary action.

In the context of expatriation, voluntariness has two possible meanings. First, it could mean a voluntary wish to surrender or abandon citizenship. Second, it could denote the voluntary performance of action which causes loss of citizenship, irrespective of intention.

The acceptance of the first alternative is precisely the goal of the absolute view of constitutional power previously discussed. It would mean that loss of citizenship would depend solely on the citizen's wish and would thus eliminate any debate regarding constitutional power. It would virtually end all forms of expatriation except voluntary renunciation, since the citizen could always assert that he had not intended to give up his citizenship.

It can easily be perceived that the adoption of the second alternative definition of voluntariness was inescapably necessary in upholding expatriation as a regulatory measure. Indeed, each of the major decisions of the Supreme Court sustaining the power of Congress to prescribe expatriation has adopted this objective test of voluntariness. Thus, Mrs. Mackenzie wished to marry an alien; Mrs. Savorgnan wished to be naturalized in a foreign state in order to marry an alien; and Mr. Perez wished to vote in a foreign election. Each one of these individuals disclaimed any intention to renounce or surrender American citizenship, but in each instance the Supreme Court deemed their subjective desires immaterial, and found that citizenship had been lost by voluntary

149 "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen." Mackenzie v. Hare, 239 U.S. 299, 311 (1915).

150 See Comment, "Voluntary": A Concept in Expatriation Law, 54 COLUM. L. REV. 932, 933 (1954). However, a suggestion has been made that the requirement of voluntariness is a construction of congressional intent rather than a description of the limits of national power. Note, 60 HARV. L. REV. 977, 978 (1947); cf. Immigration and Nationality Act § 349(b), 66 Stat. 267 (1952), 8 U.S.C. § 1481(b) (1958).

performance of acts designated by Congress. In Savorgnan v. United States, the Court observed that:

The acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.\textsuperscript{152}

Under this formulation voluntariness is an objective rather than a subjective phenomenon. In each instance the citizen’s subjective desires are not controlling and expatriation depends on lack of coercion or restraint in performing a prescribed act. For the purposes of expatriation, voluntariness thus means the capacity to make a free choice in performing the act of expatriation and the absence of duress and similar factors.\textsuperscript{153} Moreover, the courts have been very generous in accepting pleas of coercion, finding it present when the citizen’s actions were compelled by fear of injury, retaliation, imprisonment, fine, economic deprivation, and like consequences;\textsuperscript{154} and they have imposed a heavy burden of proof on a party who alleges that expatriation has occurred.\textsuperscript{155}

What of the person who contends that he was unaware of the effect of his actions? Of course everyone is presumed to know the law and one who voluntarily engages in the type of conduct designated as an act of expatriation should be aware of the possibility that it may affect his citizen-

\textsuperscript{152} Savorgnan v. United States, supra note 151, at 499-500.

\textsuperscript{153} See Comment, "Voluntary": A Concept in Expatriation Law, supra note 150, at 934.

\textsuperscript{154} See, e.g., Nishikawa v. Dulles, 356 U.S. 129 (1958) (conscription in totalitarian country); Stipa v. Dulles, 233 F.2d 551 (3d Cir. 1956) (foreign government employment induced by economic duress); Soccardo v. Dulles, 96 U.S. App. D.C. 337, 266 F.2d 243 (1955) (voting induced by fear and intimidation); Acheson v. Murakami, 176 F.2d 953 (9th Cir. 1949) (renunciation in relocation camp for Japanese, induced by mental fear and intimidation); Doreau v. Marshall, 170 F.2d 721 (3d Cir. 1948) (acceptance of Vichy citizenship induced by fear). See also Scharf 262.

\textsuperscript{155} Nishikawa v. Dulles, supra note 154; Gonzales v. Landon, 350 U.S. 920 (1955). These cases decreed that the Government could establish expatriation only by clear, unequivocal and convincing evidence and that when voluntariness was put in issue the Government has the burden of proof to show that the action was voluntary. However, the burden of proof in such cases was modified by Congress in 1961. Immigration and Nationality Act § 349(c), added by 75 Stat. 656 (1961), 8 U.S.C. § 1481(c) (Supp. V, 1964). The modification provides that loss of nationality can be shown by a preponderance of evidence and that the party who alleges his action was involuntary has the burden of establishing such involuntariness. Presumptions of voluntariness are prescribed in certain circumstances by Immigration and Nationality Act §§ 349(b)-(c), 66 Stat. 268 (1952), as amended, 8 U.S.C. §§ 1481(b)-(c) (1958). See also note 105 supra.
ship status. Yet expatriation presupposes a freedom of choice and under some circumstances it is possible that a person who was unaware of the consequences could successfully claim that his action was involuntary. In this connection it should be noted that Mackenzie spoke of "a condition voluntarily entered into, with notice of the consequences."

One obvious example of a situation requiring a finding of involuntariness is where the actor was unaware of his title to American citizenship. Here the answer seems clear. If he performed military service, voted in a foreign election, or engaged in other conduct normally expatriative, his American citizenship is not lost since he did not have the opportunity to make a free choice. So also the requisite voluntariness may be absent where the citizen was under misapprehension as to the effect of his actions, particularly if such misapprehension was caused by the advice or acts of government officials. Similar circumstances which may affect the voluntariness of choice are minority and lack of mental capacity.

**PUNISHMENT**

Another avenue for attack on the expatriation statutes has been explored in contentions that they unconstitutionally impose punishment. The constitutional protections afforded an individual before punishment can be imposed doubtless were directed primarily to the criminal process. But over the years the Supreme Court has extended these protections to punitive measures imposed for noncriminal acts. The controlling criteria are largely undefined, and in many instances the problem of determining whether the statute is penal or regulatory in character "has been extremely difficult and elusive of solution." Yet in two of the three

156 "Of course, the citizenship claimant is subject to the rule dictated by common experience that one ordinarily acts voluntarily." Nishikawa v. Dulles, 356 U.S. 129, 136 (1958).

157 239 U.S. 229, 312 (1915). See also Hurst 74; Maloney, Involuntary Loss of American Citizenship, 3 St. Louis U.L.J. 168 (1954); Maxey 172.


recent Supreme Court decisions invalidating expatriation statutes the punishment theory has been supported by a substantial segment of the bench.164 This has encouraged pleas of punishment and such contentions are being made in connection with all constitutional challenges of expatriation statutes.

To some extent this contention is a variation of the theme of involuntariness. If a person objects to the withdrawal of his citizenship, some feel that this involuntary deprivation in itself is punitive. But this view has not been accepted. The majority of the present Supreme Court apparently believes that the statute can be deemed punitive only if there is a legislative aim to punish—a design for retribution and deterrence.165 Such a punitive purpose can be shown by the language of the statute and whether it parallels or supplements a criminal statute, by its legislative history, by the nature of the sanction, e.g., fine and imprisonment, and by a finding that the only possible purpose was punitive.166 Moreover, the characterization of a statute as punitive cannot be based on conjecture. "Only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."167

The significance of characterizing a statute as punitive has not yet been fully evaluated. Possibly some might conclude that Congress has no power to impose expatriation as a punitive measure.168 However, it is clear that at least two critical consequences may follow. In the first place such a punishment could not be imposed without compliance with the procedural safeguards of the fifth and sixth amendments, such as "a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses."169 This was the holding of Kennedy v. Mendoza-Martinez,170 where the majority found that expatriation was intended as an additional punishment for the crime of draft evasion and that it consequently could be inflicted only after compliance with such procedural safeguards.

168 See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (concurring opinion); Trop v. Dulles, 356 U.S. 86, 99 (1958). However, one commentator has said, "Indeed, a moment's reflection will indicate that it is not easy to find an explicit constitutional peg on which to hang a decision that punitive expatriation is completely forbidden." Roche, supra note 120, at 343.
The second consequence is that even though procedural requirements for inflicting punishment are satisfied, yet punishment through expatriation, particularly if it results in statelessness, may be deemed cruel and unusual and thus offensive to the eighth amendment.\textsuperscript{171} This was the conclusion of four members of the bench, led by Mr. Chief Justice Warren, in \textit{Trop v. Dulles}.\textsuperscript{172} Under the statute there considered, expatriation attached only after conviction by a court-martial for desertion during time of war. Yet the plurality opinion of the Chief Justice supported a constitutional challenge on the ground that since it produced statelessness the statute inflicted cruel and unusual punishment.\textsuperscript{173}

Of course these theses depend entirely on a finding that the statute is punitive. That such a conclusion does not come easily is demonstrated by the two cases which branded expatriation statutes as punitive. Here the expatriation edicts paralleled or supplemented other statutes admittedly penal. Yet in each instance four members of the Court did not agree that extra punishment was being imposed.\textsuperscript{174} There appears to be less likelihood of persuading a majority of the Supreme Court that an expatriation statute unrelated to any criminal statute is punitive in the constitutional sense.

In dismissing an argument that a statute did not impose a penalty because its authors said it "technically is not a penal law,"\textsuperscript{175} Mr. Chief Justice Warren exclaimed, "How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!"\textsuperscript{176} This observation is equally applicable to all attempts to label specific statutes as punitive. Such labels can stick only if a punitive aim is demonstrated.

Since the expatriation statutes are concerned almost exclusively with conduct outside the United States, a finding that they are punitive often will lead to impossibility of enforcement. The prerequisite of a criminal trial will usually mean that loss of citizenship cannot be accomplished while the individual remains outside the United States. But of course the

\textsuperscript{172} 356 U.S. 86 (1958).
\textsuperscript{173} Id. at 101.
\textsuperscript{175} U.S. COMM. TO REVIEW THE NATIONALITY LAWS, 76TH CONG., 1ST SESS., CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES, pt. I, at 68 (House Comm. Print 1939). For a statement that the new expatriation provisions in the Nationality Act of 1940 were not "designed to be punitive," see id. at viii.
difficulty of enforcement cannot justify bypassing any constitutional impediments to “the truly terrifying remedy of expatriation.”\textsuperscript{177} “The compelling answer to this is that the Bill of Rights which we guard so jealously and the procedures it guarantees are not to be abrogated merely because a guilty man may escape prosecution or for any other expedient reason.”\textsuperscript{178} Moreover, as the Supreme Court has pointed out, there may be expedients short of expatriation through which the will of Congress may to some extent be enforced.\textsuperscript{179}

An even more debatable, and still unsettled, issue is presented by a claim that expatriation which results in statelessness may produce cruel and unusual punishment. This hypothesis apparently originated in a pioneering and remarkably prophetic 1955 student paper in the \textit{Yale Law Journal}\textsuperscript{180} which has had an unmistakable impact on subsequent Supreme Court expressions.\textsuperscript{181} The nub of this hypothesis is that a stateless person is shorn of rights, status, and protection, cast adrift in an unfriendly world, and condemned to a life of rootlessness.

All agree, of course, that statelessness is a severe and extremely undesirable consequence, which deprives the individual of the security and protection incidental to his identification with a particular state. In the plurality opinion in \textit{Trop v. Dulles} statelessness is described as

the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless.\textsuperscript{182}

\textbf{Statelessness is a plight often experienced by refugees from persecution.}\textsuperscript{183}

\begin{itemize}
\item \textsuperscript{177} Kennedy v. Mendoza-Martinez, 372 U.S. 144, 187 (1963) (Brennan, J., concurring).
\item \textsuperscript{178} Kennedy v. Mendoza-Martinez, supra note 177, at 184.
\item \textsuperscript{179} Id. at 184-85.
\item \textsuperscript{180} Comment, \textit{The Expatriation Act of 1954}, 64 \textit{Yale L.J.} 1164, 1187-94 (1955). Although this paper was unsigned, its authors were Stephen J. Pollak and Norbert A. Schlei, who at the time of its publication were respectively Managing Editor and Editor-in-Chief of the \textit{Yale Law Journal}. Both are now in the Department of Justice, Mr. Pollak as an Assistant to the Solicitor General and Mr. Schlei as Assistant Attorney General, Office of Legal Counsel.
\item \textsuperscript{181} Trop v. Dulles, 356 U.S. 86, 101 n.33 (1958); Maxey 174, 178.
\item \textsuperscript{182} 356 U.S. 86, 101 (1958). For very similar language see Comment, \textit{The Expatriation Act of 1954}, supra note 180, at 1190-91.
\item \textsuperscript{183} ARENDT, \textit{THE ORIGINS OF TOTALITARIANISM} 267-302 (1958).
\end{itemize}
It arises under the expatriation laws of many countries, and has been a matter of concern to scholars and international organizations, who have proposed many remedies. Article 15 of the United Nations Declaration of Human Rights proclaims the right of everyone to have a nationality and to protection against its arbitrary deprivation. Several international conferences have sought to cope with this problem.

But the acknowledgment of these considerations does not mean that a statute which causes them is necessarily unconstitutional. A statute’s undesirable consequences usually are a matter for legislative correction rather than constitutional prohibition. The design of the expatriation statutes is to cause loss of American citizenship and not to impose statelessness, which occurs only when the former citizen can claim no other nationality. It can be argued that a statute imposing a reasonable regulation cannot be deemed punitive as to some—those who become stateless—and not as to others. The plurality opinion in *Trop v. Dulles* correctly indicates that a consideration of the constitutional effect of statelessness is approached only if the particular expatriation statute is first found to impose punishment.

But even if this hurdle is passed, it is by no means certain that statelessness should be deemed a cruel and unusual punishment. While the situation of a stateless person is indeed unfortunate some of its characteristics seem too extreme. One such statement, for example, is that “the expatriate has lost the right to have rights.” The following is perhaps a more accurate depiction of the expatriate’s situation:

But it can be supposed that the consequences of greatest weight, in terms of ultimate impact on the petitioner, are unknown and unknowable. Indeed, in truth, he may live out his life with but minor inconvenience. He may perhaps live, work, marry, raise a family, and generally experience a satisfactorily happy life. Nevertheless it cannot be denied that the impact of expatriation—especially where statelessness is the upshot—may be severe. Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.

186 See *Maxey* 166-67.
187 356 U.S. at 99.
188 *Id.* at 102.
189 *Id.* at 110-11 (concurring opinion).
While some countries have been heartless in dealing with stateless persons, this situation is not generally true in the world of today. And it obviously would not be true where the person had become stateless by conduct indicating attachment to the country in which he resides, for example, by oath of allegiance, military service, voting, government service, etc. It certainly would not be true if the expatriated person is in the United States, having returned to this country after commission of the expatriating act. The stateless person’s situation in this country would be no different from that of other aliens.

An alien in the United States, whether or not he is stateless, is entitled to virtually all the protections of the Constitution, including the injunctions assuring due process, freedom of expression and procedural protections if he is charged with crime,\footnote{Bridges v. California, 314 U.S. 252 (1941); Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886).} or if deportation proceedings are brought against him.\footnote{Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); The Japanese Immigrant Case, 189 U.S. 86 (1903).} A person who lost his American citizenship would become an alien and would be entitled to the same protection as other aliens in this country.\footnote{Immigration and Nationality Act § 101(a)(3), 66 Stat. 166 (1952), 8 U.S.C. § 1101(a)(3) (1958), defines an alien as “any person not a citizen or national of the United States.”}

All will agree that the loss of the priceless title to American citizenship can be a profound deprivation. But the acknowledged gravity of the expatriate’s loss does not appear to warrant some of its extreme characterizations. For in many instances the expatriate’s situation may not be hopeless and his loss may not be irreparable. If he is outside the United States he would not be assured of reentry into this country, although he generally would be permitted to return.\footnote{Immigration and Nationality Act § 101(a)(3), 66 Stat. 166 (1952), 8 U.S.C. § 1101(a)(3) (1958), defines an alien as “any person not a citizen or national of the United States.”} For an expatriate in the United States the chief result of his changed status would be to deprive him of the right to vote, to hold public office, or to engage in some professions and employments, and to subject him to deportation if he entered the

\footnote{Certain expatriates are entitled to exemption from quota restrictions if they wish to enter the United States. Immigration and Nationality Act §§ 101(a)(27)(D)-(E), 66 Stat. 169 (1952), 8 U.S.C. §§ 1101(a)(27)(D)-(E) (1958). In addition, a stateless alien who was born in the United States is regarded, for immigration quota purposes, as having been born in the last foreign country of which he was a citizen or in which he resided: Immigration and Nationality Act § 202(a)(3), 66 Stat. 176 (1952), 8 U.S.C. § 1152(a)(3) (1958). Moreover, a person outside the United States who is denied a right or privilege of United States citizenship may generally apply to the Secretary of State for a certificate of identity so that he can come to the United States to press his claim. Immigration and Nationality Act §§ 360(b)-(c), 66 Stat. 273 (1952), 8 U.S.C. §§ 1503(b)-(c) (1958).}
United States in violation of law or if he engaged in prohibited conduct.\textsuperscript{194} However, deportation could not be accomplished unless some country was willing to accept him,\textsuperscript{195} an unlikely contingency for a stateless person. And he would not be sent to a country where he would be subject to physical persecution.\textsuperscript{196} Therefore, while such a person could not leave the United States with assurance of return, he would be able to continue residing in this country, to engage in most employments, and to pursue his normal family relationships.\textsuperscript{197} Eventually he might be able to regularize his status and regain his citizenship.\textsuperscript{198}

Thus it seems somewhat unrealistic to state that "the expatriate has lost the right to have rights." Mr. Chief Justice Warren has acknowledged this but has stated, "It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious."\textsuperscript{199} However, this seems to be a debatable premise. In opposition, it can be contended that speculative contingencies do not make a punishment cruel and unusual.

No one would deny that the expatriate's situation is highly unsatisfactory and that he is subjected to a severe consequence. But the authorities seem to hold that the severity of a consequence does not make it punitive in the constitutional sense, in the absence of an explicit penal purpose, and does not warrant its characterization as cruel and unusual punishment.\textsuperscript{200}

\textsuperscript{194} Such a deportation order was upheld in Marks v. Esperdy, 377 U.S. 214 (1964). But see Perez v. Brownell, 356 U.S. 44, 65 n.6 (1958) (dissenting opinion).


\textsuperscript{197} Trop v. Dulles, 356 U.S. 86, 110-11 (1958) (concurring opinion); see cases cited note 190 supra.

\textsuperscript{198} Various discretionary benefits are available for the achievement of permanent residence status by persons in the United States who are in irregular status. These include suspension of deportation, which expunges any ground for deportation, Immigration and Nationality Act § 244, 66 Stat. 214 (1952), 8 U.S.C. § 1254 (1958), and adjustment of status, which benefits certain aliens who would currently be eligible for entry if they were outside the United States, Immigration and Nationality Act § 245, 66 Stat. 217 (1952), as amended, 8 U.S.C. § 1255 (1958), as amended, 8 U.S.C. § 1255(a) (Supp. V, 1964). In addition, such aliens could be benefited by any private relief legislation which Congress was disposed to enact. See GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.12 (1959).


\textsuperscript{200} A number of severe consequences imposed under our laws against citizens and aliens have not been regarded as punishment in the constitutional sense. Costello v. United States,
The expansion of the grounds for expatriation in the 1940 and 1952 acts has been criticized by some observers as excessive. Some have made the point that whereas the 1940 act's edicts generally were limited to dual nationals, the 1952 act in some instances has removed this limitation, with a resultant increase in statelessness. However, to some extent, such criticism may present a subject for legislative consideration rather than constitutional mandate.

**REASONABLENESS**

Evaluations of reasonableness are constantly being made in the expatriation cases. In the final analysis this seems to be the area in which the decisive battles will be fought. A majority of the Supreme Court has declared, and for the time being at least apparently may continue to declare, that a nonpunitive expatriation statute will be upheld if there is a "rational nexus," or "relevant connection" between a power residing in Congress and expatriation as a device to effectuate it. Phrased differently, "is the means, withdrawal of citizenship, reasonably calculated to effect the end that is within the power of Congress to achieve . . . ?"

Obviously the root issue is one of substantive due process.

Let us examine the operation of this concept in relation to the conduct of foreign affairs, which, as we have seen, has been deemed the chief source of power in this area. In *Mackenzie* the Supreme Court upheld a

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201 Maxey 182; see Boudin 1513-14; Roche, *The Expatriation Cases: "Breathes There the Man With Soul So Dead . . . ?"*, in *THE SUPREME COURT REVIEW* 325, 333 (Kurland ed. 1963). Testifying in 1952 on behalf of the Association of Immigration and Nationality Lawyers, Jack Wasserman, a well known attorney specializing in immigration matters, asserted that the United States has more grounds for expatriation than any other country in the world. *Hearings Before the President's Commission on Immigration and Naturalisation* 1601 (1962).

202 Roche, *supra* note 201, at 353; Boudin 1529; Maxey 182.


205 Perez v. Brownell, *supra* note 204, at 60.
statute providing for the loss of American citizenship upon marriage to an alien because "such an act may bring the Government into embarrassments and, it may be, into controversies."206 Perez v. Brownell similarly upheld expatriation for voting in a foreign political election as necessary for "the avoidance of embarrassment in the conduct of our foreign relations . . . "207 The underlying reasoning is expounded in Mr. Justice Frankfurter's prevailing opinion:

The critical connection between this conduct and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem. Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.208

This reasoning thus yields the following analysis: (1) Expatriation was required to avoid embarrassments and embroilments in our relations with foreign governments; and (2) Congress also could reasonably interpret voting in a foreign election as inconsistent with allegiance to the United States and as demonstrating allegiance to another country.

In opposing this view it has been urged that Congress has painted with too large a brush and that it "has employed a classification so broad that it encompasses conduct that fails to show a voluntary abandonment of American citizenship"209 or which in individual cases may not be embarrassing210 or disloyal211 to the United States. Thus, the citizen may have voted in a foreign political election in order to halt Communism, as in Italy after World War II. Or he may have served in a foreign army in supporting a cause he deems just, as might happen if a small nation like Israel or Cyprus were attacked by its neighbors. Such idealistic ventures by Americans would be in the tradition of Lafayette and Kosciusko and would not necessarily be inconsistent with the interests of the United States.

206 239 U.S. at 312. For doubts as to the continuing validity of Mackenzie, see note 127 supra.


208 Id. at 60-61.

209 Id. at 76 (dissenting opinion).


211 Hurst 66.
The answer made to these contentions is that in an area as delicate and vital to the nation as foreign affairs, Congress must be free to legislate "on more than an ad hoc basis." 212 "Latitude in this area is necessary to ensure effectuation of this indispensable function of government." 213 The supporters of this view urge that in such an area judgments as to American interests and peril must be made by Congress and not by the individual citizen. In exercising such judgments Congress can deal with one problem at a time and "hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent." 221 Moreover, in legislating to meet general problems "Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation," 222 provided the measures adopted are not "inappropriate to the difficulties to be dealt with." 223

It has also been urged that expatriation may be the only effective and "uniquely potent corrective" 224 to cope with Americans in foreign countries who are engaging in activities harmful to the United States and repugnant to their obligations of citizenship. "The termination of citizenship terminates the problem." 225 As Mr. Justice Brennan has observed, "Congress might reasonably believe that in these circumstances there is no acceptable alternative to expatriation as a means of avoiding possible embarrassments to our relations with foreign nations." 226

The opponents of congressional power also point apprehensively to other hypothetical situations in which national interest might be urged to support stripping citizens of their status. It is suggested, for example, that under the Perez holding citizenship might be withdrawn from citizens who opposed current foreign policy, for example, by urging recognition of Red China or criticizing the Government's policies in the Middle East. 227 Other speculations, ex horrible, are offered of possible situations in which Congress might seek to denationalize citizens who incurred its displeasure. 228 Such extrapolations of extreme possibilities do not add too much to the discussion. In assessing due process each statute should be

214 Hirabayashi v. United States, 320 U.S. 81, 100 (1943).
220 356 U.S. at 81-82 (concurring opinion).
221 Boudin 1524, 1527-28; Hurst 66, 80.
judged in its own setting and on its own bottom. Harsh and unreasonable legislation, if it were enacted, would be dealt with by the Supreme Court, and would not be tolerated "while this Court sits."

It may be useful, however, to survey the possible boundaries of legislative power in this field. Congress patently does not have power to terminate citizenship rights and status merely because the individual citizen has disobeyed its commands or has neglected obligations of citizenship. Expatriation as a regulatory measure must have a more solid rational foundation. Perhaps the most acceptable criteria are those proposed by Mr. Justice Frankfurter in Perez. In his formulation expatriation first must be reasonably necessary to effectuate a power residing in Congress, for example, the conduct of foreign affairs. In addition, however, there must be a reasonable basis for a legislative finding that the activity which expatriates inherently indicates diminished allegiance to the United States and "also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship."

This formulation, when more fully articulated, would take into account the traditional voluntariness of expatriation as expounded in Savorgnan and Perez, but would determine the reasonableness of congressional action "at the institutional, not the personal, level." And it would avoid the difficulty of evaluating individual conduct on an ad hoc basis.

Of course this formula would not settle all questions. Thus in Schneider v. Rusk, the Court considered a statute prescribing expatriation for residence by a naturalized citizen in his former country. This statute was produced by a long history, detailed in the dissenting opinion of Mr. Justice Clark, of embarrassments and embroils of the United States resulting from such residence. However, the prevailing opinion of Mr. Justice Douglas surprisingly omitted any reference to these considerations and rested on a finding that the statute improperly discriminat-

223 Perez v. Brownell, 356 U.S. 44, 58 (1958); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (concurring opinion); id. at 214 (dissenting opinion). "This Court has never held that Congress' power to expatriate may be used unsparingly in every area in which it has general power to act. Our previous decisions upholding involuntary denaturalization all involved conduct inconsistent with undiluted allegiance to this country." Ibid.
224 356 U.S. at 60-61.
225 Id. at 61.
226 Roche, supra note 201, at 342; Maxey 175.
227 Note, "Voluntary": A Concept in Expatriation Law, supra note 210, at 935.
228 377 U.S. 163 (1964).
229 Id. at 169 (dissenting opinion).
nated against naturalized citizens. The same day’s affirmance of *Marks v. Esperdy*\(^{230}\) albeit by an equally divided Court, appears to indicate however, that the result may be different when such special considerations are not present.

**AUTOMATIC EFFECT**

In *Marks v. Esperdy* the district court ruled that expatriation could not be effective until it was established by judicial determination.\(^{231}\) This ruling was reversed by the court of appeals, which found that expatriation took place automatically when the statutory contingency—foreign military service—occurred.\(^{232}\) The equally divided Supreme Court’s affirmance supported the latter holding.\(^{233}\) This phase of the constitutional debate has appeared in various guises from time to time and merits scrutiny.

The first inquiry, of course, must be whether the statute itself contemplates antecedent judicial action. The answer to this inquiry seems clear. Except for desertion and treason, which must be accompanied by convictions,\(^{234}\) and denaturalization for fraud or illegality in obtaining naturalization,\(^{235}\) the statute mentions no judicial prerequisite for deprivation of citizenship.\(^{236}\) Moreover, the design of Congress for expatriation simultaneously with the performance of an act of expatriation is portrayed in the statute itself, which declares that in such cases the citizen “shall


\(^{232}\) 315 F.2d 673 (2d Cir. 1963).

\(^{233}\) 377 U.S. 214 (1964).


\(^{236}\) In one instance, the statute mentions an administrative procedure in which the Attorney General must approve the renunciation of citizenship in the United States during time of war before it can become effective. Immigration and Nationality Act § 349(a)(7), 66 Stat. 268 (1952), 8 U.S.C. § 1481(a)(7) (1958). In addition, Immigration and Nationality Act § 358, 66 Stat. 272 (1952), 8 U.S.C. § 1501 (1958), provides a procedure by which State Department officials may issue a certificate of loss of nationality for any person in a foreign state whom they believe “has lost his United States nationality.” The language of the statute and its legislative history indicate that such certificates were designed only to record a previous occurrence. U.S. COMM. TO REVIEW THE NATIONALITY LAWS, 76th CONG., 1ST SESS., CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES pt. 1, at vi, 78, 80 (House Comm. Print 1939).
lose his nationality,

and that such loss of nationality "shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter." In addition the legislative history confirms the statute's aim for expatriation automatically upon the performance of one of the designated acts.

The next question is whether there is a constitutional prohibition against expatriation without a prior judicial declaration. No explicit constitutional mandate appears to provide firm support for such a requirement, except for statutes deemed punitive, for which procedural safeguards are inscribed in the fifth and sixth amendments.

Some might find such support in the generalized reference to the "judicial power" in article III of the Constitution. But this seems a slender reed on which to rest an affirmative safeguard. More relevant perhaps is the bottomless basket of the fifth amendment's due process pronouncement, from which the courts continue to extract new precepts to accommodate developing notions of fairness. But there has been no recognition of any such process in any decision of the Supreme Court. Indeed every decision of the Court on this subject, early and late, has either found or assumed that expatriation was the immediate result of certain actions, and that the function of the courts was to determine only whether expatriation had previously occurred. This was true in the earliest cases, which dealt with property rights dependent on the retention of citizenship status.

In each instance the courts determined that there had been no "act of expatriation" and that citizenship had not previously been lost. This recognition and apparent approval of the automatic nature of expatriation has continued over the years, through the Court's latest decisions, although this issue was seldom argued by the parties. Thus in ruling that the overt act of voting had caused expatriation, Perez found expatriation useful in implementing the foreign affairs function precisely because its operation was automatic.

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241 See, e.g., Talbot v. Jansen, 3 U.S. (3 Dall.) 133 (1795); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).


Kennedy v. Mendoza-Martinez likewise recognized that expatriation statutes "automatically—without prior court or administrative proceedings—impose forfeiture of citizenship ...." The majority deemed the statute in that case punitive and found that such automatic loss of citizenship therefore could not be imposed without observing the procedural protections required for criminal punishment.245

A related issue is whether administrative officials are authorized to make determinations that citizenship has been lost in advance of a judicial determination. This issue has been raised from time to time by persons seeking to enter the United States or by those against whom deportation proceedings are brought. In each instance the administrative officials are given authority to act only against aliens.246 When citizenship is claimed, particularly where the person was born a citizen, the administrative jurisdiction sometimes has been questioned. Nevertheless, the administrative tribunal's authority to determine whether it does have jurisdiction has been upheld. This was the ruling of Mr. Justice Holmes in United States v. Sing Tuck,247 in which he commented that the statute points out a mode of procedure which must be followed before there can be a resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists .... [I]t is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way .... [B]efore the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with.

The authority of administrative officers to adjudicate citizenship claims, both in exclusion and expulsion cases, has been consistently confirmed in subsequent decisions.248

Some observers, led by Mr. Justice Black, oppose what they regard as administrative power to terminate citizenship.249 But it does not seem correct to characterize the administrative action in this fashion. Expatriation, as we have seen, operates automatically and both administra-

244 372 U.S. at 164.
245 Id. at 144.
249 See Trop v. Dulles, 356 U.S. 104 (1958) (Black, J., concurring); Roche, supra note 201.
tive and judicial consideration comes after the event. Administrative authorities may determine whether expatriation has occurred only by acting in areas in which they have jurisdiction, for example, in determining whether exclusion or deportation should be ordered,\(^2^{50}\) whether a passport should be issued\(^2^{51}\) and whether a person is qualified to vote.\(^2^{52}\)

The view that expatriation should await a judicial determination would involve obvious difficulties. Thus, a person outside the United States would be free, sheltered by the mantle of American citizenship, to pursue activities inimical to the United States. No known judicial process brought by the Government could reach his citizenship status unless he chose to return to the United States.\(^2^{53}\) Since they would have little to gain by such a course, it is doubtful that many citizens would initiate suits which could result in a termination of their status. Moreover, a finding that administrative authorities could not pass on citizenship status until courts have ruled would in effect largely frustrate their power to act in the wide variety of cases in which such status is in issue.\(^2^{54}\) Also, it would unnecessarily burden the courts with the large volume of cases in which the administrative officers rule in favor of the citizenship claim. Such difficulties are not decisive in constitutional adjudication, since neither administrative nor judicial convenience would justify overriding constitutional rights.\(^2^{55}\) However, they may explain, at least in part, why automatic expatriation has been favored by Congress and the courts.

Due process may indeed require some opportunity for judicial review. But the rule of automatic expatriation does not shut off access to the courts. A person whose citizenship status is disputed has access to many remedial roads to vindicate his title to citizenship. If abroad, he can generally apply to the Department of State for a certificate of identity enabling him to come to the United States to press his claim.\(^2^{56}\) If his

Professor Roche observes that the Supreme Court has fashioned a national expatriation policy "that recognizes that depriving an American of his citizenship is not a casual legal undertaking that can be left in the hands of virtually invisible administrative bodies." \(^{1}^{d}_{.}\) \(^{3}^{56}\) at 356.

\(^{2}^{50}\) See cases cited note 248 supra.


\(^{2}^{52}\) See Mackenzie v. Hare, 239 U.S. 299 (1915).

\(^{2}^{53}\) Alternative measures for sanctioning draft evaders have been suggested by the Court. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 184-85 (1963).

\(^{2}^{54}\) See cases cited notes 248 & 251 supra.


citizenship claim is rejected by administrative officials he can, whether he is in the United States or abroad, bring suit in a court of this country for a judgment declaring him to be a citizen of the United States. If his deportation from the United States is ordered he can challenge the deportation order by petition for review or habeas corpus, and in either remedy he is entitled to de novo judicial evaluation of his citizenship claim. If he is ordered excluded from the United States he can challenge that order in habeas corpus proceedings, although in some situations he may not, in such review, be entitled to de novo judicial inquiry. Moreover, in asserting that expatriation has occurred the Government may have to meet a heavy burden of proof.

These procedural benefits are not equivalent to the prior judicial determination for which some have contended. However, they do add up to a substantial measure of protection. Until now, they have been deemed to satisfy the requirements of due process.

Present Status of Various Expatriation Provisions

The swift rush of decisions in the past six years has shaken the foundations of congressional power to expatriate. Three separate statutes have been found unconstitutional and two others have been saved precariously at the edge of the cliff. The various decisions have produced a wide diversity of views expressed in many opinions. As the dust temporarily settles, it may be useful to survey the condition of the various elements of the structure in the light of current attitudes in the Supreme Court of the United States.

262 See United States v. Ju Toy, 198 U.S. 253 (1905); United States ex rel. Chu Leung v. Shaughnessy, 176 F.2d 897 (2d Cir. 1949); Lee Fong Fook v. Wixon, 170 F.2d 245 (9th Cir. 1948), cert. denied, 336 U.S. 914 (1949); Carmichael v. Delany, 170 F.2d 239 (9th Cir. 1948); United States ex rel. Medeiros v. Watkins, 166 F.2d 897 (2d Cir. 1948).
263 See note 155 supra.
264 The grounds for expatriation and their interpretation are reviewed in Scharf 251.
NATURALIZATION IN A FOREIGN STATE

Naturalization in a foreign state always has been regarded as the most effective method of accomplishing loss of American citizenship. Since it entails a positive identification with a foreign state, it has the virtue of avoiding statelessness. Expatriation through naturalization was recognized under the Bancroft Treaties concluded with many countries commencing in 1868 and under executive interpretations prior to legislative definition of acts of expatriation. It was pronounced a ground for expatriation in the 1907, 1940 and 1952 legislation.

Savorgnan v. United States ruled that voluntary naturalization as a citizen of a foreign state caused loss of American citizenship, irrespective of the citizen’s subjective desires. The constitutionality of the statute was not directly considered but was implicitly endorsed in the Supreme Court’s holding of expatriation. Naturalization of a parent does not deprive a minor child of American citizenship, unless the child confirms his acceptance of foreign allegiance by failing to establish residence in the United States within a prescribed period after attaining majority. Foreign naturalization of a husband who is an American citizen, likewise, does not affect his wife’s status unless she joins in the naturalization. Naturalization by operation of law or treaty does not expatriate unless the citizen affirmatively evinces a wish to accept the foreign nationality.

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266 Act of March 2, 1907, ch. 2534, § 2, 34 Stat. 1228.
267 Nationality Act of 1940, ch. 876, § 401(a), 54 Stat. 1168.
270 Id. at 499-502.
OATH OF ALLEGIANCE TO A FOREIGN STATE

There is a difference of opinion whether an oath of allegiance to a foreign state itself caused loss of American citizenship prior to 1907.276 However, the 1907 act276 prescribed this as grounds for expatriation and this prescription has been continued in the 1940277 and 1952278 legislation. The nature and the voluntariness of such oaths frequently have been the subject of inquiry in expatriation cases.279

No court has yet considered the constitutionality of this statutory provision.280 Since such an oath of allegiance, if voluntary, depicts a diminution of allegiance to the United States, constitutionality appears likely to command majority support in the Supreme Court. However, acquisition of foreign nationality is not necessarily a concomitant of an oath of allegiance, and problems of statelessness would still be confronted.

FOREIGN MILITARY SERVICE

Before 1941 foreign military service did not expatriate unless it was coupled with an oath of allegiance or some other affirmative act of expatriation.281 Under the 1940 act military service for a foreign state caused loss of American citizenship only if performed by one who had acquired the nationality of the foreign state.282 The 1952 act removed the latter restriction, and unauthorized foreign military service by an American citizen is sufficient to expatriate him.283 Since the impact of the statute is no longer limited to dual nationals, the specter of statelessness patently lurks in the background.

275 Borchard, op. cit. supra note 265, § 319, at 682; 3 Hackworth, op. cit. supra note 272, at 217-18; Scharf 282.


277 Nationality Act of 1940, ch. 876, § 401(b), 54 Stat. 1169.


280 In Savorgnan v. United States, 338 U.S. 491 (1950), an oath of allegiance was taken in connection with the foreign naturalization. Since the naturalization resulted in expatriation, it was not necessary to consider the effect of the oath of allegiance.


282 Nationality Act of 1940, ch. 876, § 401(c), 54 Stat. 1169.

The constitutionality of this provision was upheld in *Marks v. Esperdy.*284 But the equal division of the Supreme Court, with the abstention of Mr. Justice Brennan, appears to anticipate and encourage further assaults upon this statute. However, most military service cases will probably continue to turn on the voluntariness of the service, which in the past has been the most fruitful subject of inquiry in such situations.285

EMPLOYMENT BY FOREIGN GOVERNMENT

Before the 1940 act there was no statute prescribing expatriation for employment of an American citizen by a foreign government and the effect of such service was uncertain.286 The 1940 act designated such employment as a ground for expatriation if nationality in the foreign state was a prerequisite to the employment.287 The 1952 act has a similar provision applicable to service performed by dual nationals or to service for which an oath of allegiance is required.288

No court has yet considered the constitutionality of this provision. However, the statutory requirements may have inherent elements of divided allegiance similar to those presented by an oath of allegiance and by foreign military service.

VOTING IN FOREIGN POLITICAL ELECTION

Before the 1940 act, voting in a foreign country did not itself affect an American citizen's status.289 The 1940 act designated such voting in a foreign political election or plebiscite as a ground for expatriation and this provision has been continued in the 1952 act.290 In some instances, statelessness may be a consequence of such expatriations.

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284 377 U.S. 214 (1964), *affirming by an equally divided Court United States ex rel. Marks v. Esperdy,* 315 F.2d 673 (2d Cir. 1963); see note 113 *supra* and accompanying text.


286 See 14 Ops. Att'y Gen. 295, 297 (1873); H.R. Doc. No. 326, 59th Cong., 2d Sess. 163 (1906);

287 *Borchard, op. cit. supra* note 265, § 336, at 712; Scharf 288.

288 Nationality Act of 1940, ch. 876, § 401(d), 54 Stat. 1169.


The constitutionality of this provision of the 1952 act was sustained in Perez v. Brownell.291 However, the Supreme Court's equal division in Marks v. Esperdy,292 and Mr. Justice Brennan's statement of his "felt doubts"293 as to the soundness of Perez, in which he concurred, appear to imply its future reexamination. In the meantime, voluntariness of the voting will continue to be a major issue.294

FORMAL RENUNCIATION OF NATIONALITY

Even in the absence of statute, formal renunciation of nationality usually was regarded as an act of expatriation.295 Both the 1940296 and 1952297 acts recognized the expatriative effect of such renunciations outside the United States. In addition, a 1944 act,298 codified in 1952, sanctioned such renunciations in the United States299 during time of war.300 Although no case has yet considered this phase of the statute, its constitutionality obviously will be sustained as satisfying the criteria of all points of view. In such situations, the citizen's voluntary abandonment

295 14 Ops. Atty Gen. 295 (1873); Borcheid, op. cit. supra note 265, § 241, at 552, § 319, at 681; Scharf 293.
296 Nationality Act of 1940, ch. 876, § 401(f), 54 Stat. 1169.
298 Nationality Act of 1940, § 401(i), added by ch. 368, 58 Stat. 677 (1944) (now Immigration and Nationality Act § 349(a)(7), 66 Stat. 268 (1952), 8 U.S.C. § 1481(a)(7) (1958)). For litigation considering the voluntariness of such renunciation by Americans of Japanese ancestry during World War II, see Kiyama v. Rusk, 291 F.2d 10 (9th Cir.), cert. denied, 368 U.S. 866 (1961); McGrath v. Abo, 186 F.2d 766 (9th Cir. 1951); Acheson v. Murakami, 176 F.2d 953 (9th Cir. 1949).
299 Under current legislation most acts of expatriation are inoperative when performed in the United States, but can become effective upon removal of the citizen from the United States. Immigration and Nationality Act § 351(a), 66 Stat. 269 (1952), 8 U.S.C. § 1483(a) (1958); cf. Savorgnan v. United States, 338 U.S. 491 (1950); Mackenzie v. Hare, 239 U.S. 299 (1915). Both of these cases were decided under earlier statutes which did not contain a similar restriction.
300 Act of March 2, 1907, ch. 2534, § 2, 34 Stat. 1228, precluded expatriation of an American citizen during time of war, but this restriction was discontinued in the 1940 and 1952 statutes.
of his citizenship apparently will be effectuated if accomplished in compliance with law, even though statelessness may result.\textsuperscript{301}

**DESERTION FROM MILITARY FORCES DURING TIME OF WAR**

Desertion from military forces during time of war was a ground of expatriation recited in the 1940 act\textsuperscript{302} and continued in the 1952 act.\textsuperscript{303} It was found unconstitutional in *Trop v. Dulles.*\textsuperscript{304}

**TREASON AND RELATED ACTS**

The 1940 act\textsuperscript{305} likewise introduced conviction for treason as a ground for expatriation and this edict was continued in the 1952 act.\textsuperscript{306} A 1954 amendment enlarged this section making it applicable to convictions for sedition, insurrection and advocacy of violent overthrow of the government of the United States.\textsuperscript{307} Although there were a number of convictions for treason after World War II, the effect of such convictions on citizenship status has not yet been adjudicated.\textsuperscript{308}

The constitutionality of this provision likewise has not yet been considered. To some extent these acts may be governed by the same con-

\textsuperscript{301} For a discussion of efforts by Lee Harvey Oswald, President Kennedy's accused assassin, to renounce his American citizenship while living in Soviet Russia, which were unsuccessful because of noncompliance with prescribed formalities, see *Report of the President's Commission on the Assassination of President John F. Kennedy* app. XV, at 746-60 (1964). Accounts of the apparently successful renunciation of his American citizenship by Garry Davis, who described himself as a citizen of the world, are found in *N.Y. Times,* April 23, 1958, p. 29, col. 5; *id.*, March 29, 1958, p. 8, col. 8; *id.*, Feb. 25, 1956, p. 10, col. 6; *id.*, Feb. 24, 1954, p. 3, col. 4; *id.*, Sept. 13, 1948, p. 5, col. 2; *id.*, Sept. 12, 1948, § 1, p. 30, col. 2.

\textsuperscript{302} *Nationality Act of 1940,* ch. 876, § 401(g), 54 Stat. 1169. Desertion was also a ground for loss of citizenship in the Act of March 3, 1855, ch. 79, § 21, 13 Stat. 490.


\textsuperscript{304} 356 U.S. 86 (1958).

\textsuperscript{305} *Nationality Act of 1940,* ch. 876, § 401(h), 54 Stat. 1169. Treason is defined in U.S. Const. art. III, § 3. Specific statutory authorization for prosecution for treason is found in 18 U.S.C. § 2381 (1958).


\textsuperscript{308} For treason convictions for defections during World War II, see Kawakita v. United States, 343 U.S. 717 (1952); Gillars v. United States, 87 U.S. App. D.C. 16, 182 F.2d 962 (1950). Upon completion of his prison sentence in 1964, Kawakita was returned to Japan. However, there was no proceeding involving an adjudication of his citizenship status.
siderations as desertion; however, this phase of the statute possibly may be differentiated because it involves considerations of allegiance.

ABSENCE TO EVADE MILITARY SERVICE

An 1865 statute providing for loss of citizenship of draft evaders was repealed in 1940.\textsuperscript{309} However, new legislation to accomplish this result was enacted in 1944, during World War II, and codified in 1952.\textsuperscript{310} This statute was found unconstitutional in Kennedy v. Mendoza-Martinez.\textsuperscript{311}

RESIDENCE IN FOREIGN STATE

Before 1907 residence in a foreign state did not result in loss of American citizenship, without some concomitant act of expatriation.\textsuperscript{312} Because our Government was experiencing "increasing embarrassment"\textsuperscript{313} resulting from return to their countries of origin by naturalized Americans, the 1907 act declared that residence by a naturalized citizen in a foreign state would raise a presumption that he had ceased to be an American citizen.\textsuperscript{314} The 1940 act and the 1952 act eliminated the presumption and made loss of nationality automatic in such situations.\textsuperscript{315} Because these provisions applied only to naturalized citizens, they were declared unconstitutional, insofar as they related to residence in country of former nationality, in Schneider v. Rusk.\textsuperscript{316} A similar provision relating to residence in any other foreign country\textsuperscript{317} would necessarily appear to fall

\textsuperscript{309} Nationality Act of 1940, ch. 876, § 504, 54 Stat. 1172.


\textsuperscript{311} 372 U.S. 144, 165 (1963).

\textsuperscript{312} Borchard, op. cit. supra note 265, §§ 326-30, at 690-703; Scharf 297.


\textsuperscript{314} Act of March 2, 1907, ch. 2534, § 2, 34 Stat. 1228. This presumption was easy to overcome. See United States v. Gay, 264 U.S. 353 (1924). Moreover, it was not certain whether the presumption related to loss of citizenship or loss of diplomatic protection. See Camardo v. Tillinghast, 29 F.2d 527 (1st Cir. 1928); United States ex rel. Anderson v. Howe, 231 Fed. 546 (S.D.N.Y. 1916); 35 Ops. Att'y Gen. 399, 404 (1928); 28 Ops. Att'y Gen. 504 (1910).


\textsuperscript{316} 377 U.S. 163 (1964).

simultaneously. Not yet considered by the Court are other provisions directed at residence abroad by dual nationals after they attain majority.\textsuperscript{318}

\textbf{Conclusion}

The expatriation controversy involves grave issues of national power and individual choice. Most American citizens perhaps would not regard themselves as immediately affected, since they will live their lives on American soil, assured of secure membership in the community of citizens. Yet any measure which may depreciate citizenship status should be of concern to all Americans. Moreover the security of the citizenship tie has been a matter of increased importance to the nation and the citizen in this age of increased mobility, when millions of Americans travel outside the United States each year and hundreds of thousands remain abroad, in more or less stable residence.\textsuperscript{319}

One striking aspect of our discussion is the finding that this is still an unfinished chronicle. Although 175 years have elapsed since the adoption of the Constitution, we have not yet arrived at a clear understanding of the nature and extent of the power to expatriate American citizens. This lack of firm guidelines is surprising in an area as fundamental as the title to American citizenship.

It is also significant that such uncertainty has persisted despite a constant awareness of the problem and debate as to its resolution. This debate has traversed different stages and has reflected changing ideas. At its inception it was concerned with the accommodation of ancient dogmas to the needs of a burgeoning young nation. As immigration increased the emphasis shifted to implementing "the natural and inherent right" of the immigrants to sever their ties with their country of origin. After 1907 the pattern changed again and was concerned primarily with measures by the federal government to terminate the citizenship of those whose actions were deemed detrimental to the national interest.

These restrictive measures eventually provoked constitutional challenges which resulted in the development and exploration of new con-


$^{319}$ See 1963 Immigration & Naturalization Serv. Ann. Rep. 21. From 1954 to 1963, 43,457 American citizens were reported as having been expatriated. Id. at 103. However, this total will be substantially reduced as a consequence of the Supreme Court decisions, discussed earlier, declaring unconstitutional three of the statutory grounds for expatriation. The Department of State has estimated that approximately 618,900 American citizens were residing abroad on March 31, 1963, of whom 336,543 were registered at American consulates. See generally Scharf 251.
cepts regarding the power of Congress to prescribe expatriation. In part this development is a segment of a larger picture, in which constitutional interpretations are constantly being reexamined to conform to changing notions of the proper allocation of power between the citizen and the state. In this process, venerable precepts of the past have been reappraised and sometimes discarded.\(^{320}\) In large measure, the course of Supreme Court decisions has also been the product of a new attitude towards American citizenship, which to some extent originated twenty years ago with *Schneiderman v. United States*.\(^{321}\) This attitude regards American citizenship as a priceless status and vigorously resists any efforts to impair it.\(^{322}\)

The clash of ideas and the close divisions in the Supreme Court suggest that this debate will continue and that the major issues are still largely unsettled. The extent to which the national need, expressed in the considered judgment of Congress, can effect the termination of citizenship status which the individual citizen does not wish to relinquish is still uncertain. The attainment of a stable solution to this problem will probably be deferred until its full implications are weighed by Congress, the courts and the people.


\(^{321}\) 320 U.S. 118 (1943). Earlier expressions of this attitude may be found in Ng Fung Ho v. White, 259 U.S. 276 (1922); Kwock Jan Fat v. White, 253 U.S. 454 (1920); cf. United States v. Ju Toy, 198 U.S. 253 (1905); United States v. Wong Kim Ark, 169 U.S. 649 (1898).

ON THE NEED FOR "IMPACT ANALYSIS" OF SUPREME COURT DECISIONS

ARTHUR SELWYN MILLER*

Asserting that those who advocate development of "neutral principles" in constitutional litigation take a too limited view, Professor Miller suggests that critics of the Supreme Court evaluate the "impact," or societal effects, of the Court's decisions, as well as analyze the reasoning used in the Court's opinions. After an extensive analysis of the role of change in our legal structure and the position of the Supreme Court in our social and governmental structure, he calls upon those who comment upon the Court's decisions to take cognizance of the milieu in which the Court operates. Using the 1963 Supreme Court Review as an example, he points to shortcomings of present criticism and emphasizes that only when scholars develop rules about constitutional law, as opposed to rules of constitutional law, will a true understanding of the Supreme Court be attained.

The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence . . . . Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The ends which the law serves will dominate them all.

—Benjamin Nathan Cardozo

INTRODUCTION

The Anglo-American legal system is at least 1000 years old—even older if one adds its Roman law history. It is remarkable that in all that time, with the millions of lawyers (and other students of the legal process) who have come and gone, there is no accepted conception of the nature of the judicial process. This is particularly true of that peculiar institution of constitutional adjudication in the United States, but it is also valid for adjudication generally. Neither is there any really satisfactory method of judicial criticism, if by "satisfactory" one means a method which will comprehensively analyze and explicate all aspects of the judicial decision. Courts have been central to the development of law in English and American history, yet much that makes up the conventional wisdom is demonstrably faulty. It was so demonstrated, in part at least, by the intellectual movement during this century which bears the label of "legal realism," the chief exponents of which included Cardozo and Frank, Llewellyn and Arnold, Douglas and the two Cohens, as well as Moore and Bingham. But those idol-smashers did only half

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1 The Nature of the Judicial Process 66 (1921).
a job at best; they ripped the facade off the classical jurisprudential idea that the appellate judge was a passionless vehicle for the application of the law to the facts of the case. However, they have done nothing to replace it.\(^2\) Cardozo’s “summons to a better understanding,”\(^8\) issued forty years ago, remains unanswered.

The ancient conception—that the judge did not have a creative role in deciding cases—has not been the same since. The shambles of classical jurisprudence lie in ruin, like ancient Mayan temples, but no one, other than Professor M. S. McDougal,\(^4\) has as yet tackled the rebuilding task. Such a job of reconstruction is necessary if courts are to retain—perhaps “regain” would be a better word, now that the administrative state has arrived—their central position in the legal system. Furthermore, the temples of classical jurisprudence are still peopleled; many, perhaps most, who write about law and legal subjects still adhere to its tenets, although in a more sophisticated form. Thus what Morris Raphael Cohen rightly derided as the “phonograph” theory of justice\(^5\) is proving hard to bury and to keep interred. Just as the common-law forms of action, “although buried, still rule us from their graves,” so, too, if scholarship in the law reviews is any criterion, the conventional wisdom of yesteryear still abides. The late Karl Llewellyn said in 1960 that legal realism “is tending in modern jurisprudential writing to be treated as an episode to be relegated to history.”\(^6\) Some writers even proffer remarks—usually derogatory—about “neorealists”\(^7\)

The hardihood of the former wisdom may be attributed to a number of causes, but whatever the cause, it is clearly to be seen in the commentary upon the Supreme Court of the United States, and the written opinions of its Justices. Since 1803 the Court has been reviewing acts of other organs of government, state and national, but its decisions are still the subject of intense interest and both responsible and irresponsible criticism. There is still debate over what Americans often grateulate them-

\(^2\) Legal realism, it should be mentioned, was largely an effort to describe what went on in fact in the process of appellate adjudication. It was never a philosophy and did not purport to be one, and thus left the rebuilding task to others.


\(^5\) M. R. Cohen, Law and the Social Order 380-81 n.86 (1933).


selves as their unique contribution to the science of government, judicial review: its scope, its role, and the very nature of the constitutional adjudicative process. Much of this debate in recent years has tended to be a call for "principled" decision-making and better opinion-writing. Accordingly, it may be taken to be a sort of counter-revolution to the legal-realist movement, which often scoffed at the idea that legal rules, as such, were the main determinants of appellate court decisions. The counter-revolutionaries may be said to be swinging the pendulum back, at least to the extent of saying that the rules are not irrelevant to the decision-making process. But they offer little more than an *ad hominem* call for "reason" in adjudication or "principled" decisions (sometimes "neutral" principles) or decisions in accord with "the law as it has been received and understood," and accordingly they have only a limited value. They do not analyze the concept of reason, nor do they set forth which principles they advocate.

Obviously, something more is needed if there is ever to be a truly satisfactory *description* of the adjudicative process. Equally obviously, quite a bit more is needed if there is ever to be an adequate *prescription* of what courts, particularly the Supreme Court, should do in those human disputes which are brought before them for judgment. My purpose in this brief article is to suggest one added dimension which should be considered in an evaluation of judicial opinions, namely, "impact analysis" of the societal effects of Supreme Court decisions.

The late Felix Cohen set forth a like suggestion, at far greater length, more than thirty years ago. But that seed fell on barren ground, although some small efforts have been made to fill the gaps Cohen discussed. He was concerned with the uses to which law (and the legal process) were put in society:

[L]aw has instrumental value in so far as it promotes good human activity, or more briefly, the good life. The good life involves both intrinsic and instrumental values, so that possible non-human goods (e.g., the well-being of domestic animals) which law can attain indirectly by affecting human conduct are not excluded from our valuations, appearing as results which endow human life with instrumental value. And on the other hand, since law is the work of human beings, any intrinsic values which may appear in the legal order will be accounted for in an evaluation of the lives of those directly implicated in this order. Accordingly, the valuation of law is part of that branch of ethics which we

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have called moral science, and every legal element can receive a final evaluation in terms of the good life.\(^\text{10}\)

In the present discussion, neither the "good life" nor any theory of evaluation is set forth; the gist of what follows is the suggestion that adequate legal criticism, at the barest minimum, must look to the consequences of law and of judicial decisions, as well as to the corpus of doctrine often called precedent. Professor Paul A. Freund once said that "to understand the Supreme Court . . . is a theme which forces lawyers to become philosophers"\(^\text{11}\)—but, unhappily, very few have; moreover, if the present suggestion is valid, then lawyers will have to be privy to the insights of such disciplines as economics and sociology and political science if they are to be able to comment meaningfully upon Court decisions.

**THE ELEMENTS OF IMPACT ANALYSIS**

Understanding of the Supreme Court and of its role in the American system will be furthered by systematic and comprehensive attention paid to the social impact of Court decisions. Impact analysis has at least two facets: (a) an appreciation by judges of the consequences of their decisions; and (b) an evaluation by commentators of the social effect of judicial decisions. It looks to the consequences of judicial decisions and evaluates them in accordance with the extent to which they further the attainment of societal goals. It thus involves asking what the law should be as well as what it is. "[D]emocracy," Frank H. Knight has said, "has assumed the task, enormously more difficult than enforcing a law known to all, of deciding what the law ought to be and making any changes called for."\(^\text{12}\) That statement pinpoints the problem in constitutional adjudication: the need for deciding what the law "ought to be."

Now, what constitutional law "ought to be" in substantive terms is a question beyond the scope of this article. It is, nonetheless, meet to say that we should not forget, as indeed lawyers have often forgotten, that the Constitution (and the social order it governs) was established for certain, quite definite purposes. Without going into the question of what may have been the "real" motivations of the fifty-five men now revered in America's hagiology as the Founding Fathers, the Preamble

\(^{10}\) F. S. Cohen, *Ethical Systems and Legal Ideals* 17-18 (1933).

\(^{11}\) Freund, *On Understanding the Supreme Court* 7 (1949).

to the Constitution itself sets forth the objects for which it was written: "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty . . . ." These familiar words set the tone, and Mr. Chief Justice John Marshall's opinion in *McCulloch*¹³ thirty-two years later established the method—by adding the concept of an evolving Constitution—through which American constitutional development has taken place. Constitutional interpretation has proceeded side by side with legislation (and, in the present century, with administrative law-making) to make up a legal system by which the ideals set forth in the Preamble have been and are being furthered.

An essential point here is change, which is a primary characteristic of American society (for a number of reasons, not least of which is the scientific-technological revolution) and which may be seen throughout American law, both public and private. Constitutional change, it is submitted, should be evaluated in terms of whether or not it tends to further the ideals of the Preamble. As Knight has said: "The real task faced is that of social progress, definable only as a direction of change (in a complex sense, mostly negative) through alleviating some of the grosser injustices that a society can agree upon and find remediable."¹⁴

The accomplishment of that task can be helped through impact analysis, for it is only when given decisions are criticized and evaluated in terms of postulated goals that it can be determined whether social progress is being attained, just as initially it is only through attention to consequences that the Court can determine the criteria for particular decisions. Impact analysis cannot set the goals of decision-making—that has to come from elsewhere—but can assist in two ways: (a) in providing a basis for decision and (b) in evaluating the decisions themselves.

THE JUDICIAL PERSPECTIVE

If another dimension is added to the judicial process, so that it encompasses both a conceptual scheme and an appreciation of effects of decisions, the result will be a major alteration in the image of constitutional adjudication. A number of problems will be raised thereby, problems of a complexity that goes far beyond what has hitherto been true. For the judiciary, the new dimension presents somewhat different challenges from that of the observer of the judicial process. Hence, a

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¹⁴ Knight, *supra* note 12, at 3.
separate exposition will be made. What follows in this subsection is a listing of some of the problems raised by "impact analysis" from the standpoint of the federal judiciary, and more specifically, from the very specialized point of view of the Supreme Court. While, as will be shown below, much of what is said here has a wider application, nevertheless, the narrower concentration seems desirable.

Law as a Process

It is fair to say that law and the legal system in the United States have yet to come to terms with the factor of social change. Commentators, both on and off the bench, have not been able to reconcile the conflicting demands—the "antinomies," as Cardozo called them—of rest and motion, and of the basic social constant of change with its ineluctable concomitant of legal change. The Anglo-American legal system grew out of a relatively static society, a society which got its cosmology in Newtonian mechanics and its philosophy from Descartes, a society which had not yet felt the hurricane forces unleashed by the scientific-technological revolution. Law, when the legal theorists constructed a framework for analyzing it, was viewed as a static system—a closed system of concepts—which made up a "seamless web" of immutable truths. Legislation, which is largely a 19th-century phenomenon, came along later to spoil that vision and to inject the factor of calculated, purposive change in law. The ancient learning was such, however, that even today the center of attention is still the courts and the judges, and there is still a lingering suspicion of legislators.15

Social change is one of the commonplaces of the day. As W. Lloyd Warner has put it, "the processes of change are in themselves integral parts of the social system."16 Brought about by the accelerating impact of scientific and technological development, alterations in the social structure are creating the conditions which produce obvious and continuing legal change. The Anglo-American legal system, as Professor Paul Deising has said, developed "by denying change."17 This was accomplished through the use of legal fictions and similar techniques which

15 Reflected, for example, in the fact that the law schools have until recent years paid little attention to the legislative process. A similar gap may be found in the almost complete failure to grapple with the administrative process, except in courses on judicial review of administration, i.e., "administrative law."


permitted the form of older concepts and institutions to remain while the substance changed. However, the time has come—it is, indeed, past—when change must not only not be denied, it must be openly avowed. In terms of the American Constitution, the need is for avowal of the evolutionary character of that document with all that that implies for traditional views of laws and constitutions.

The Principle of Doctrinal Polarity

The adversary system of litigation, at least so far as appellate practice is concerned, is bottomed on the notion of a rather high degree of uncertainty in the law that may be considered relevant and applicable in any given case. That characteristic seems to be valid so far as private-law litigation is concerned; but even if disputed there, it seems to be beyond question with respect to constitutional adjudication. Any case which reaches the Supreme Court, and certainly those upon which the Court rules on the merits, may be said to involve at least two conflicting lines of doctrine. A convenient label for this characteristic is the Principle of Doctrinal Polarity. Litigants in constitutional cases represent conflicting social interests and collide in a clash of opposites when before the Court; for these litigants, as Oliphant and Hewitt maintained thirty-five years ago, "two conflicting major premises can always be formulated, one embodying one set of interests, the other embodying the other."18

This, of course, is familiar learning. But what is not familiar are the criteria by which judges choose between the conflicting interests. It is clear enough that if one accepts a certain major premise, then conclusions follow by ineluctable logic.19 But why are those premises...


19 The Court's opinion is lengthy, but its thesis is simple: (1) The withdrawal of citizenship which these statutes provide is "punishment." (2) Punishment cannot constitutionally be imposed except after a criminal trial and conviction. (3) The statutes are therefore unconstitutional. As with all syllogisms, the conclusion is inescapable if the premises are correct. But I cannot agree with the Court's major premise—that the divestiture of citizenship which these statutes prescribe is punishment in the constitutional sense of that term. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 201-02 (1963) (Stewart, J., dissenting).
chosen in the first place? This question is not answered in the cases. Such a failure to explain the bases of choice has led Mr. Justice Black to castigate the interest-balancing approach and, at least in first amendment cases, to proffer an absolutist conception, one in which a literal "plain meaning" is made of the first amendment. \(^{20}\) Mr. Justice Black may be correct in his criticisms of the Frankfurter approach, but does not himself give much more help in explaining why he accepts certain premises.

A Jurisprudence of Consequences

The clash on the Supreme Court and the Principle of Doctrinal Polarity pose a problem for which no one as yet has supplied a solution. The consequence has been a situation of the mutual exchange of *ipse dixit* and *ad hominem* statements by Justices of the Supreme Court and by commentators. Thousands of words have been written, for example, about the recent voting cases and about the school prayer decisions. But those who approve and those who decry have one common ground: they do not provide readers with any basis for explaining why they accept one premise over another. It is here that "impact analysis" would seem to be of some assistance. The following hypothesis is suggested as a way of thinking about the problem: *Choices are made by Justices from among conflicting principles (or inconsistent interests) not because of compelling law, but because of an evaluation of what the impact of given decisions is thought to be.* \(^{21}\) As said above, the judicial decision is a law-creating institution; in it, the Justices seek to manage a segment of the future. Rather than engaging solely in retrospection, the Justices are also looking forward—result-oriented, in the non-invidious sense of the term—as much as they are concept-oriented.

Holmes, as usual, noted the situation many years ago when he stated:


\(^{21}\) Cf. Wasserstrom, *The Judicial Decision* 172-73 (1961). In discussing the justification of decisions, Professor Wasserstrom maintains that a "two-level" process is involved—first, the decisions "must be shown to be formally deducible from some legal rule," and second, "the rule upon which its justification depends must be shown to be itself desirable." Wasserstrom concludes: "The two-level procedure expressly provides that only those premises, those legal rules, whose implementation has been ascertained to be conducive to the production of socially desirable consequences, can count as good reasons for individual judicial decisions." *Ibid.* (Professor Wasserstrom does not enlighten us to how "socially desirable consequences" can be ascertained.)
I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said.

... I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and burning questions.22

The Holmesian statement still holds true, at least in part. But it can be extended somewhat: it is submitted that judges normally do weigh “considerations of social advantage”—i.e., take the consequences of their decisions into account—whether or not they articulate those considerations in their opinions. As Holmes said, this is “inevitable” and unavoidable. The question is not: Should a judge take policy considerations into account? Rather it is this: Which policy should he choose? For choose he must, however his opinion may be phrased.

It is in private law as well as public law that a jurisprudence of consequences may be discerned. And it is, as I have said, familiar learning. But it needs repeating because it has not struck home and has not become widely accepted by lawyers generally. The essential point is that the Supreme Court in constitutional adjudications, hearing as it does only a handful of cases each year, deals with a fluid situation, and, accordingly, must look forward as well as back. It must “legislate,” at least in part, and determine what the law should be as well as what it is. This is because each case that comes before it, and is decided on the merits, is in basic part unique.

But saying that the Court does “legislate” via impact analysis does not necessarily mean that it should openly avow that it does. Nor does it answer the questions of how much “legislation” and when.

The Need for Expertise

A jurisprudence of consequences poses complex problems. In the first place, impact analysis makes the task of adjudication enormously more complicated. For judges to weigh considerations of social advantage is a far more difficult job than to apply rules or principles in given cases. If done in any systematic and thoroughgoing manner, it calls for a quality of expertise on the part of both judges and lawyers for which

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their legal education will not have prepared them. As Cardozo said forty years ago:

Some of the errors of courts have their origin in imperfect knowledge of the economic and social consequences of a decision, or of the economic and social needs to which a decision will respond. In the complexities of modern life there is a constantly increasing need for resort by the judges to some fact-finding agency which will substitute exact knowledge of factual conditions for conjecture and impression.23

Reference to one situation may serve to indicate the problem more specifically: antitrust law. The Sherman Act has all the attributes of a constitutional provision. Both in the original statute, which is couched in generalized terms, and in its exegesis by the Court there may be seen a close analogy to “pure” constitutional cases. Writing a decade ago, Mr. Justice Frankfurter made the following statement concerning the judicial task in antitrust cases:

Take a problem that has been confronting the Supreme Court, Sherman Law regulation of the movie industry. A number of decisions have been rendered finding violations under the Sherman Law. Does anybody know, when we have a case, as we had one the other day, where we can go to find light on what the practical consequences of these decisions have been? ... I don't know to what extent these things can be ascertained. I do know that, to the extent that they may be relevant in deciding cases, they ought not to be left to the blind guessing of myself and others only a little less uninformed than I am.24

What bothered Mr. Justice Frankfurter should trouble his colleagues on the bench, as well as all other members of the legal profession. The decisions of the Supreme Court in Sherman Act cases, since, as John R. Commons said, it acts as “the first authoritative faculty of political economy in the world,”25 have important consequences for the nature of the American economy and for the government-business relationship. Should the Supreme Court act as blindly as Frankfurter suggests it does? Should it not have greater assistance from members of the bar, plus aid from political economists in making the essentially economic decisions involved in antitrust law? Such a suggestion has in fact been proffered by lawyer-economist Mark S. Massel of The Brookings Institution. In a paper published in 1962, Massel concluded:

It seems clear that means must be found to alleviate the burden of the judges in order to insure significant application of the public intent behind the anti-

23 Cardozo, op. cit. supra note 3, at 116-17.
24 Frankfurter, Some Observations on Supreme Court Litigation and Legal Education 17 (1954).
25 Commons, Legal Foundations of Capitalism 7 (1924).
trust laws. . . Obviously, such efforts should not be based on any belief that they would reduce the importance of judicial judgment. . . Economic advice can be used to help to define the issues, to organize data, to suggest analysis of evidence and precedent, to outline available alternatives for the judicial decision, and to make reasonable predictions about the consequences of such alternatives.26

This calls for a level of expertise not often found within the legal profession, on or off the bench, for lawyers must be able to utilize the insights of economists. It is, furthermore, questionable at the present time whether the skills of economists measure up to the need set forth by Massel. But is there any feasible alternative to following up on his suggestion, once one accepts the Frankfurter proposition that the Justices on the Court are milling around in the dark without effective guidance?

One alternative, of course, would be for the Court to remove itself (or be removed) from the task of making antitrust decisions. It is entirely possible that this will eventually take place,27 for ever increasingly the economic decisions of government are made either administratively, under delegations of power from Congress, or directly by Congress itself. Regardless of whether the Court will at some time cease to make decisions of a politico-economic nature, the situation today approaches absurdity. A Court invested with the power of such decision-making admittedly has little or no expertise in the problem; the Department of Justice, with several hundred lawyers, few if any of whom have any economic learning, does little or nothing to provide assistance for the Court; and the practicing bar only adds to the already dismal picture. At a time when the government-business interface in the United States is undergoing profound change, we still struggle under the myth that Sherman Act questions are legal questions and hence are for

26 Massel, Economic Analysis in Judicial Antitrust Decisions, 20 A.B.A. ANTITRUST SECTION 46, 58 (1962). Compare Friendly, Reactions of Lawyer—Newly Become Judge, 71 YALE L.J. 218, 221-27 (1961), with Hyneman, Free Speech: At What Price?, 56 AM. POL. SCI. REV. 847 (1962). Hyneman states: "[N]one of the judges to date . . . has so far produced an opinion that stands as proof that his decision rests on a comprehensive, sharply discriminating and systematic scrutiny of the known and probable social consequences of the act under consideration." Id. at 851.

courts to decide. Either the courts must get out of the act or they must be assisted so as to be able to cope with the basic problems of Sherman Act enforcement.

Assuming the latter alternative is followed, impact analysis would be of some help. But it is an immensely difficult task and one not likely to be followed. It is complex enough for antitrust, which we have used as an example, but if magnified to the range of questions decided by the Supreme Court, then the task becomes one of staggering proportions. If the Justices are to be held, as is suggested above they should be, to the expertise of political economists in Sherman Act cases, and if they are to be held to similar lofty positions of expert knowledge for other complex societal questions, the question immediately arises as to whether or not the problem could be met and resolved in any reasonably satisfactory way. No doubt it was considerations such as these which led to the advent of the “administrative state” and to the abdication of the judiciary from any sustained scrutiny of the substance of economic and social decisions entrusted to the public administration by Congress.28 The question which now presents itself with increasing persistence is whether those considerations of non-expertise argue for removing the judiciary from all fields of economic regulation.

But if judges are not experts in economics, they also are not particularly expert in many other areas of societal concern in which their decisions have an impact. Can the same argument be made for judicial abdication in such areas as the position of ethnic groups (principally, the Negroes) in this country, the administration of criminal law, the separation of church and state, and representation in legislatures? All of these decisional areas have found the Supreme Court under attack from one source or another.

There are other aspects to the difficult problem facing the Supreme Court if it should ever systematically and comprehensively undertake to gauge its decisions in the light of their consequences, as well as justify them doctrinally. One of these is the flow of information to the Court. What data are relevant for use in the judicial decision-making process? And how should these data be relayed to the Justices? We have heard

28 Lawyers, with invincible parochialism, still overemphasize the importance of the judiciary in the governmental process. This is particularly true of the legal practitioner, who keeps asserting that administrators should act more like judges act (or are supposed to act). Compare Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 HARV. L. REV. 863 (1962), with Benjamin, A Lawyer’s View of Administrative Procedure—The American Bar Association Program, 26 LAW & CONTEMP. PROB. 203 (1961).
much in recent years about the employment of assertedly “nonlegal” data in Brown v. Board of Educa-
tion. Some social scientists have hailed the famous footnote eleven of that case as a landmark in the Court’s recogni-
tion that sociologists and psychologists, and the like, have something to say of relevance to constitutional adjudication. Others—for example, the late Professor Edmund Cahn—have disagreed, and have tended to question such data. But of course the “Brandeis brief” has been in operation since 1908, and the Court has long used “nonlegal” matter, such as statistics and political theory, in its decisions. One need only refer to such well-known decisions as the Social Security Cases, particularly the dissenting opinion by Mr. Justice Holmes, and Dennis v. United States to indicate this.

Nevertheless, it is one thing to say that the Justices have often employed “nonlegal” data in their opinions, but it is quite another to maintain that they have used it properly. If it be granted that it is at least the lesson of history that such data are relevant to constitutional adjudication, how should it be relayed to the Court? Furthermore, how are the Justices to determine the validity of the learning from such disciplines as economics, political science and sociology? Is there such agreement among the practitioners of these esoteric pursuits that a lawyer may without fear accept the statements of any of them? The answer to that, quite obviously, is no. Accordingly, there is the further problem of evaluating the conflicting propositions advanced by equally respected members of the nonlegal professions. The flow of information to the Court, according to the orthodox notion, is via the briefs and argument of counsel, the record of the trial court and the concept of judicial notice. This must be augmented, either through the invention of new techniques or by improving present methods, if that flow is to provide the Justices with the valid insights of disciplines other than law. It will

32 See Wormuth, The Impact of Economic Legislation Upon the Supreme Court, 6 J. PUB. L. 296 (1957).
34 198 U.S. 45 (1905).
35 Id. at 74.
37 See Frank, The Lawyer’s Role in Modern Society, 4 J. PUB. L. 8 (1955).
do little good, and perhaps much harm, if all that is furnished is the competing "wisdom" of experts for both sides of the case, experts who may be expected to testify in accordance with the desires of the party retaining them. The "fallacy of the impartial expert" should be recognized, if not exploded. The problem that this poses is of major proportions: the Justices can and do take the consequences of their decisions into account; should they continue to operate on the basis of assumptions and untested hypotheses? If not, then how is the situation to be improved?38

The Demand for Predictability

The question of the extent to which the Court should be forward-looking must also be posed. What is the proper balance between principle and result, between preexisting concept and an evaluation of the consequences of a decision? That the Justices on the Court do look prospectively (i.e., legislate) seems to be beyond argument. But how much of this should they do?39 That judges can and do "legislate" has been recognized by many members of the bench. Holmes, for example, did not deny this, but said that the judge was confined from "molar to molecular" motion.40

The question of how much is too much judicial norm-setting cannot be more than posed here. An adequate answer to it would entail an inquiry beyond the scope of the article. Nevertheless, it may be said that one important facet of the question is the extent to which predictability—i.e., certainty—should be striven for and is attainable in the constitutional

38 Judge Charles Wyzanski met this problem by appointing an economist as one of his "law" clerks when he had an important case before him. See Kayser, United States v. United Shoe Machinery Corporation: An Economic Analysis of an Antitrust Case (1956).

39 This problem—how much is too much?—seems to be at the center of the difficulty of those academic lawyers who decry the Court's recent reapportionment decisions. None deny the law-making proclivities of the Court, but want it sharply circumscribed—although they never tell us, save in response to specific decisions, how much is too much. See, e.g., Neal, Baker v. Carr: Politics in Search of Law, in The Supreme Court Review 252 (Kurland ed. 1962). In this regard, the academicians join the politicians whose "ox is being gored" by the reapportionment decisions. Strange bed-fellows! One can understand the dismay of the politicians, who may soon be out of office, but it is difficult to discern just what it is that academic critics want. Dean Eugene V. Rostow may have put his finger on the core of the matter when he said that critics (academic and otherwise) "are uttering a protest which they find . . . hard to reduce to logical form. It is not so much a protest against the Court as against the tide of social change reflected in the Court's opinions." Rostow, The Sovereign Prerogative 111 (1962).

adjudicative process. This is a question of exceeding complexity, calling for a reconciliation of the great antinomies of rest and motion, of a static order and a dynamic flux, of stability and progress. Whitehead asserted that:

There are two principles inherent in the very nature of things, recurring in some particular embodiments whatever field we explore—the spirit of change, and the spirit of conservation. There can be nothing real without both. Mere change without conservation is a passage from nothing to nothing. Its final integration yields mere transient non-entity. Mere conservation without change cannot conserve. For after all, there is a flux of circumstance, and the freshness of being evaporates under mere repetition.41

If it be granted that change is the law of life and that constitutional law is an evolving system42—and who can deny it?—then the question of predictability must be seen as subordinate to, or at least on the same level as, the attainment of desirable social ends—in short, the realization of justice in the particular case. Predictability, or certainty, accordingly, is not the only goal of the constitutional adjudicative process. And that is so, even though one may sympathize with the plaintive cry of the late Mr. Justice Owen Roberts who, in the 1940’s, asserted that Supreme Court decisions were like “a restricted railroad ticket, good for this day and train only.”43 How the Court might rule on a given case thus becomes, for the observer, not an evaluation of precedent, but an intuitive feeling a close observer of the high bench gets from long continued study of particular Justices and the trends of their decisions.

This means that on the present Court one can foresee without too much possibility of error how Justices Black, Douglas, Goldberg and Mr. Chief Justice Warren are likely to rule in certain cases. In other words, in some cases, e.g., civil rights, F.E.L.A., regulation of business, there is a fairly high degree of predictability (certainty) for a number of the Justices. And this, oddly enough, is decried by some commentators for a number of reasons, such as wrong reasoning, “result-oriented,” and so on.44 These observers are willing to forego this type of certainty, while plumping for better judicial method.

What, then, is the proper method? There is no accepted model of the judicial process in the sense of a conception which both fully ex-

41 WHITEHEAD, SCIENCE AND THE MODERN WORLD 281 (1925).
44 E.g., Griswold, supra note 9; see Miller, A Note on the Criticism of Supreme Court Decisions, 10 J. PUB. L. 139 (1961).
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plains what takes place and also projects what should occur. The Supreme Court is forward-looking in its decision-making; it does take into consideration the impact its decisions will have. But it is also interested in stare decisis and in as much stability as can be attained. In its decisions it reconciles these two polar opposites and compromises—perhaps "makeshift compromise," in Cardozo’s term—between a desire for certainty and a search for justice. "The goal of juridical effort, says Demogue, is not logical synthesis, but compromise." But how know where to strike the balance, to effect the compromise? The task for the judge is one thing, for the lawyer or commentator upon the Court another.

The Reality of Judicial Bargaining

Reference to what is perhaps the most revealing exposition of the Supreme Court in action lends support to this "compromise" view of the judicial process. In Alpheus Thomas Mason’s biography of Mr. Chief Justice Harlan Fiske Stone47 there are recounted a number of examples of this type of decision-making. A clear example is Ex parte Quirin,48 the case of the Nazi saboteurs. Eight German nationals had been caught soon after they landed on the eastern shore of the United States in 1942. They were tried by a special military commission established by the President. Convicted by the commission, their counsel sought review by habeas corpus in the Supreme Court. The issue was the jurisdiction of the commission to try the Germans, particularly in light of Ex parte Milligan,49 a Civil War case holding that a military tribunal had no jurisdiction over a civilian defendant where civil courts were in operation. The Supreme Court, on summer recess, was specially convened on July 29, 1942, to hear the question. The Court upheld the power of the President. As Mason puts it: "The decision itself, a cryptic per curiam, upheld the jurisdiction of the Military Commission to try the Germans and announced that an opinion would be filed later."50

The ensuing pages of the biography are a fascinating account of how Mr. Chief Justice Stone conducted a diligent search to find precedent to justify the previously reached decision. The question, in Stone’s mind, was what was "good judicial diplomacy" in the circumstances. One of

45 Cardozo, The Paradoxes of Legal Science 6 (1928).
46 Id. at 5.
48 317 U.S. 1 (1942).
49 71 U.S. (4 Wall.) 2 (1866).
50 Mason, op. cit. supra note 47, at 657.
those circumstances, it may be noted, was that six of the Germans were put to death soon after the Court's decision and before its opinion had been released. This factor caused the Chief Justice and his colleagues, to use his term, certain "embarrassments.\textsuperscript{51} The opinion finally was released on October 29, 1942. The times were difficult; the nation was at war; the President was insistent that the eight Germans be killed; congressional sentiment was summarized as follows:

Our people are of the opinion that the eight Nazi saboteurs should be executed with all possible dispatch. . . . They are confident that the military tribunal will decree their death. Any interference with that trial by civil court would strike a severe blow to public morale.\textsuperscript{52}

The Supreme Court thus faced enormous pressure, and it may be that the Justices did as well as could be asked of anyone in the situation. Nonetheless Mason comments:

However one looks at it, approval of presidential and commission action after the fact, in ignorance of what had taken place, was stiff medicine. To Stone's chagrin, perhaps, the judiciary was in danger of becoming part of the executive juggernaut.\textsuperscript{53}

That aside, the interesting point in \textit{Quirin} is the "decide first, opine afterwards" procedure. How often this characterizes the Supreme Court's operations is not known; the legal profession is not often favored with such a candid exposition as that contained in Stone's biography. Nevertheless, as a recent study documents, "leadership" and "bargaining" do take place in the Court's deliberations.\textsuperscript{54} There is considerable give-and-take on the Court. Opinions are rewritten and even votes are changed on the basis of a complex interchange among the nine men. "To bargain collectively," moreover, "one must have something to trade and also a sanction to apply if the offer is rejected or if there is a renge on the bargain. The personal honor of the Justices minimizes the possibility of a renge in the usual sense of the term, though under existing Supreme Court practice a Justice is free to change his vote up to the minute the decision is announced in the courtroom."\textsuperscript{55}

\textsuperscript{51} Id. at 661.

\textsuperscript{52} N.Y. Times, July 29, 1942, p. 11, col. 2 (statement by Representative Celler).

\textsuperscript{53} Mason, \textit{op. cit. supra} note 47, at 666.


\textsuperscript{55} Id. at 657.
opinion; on the other hand, the sanction which might be used against a Justice is the threat of a dissenting or concurring opinion.

The question, then, of "how much is too much?" by way of forward-looking depends in large part upon the caliber of the personnel of the Court and the extent to which leadership is possible and bargaining takes place. It depends as well upon an evaluation of the social milieu in which the Court operates and the social context (impact) of the decision. As I have said in a previous paper:

How and when [do] changes in constitutional interpretation come about[?] A fundamental hypothesis, and a corollary thereto, may be suggested. The hypothesis is this: A change in constitutional interpretation is feasible (perhaps even necessary) when the positive law of the Constitution is not in consonance with the living law of society and an attempt is being made to bring the two into coincidence. The corollary is this: A Court decision may itself operate so as to help create the favorable social milieu—by acting as a catalytic agent to precipitate a change in an unsteady equilibrium.56

Mr. Dooley once opined that the Supreme Court tended to follow the election returns, but what seems more accurate is that the Court has its antenna keenly tuned to the prevailing climate of opinion and to the direction in which the political winds are blowing. In this respect, both elections and Court opinions may be said to reflect the same sort of consensus that is operating at any one time within the American polity. Judges, then, are not necessarily confined from "molar to molecular" motion; immersed in the "travail of society," at times they must be willing to break loose, to "experiment, which always involves a leap into the dark future."57

Such leaps—as in the recent reapportionment cases—are not improper in and of themselves, even though obloquy has been heaped upon them by some academic commentators. The position of these commentators, when one reflects upon it, is a most astonishing proposition: that there is a certain, prescribed, undeviating way for the Court to operate. There is none, of course, although the conventional academic wisdom would have us believe that such a model of judicial propriety does exist. The conventional wisdom is based on a faulty view of history, an erroneous conception of modern society, and a lack of appreciation of the niceties of American government.58 This is not, it may be noted, necessarily to

56 Miller, supra note 42, at 915-16.
58 See Wilson, Constitutional Government in the United States 157 (1908). "The Constitution," says Wilson, "is not a mere lawyers' document," but rather "the vehicle of a nation's life." Ibid. It is noteworthy that most, if not all, of the contemporary academic
defend the decisions in the reapportionment cases, but merely to suggest that they are less out of line with the century-and-three-quarters of Supreme Court review of other governmental action than many critics are willing to admit. To cite but one example, the Court’s decision in the Steel Seizure Case\(^59\) in 1952 is fully as open to the shrill criticism that the reapportionment decisions have elicited; oddly, however, the academic commentators apparently find nothing in that strange case to criticize.

**THE CHANGING ROLE OF THE SUPREME COURT**

The Image of the Court

Would it be better if there were a conscious avowal by judges of the ends sought to be served in adjudication? Would a frank recognition of the two elements produce a more satisfactory picture of the judicial process? One commentator, Father Albert Broderick of the Catholic University School of Law, so believes; he maintains that the constitutional judge . . . is a legislator constantly revising and adapting. There is undoubtedly some difference from legislation: whereas on-again, off-again of a particular law or course of legislation at successive legislative sessions would be acceptable, in a Court it would not. But with this obvious qualification, might the Supreme Court not frankly avow that its decisional development in broad areas committed to its care is directed towards orderly achievement of currently accepted social goals?\(^60\)

Whether Father Broderick’s suggestion should be followed depends in large part upon the “image” of the Supreme Court and whether such frankness would impair its position in the value hierarchy of the American people. A number of reactions to this question may be discerned. On the one hand, there are some who admit that the Court can and does “legislate,” *i.e.*, does look forward and take social consequences into consideration, but who stoutly maintain that this should not be revealed to the laity else they will suffer emotional shock and that will cause

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\(^59\) Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

them to think less of the Court.61 It is not at all clear how this school of opinion knows just what the American people think of the Court, if indeed they think of it at all, or how they would react to the notion that the facade should be ripped off the judicial process. That aside, the fact that the American people are legalistic and litigious, as Dicey and de Tocqueville long ago noted, does not mean that they also have the same view of the Court and its process as do lawyers. (For that matter, as noted above, lawyers themselves still argue, and bitterly, about judicial method.) Those who think that the mystery should be kept about the Court's process may be said to belong to the school of "squid jurisprudence," the major tenet of which is to keep the truth from all except the priesthood of the law. These observers believe that they themselves have the intellectual stamina to withstand the trauma of knowing that decisions are not brought by judicial storks, but fear the effect of that knowledge on the populace at large. They wish, accordingly, to hide the facts of judicial government from the people behind a cloud of impenetrable ink.

Now, it may well be, as General Charles de Gaulle has said, that leadership and prestige require mystery. "There can be no prestige without mystery. In the designs, the demeanor, and the mental operations of a leader, there must always be a 'something' which others cannot altogether fathom, which puzzles them, stirs them, and rivets their attention."62 Hence, possibly the Supreme Court will suffer institutionally from both taking on too much (not exercising self-restraint, as Justices Frankfurter and Harlan would have them do) and from a candid avowal of the mysteries of the decisional process on the Court. Frankfurter's views are well known; their last, and perhaps most effective statement, came in 1962 in his impassioned dissenting opinion in


When I first published the foregoing views [on judicial legislation] in 1914, the deans of some of our law schools wrote me that while the contention that judges do have a share in making the law is unanswerable, it is still advisable to keep the fiction of the phonograph theory to prevent the law from becoming more fluid than it already is. But I have an abiding conviction that to recognize the truth and adjust oneself to it is in the end the easiest and most advisable course. The phonograph theory has bred the mistaken view that the law is a closed, independent system having nothing to do with economic, political, social, or philosophical science. If, however, we recognize that courts are constantly remaking the law, then it becomes of the utmost social importance that the law should be made in accordance with the best available information, which it is the object of science to supply.

Ibid.

62 Quoted by James Reston, N.Y. Times, Aug. 21, 1964, p. 28, col. 3.
Baker v. Carr. Harlan echoed this in 1964 and added a touch of his own while dissenting in Reynolds v. Sims. In that case, extending the "one man-one vote" doctrine to both houses of state legislatures, Mr. Justice Harlan asserted that such decisions sapped the vitality of the American political system, weakened the fabric of federalism, and reflected a mistaken view of the function of the Supreme Court:

[T]hese decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements.

The learned Justice, it may be noted, cited no evidence for these statements. Just who, it may be asked, believes the Court is the "haven" he mentions or that the Constitution will cure every major social ill? Mr. Justice Harlan sets up and knocks down the flimsiest of straw men in that statement. But it is a clear statement of concern for the impact or the consequences of judicial decisions. In some respects it recalls to mind a not dissimilar blast of outrage uttered thirty years ago by Mr. Justice McReynolds in his dissenting opinion in the Gold Clause Cases: "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling." The concern for purported adverse social consequences is, as we have previously noted, not atypical of the judicial process. However, it is not often that we are favored with such classic statements, which, in both instances, appear to be based entirely upon what Mr. Justice Harlan calls his "conviction" and not upon any evaluation of empirical data. This is not to say that the members of the Court's majority in Reynolds offer any better delineations of the reason for their conclusions; these conclusions seem, in final analysis, to be ipse dixit. Neither do they display any concern for or appreciation of the social consequences of their decisions. Both the majority and the dissenters in Reynolds wrote opinions which are noteworthy for their conclusions but not for their "reasoning." Neither is different in any essential way from the way Justices have been writing opinions since the Court was first established.

63 369 U.S. 186, 266 (1962).
64 377 U.S. 533, 589 (1964).
65 Id. at 624-25.
66 294 U.S. 240, 381 (1934).
What this may mean is that the Justices feel that a frank avowal of the decisional process, along the lines that Father Broderick has suggested, is not desirable. They may be right. It is possibly the prudential way for the Court to follow in the enunciation of rules of constitutional law.

A second viewpoint on the image of the Court is to deny that there is any validity to the notion of the living Constitution or to law as an evolutionary phenomenon. This, too, has its adherents; they belong to the school of what Pound called "mechanical jurisprudence." To them, the Constitution is a static, unchanging instrument and the task of the Court is to keep it so. It is difficult to see how this viewpoint has any basis at all; it can hardly be taken seriously at this date.67

Another group pays lip service to the idea of change—not denying it but not really accepting it, either—and maintains that Court opinions, whatever the result may be, should be "reasoned" or "principled."68 A number of these also believe that the Court should have an essentially quietistic role in government—exercise "judicial self-restraint" in the manner that Mr. Justice Frankfurter was alleged to do—and should not intrude into "political thickets" or other abrasive areas which might ultimately jeopardize the high position of the Court in the value hierarchy of Americans. But these commentators seldom explain what they mean by "reason" or "principle" or suggest any guidelines which might be used as bases for knowing when to restrain. Members of this group fear that by trying to do too much, the Court will lose status and not do anything. They seem to believe that either the Court should be preeminent in position and power or that it will plummet to the other extreme. But even if the Court should lose esteem, as it has in some quarters, and even if it should be subjected to pressure or attempted loss of jurisdiction by congressional statute, surely one need not suppose that the Court will be eliminated from the American scene.

The fundamental question involved in this discussion is the role of the Supreme Court in a society characterized by rapid social change. This in turn means fitting the Court into a governmental structure which has assumed the responsibility of "managing" change. In a well-known

67 This is what Dean Griswold had called, in another context, the "fundamentalist theological" approach. Griswold, supra note 20, at 172. See, e.g., Pittman, The Law of the Land, 6 J. PUB. L. 444 (1957); 102 Cong. Rec. 6821 (1956) (extension of remarks of Representative John Bell Williams).

passage, Sir Henry Maine once stated that change in law (and thus in social institutions) comes in three ways: through legal fictions employed by judges, through judges taking “equity” into consideration, and through legislation.\(^69\) His remarks related for the most part to the common law and to the categories of private law. But what about constitutional law, American variety?

**The Governmental Posture of the Court**

Whatever may have been the intention of the Founding Fathers, the American government has during this century taken on a fundamentally new posture. The “Positive State” has come into being, characterized by massive governmental interventions into socio-economic affairs. This has been discussed elsewhere and requires no present restatement.\(^70\) The question for present purposes is not the extent and nature of this intervention, or of its constitutionality; rather, it is the governmental posture of the Supreme Court of the United States.

It is doubtless accurate to maintain that each of the branches of the national government has been undergoing an evolution, not only with greater rapidity in recent years, but also throughout American history. Thus it is that Congress by and large has found its role changing as new problems face the nation.\(^71\) It has reacted to these new problems in varying ways; what they are need not be recounted at this time. This is equally true of the Executive: there is no question that this branch is the recipient of slowly accreting powers. The United States is becoming—perhaps has become—an “administrative state,” one in which the locus of effective power is in the executive-administrative branch.\(^72\) If that be granted, and there would seem to be a consensus among informed observers on the point of both Congress and the Executive, where does that leave the Court?

In many respects, the judicial task has changed markedly in the past three decades. In the first place, the judiciary has long since given up

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any sustained constitutional scrutiny of the economic decisions of the political branches of government. For those, the Court acts in the role of the interpreter of statutory programs. This does not mean that the creative task of the judge in such matters has been eliminated. Far from it. It merely means that it operates in a different milieu. All statutes require interpretation and, as Bishop Hoadly long ago said, this is a key law-making position.\(^{73}\)

Second, the Supreme Court has in its constitutional adjudications tended to concentrate upon the field of civil rights and civil liberties. Some of these "constitutional" decisions have come in what are really statutory interpretation matters; for example, in *Greene v. McElroy*\(^ {74}\) and *Kent v. Dulles*,\(^ {75}\) the Court made what may be termed constitutional decisions without actually doing so in fact. With respect to "pure" constitutional decisions (those based upon an interpretation of the fundamental law itself), the areas of principal concern have been the administration of the criminal law, the church-state position, the position of the Negro in American society, patterns of voting for legislatures, and loyalty-security problems. All of these have raised storms of controversy and have enmeshed the Supreme Court deeply in the governmental process—but in a way different from the 1890-1937 heyday of naysaying by the Court.

This is the third—and most important—change in the judicial task: Rather than being a negative censor of programs proposed by the political branches of government, as it was during the 1890-1937 period, the Court now has an affirmative posture. This is best seen in the several series of cases concerning the Negro, the administration of the criminal law and the apportionment of legislatures. This tendency has been discussed elsewhere, so there is no present need to develop it in full.\(^ {76}\) The change from an aristocratic censor of the legislature to an institution which sets affirmative norms is both a subtle and a profound one in the

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73 Benjamn Hoadly, Bishop of Bangor, Sermon Before the King, 1717, p. 12, as quoted in *Gray, The Nature and Sources of the Law* 102 (2d ed. 1927).
75 357 U.S. 116 (1958) (passport procedure of the Department of State).
76 Miller, *An Affirmative Thrust to Due Process of Law?*, 30 Geo. Wash. L. Rev. 399 (1962); see Rostow, *The Sovereign Prerogative* (1962), who states:

The powers of the Court are a vital and altogether legitimate part of the American Constitution. They should be used positively and affirmatively to help improve the public law of a free society capable of fulfilling the democratic dream of its Constitution in the turbulent second half of the twentieth century.

*Id.* at xxxiv.
jurisprudence of the Supreme Court. It has not come through any announced shift, but it may be seen through an evaluation of what the Court has done during the past quarter-century. It is, accordingly, a fundamentally different Court—at least in part—which sits now in Washington; and it is as an altered institution, operating within the facade of its older function, that it should be evaluated and discussed.

Cooperation as the Norm

The "affirmative" jurisprudence of the Court means that its relationships to the other branches of Government, and to the state governments, have also changed. In brief, this change places an emphasis upon cooperation between the branches, rather than conflict, and cooperation between the central and parochial governments of the federal system, rather than aloofness. As to the former, it is a long road from President Jackson's perhaps apocryphal sneer ("Chief Justice Marshall has made his decision, now let him enforce it") to the use of armed force by two modern Presidents in the enforcement of judicial decrees against recalcitrant state governments. So, too, in the relationships between the judiciary and Congress: there is at least a tacit, perhaps an express, recognition in the national legislature that Court decisions must be accorded a very high degree of deference. Attempts during the past twenty-five years to change such decisions, by amendment or by statute, have not been successful. While it is true that legislation has followed the tidelands decisions, decisions on state taxation of interstate commerce and Jencks, nevertheless, many far-reaching judicial decisions have remained law. The effort to amend the Constitution to "overrule" the Pink and Belmont cases failed, as apparently has the more recent effort to overturn the

81 United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324
School Prayer Cases. Perhaps the best-publicized recent attempt to vitiate a Supreme Court ruling was the vain effort in 1964 by both houses of Congress to avoid the effects of legislative apportionment, which was put on a "one man-one vote" basis by the decision in Reynolds v. Sims. And it may be said that the Civil Rights Act of 1964 is a (belated) legislative recognition of the need to cooperate with the Court (and the Executive) in the massive realignment of the status of the Negro now under way. Cooperation, not conflict, is by slow accretion becoming the norm within the rubric of "separation of powers."

Similarly, cooperative actions may be seen growing within the units of the federal system. Obvious in the many grant-in-aid and other financial programs annually enacted by Congress, and placed in the hands of the states for localized administration, it can also be seen in the impact which Court decisions have upon the states. Of course, this tendency runs as far back as Martin v. Hunter's Lessee and Cohens v. Virginia, which established the power of the Supreme Court to review decisions of state courts on federal questions, and includes the decades of commerce clause and due process decisions relating to state legislation. Just as Supreme Court decisions, to bring the discussion up to the present day, have had a higher degree of cooperation from the other branches of the national government, so it may be said that they are receiving cooperation from the states. As such, they are a reflection of the growing unity, if not uniformity, of the American people. The picture of course is not an even one. Some decisions, as in racial segregation, have been systematically ignored by some states; however, even here almost every state is beginning the adjustments which must be made if the Negro is to attain first-class citizenship, adjustments which have become necessary because of national governmental decisions. Other decisions, as in school prayers, may have fallen on barren soil, in that it is likely that they are seldom followed anywhere. The reapportionment decisions, it would seem, have

(1937). The controversy in the early 1950's over the treaty and agreement-making power of the federal government reflected a reaction to the Supreme Court's opinions in such cases as Pink and Belmont, which upheld the independent power of the President to conclude international agreements. An attempt to amend the Constitution, by the so-called "Bricker Amendment," failed by one vote in the Senate. See Kauper, op. cit. supra note 78, at 310-12.

85 14 U.S. (1 Wheat.) 304 (1816).
86 19 U.S. (6 Wheat.) 264 (1821).
87 For example, in Kentucky it seems that most school districts will not adhere to the
been accepted by an appreciable number of American people and a thorough readjustment of legislative districts on both the state and the national level would seem to be coming. In this instance, the affirmative jurisprudence of the Court has found ready allies and cooperation in many, if not all, states.

The Popular Reaction

It is submitted that the American people, speaking broadly, do not disapprove of the new jurisprudence of the Supreme Court. Despite certain obvious evidence to the contrary, the decisions in the past twenty-five years appear to have touched responsive chords in the nation. The swirl of controversy engulfs the Marble Palace, it is true, but nevertheless it is difficult to discern a nation-wide groundswell of opinion which would either overturn particular decisions or which would basically alter the Court's power. Instructive testimony on this score may be found in the decisions on the School Prayer Cases. When those decisions were enunciated, cries of outrage went up from many parts of the country, but principally, it would seem, from those who had not taken time to read what the Court had said or to understand its decision. The tide of opposition peaked in early 1964 in the effort to get an amendment through Congress on the issue. However, this attempt appears to have foundered, because of widespread efforts to explain the decisions and also to support them. The Court has not been treated well by the bar, practicing or academic, in explaining decisions to the American people. Even so, what passes for public opinion in this nation has looked upon the Court and the Constitution as symbols of awe and reverence.

Oddly enough, as mentioned above, other than the politicians, it is the scholars and commentators upon the Supreme Court who have felt most outraged by decisions in sensitive areas, or who have at least felt sufficiently uneasy to put their opinions into print. For some of them, the decisions. See N.Y. Times, Aug. 30, 1964, § 1, p. 36, col. 1. The earlier decisions on the church-state question, such as McCollum v. Board of Educ., 333 U.S. 203 (1948), apparently had little effect. See Patric, The Impact of a Court Decision: Aftermath of the McCollum Case, 6 J. Pub. L. 455 (1957), one of the few attempts to apply impact analysis to a Court decision.

88 According to a Gallup Poll, 47% of the people approve of the decisions, 30% disapprove, and 23% have no opinion. Washington Post, Aug. 19, 1964, § A, p. 7, col. 2.
89 See supra note 82.
90 See supra note 82.
image of the Court has been tarnished. But for them, the question of the Court’s methodology and of whether its mysteries should be divulged to the laity, is predicated upon unexamined views of the entire governmental process, in particular that of the Supreme Court. That Court is to be studied and understood, it is submitted, only as an organ in a government of affirmative responsibility, one which has undertaken obligations far beyond those of yesteryear, a government toward which the American people look for guidance and for succor. The Court, accordingly, as a constitutional tribunal is not to be evaluated as a court deciding only the routine disputes of meum and tuum, but as an organ which has great public-policy influence.

THE PERSPECTIVE OF THE “DISINTERESTED” OBSERVER

The main task of the commentator upon the Supreme Court and its jurisprudence is to contribute to the understanding of that peculiar American institution. An important secondary task is to provide a flow of informed commentary which will serve the purpose of constructive criticism of the Court and its work, and thus assist in keeping the Justices within proper bounds. These are no mean jobs. On the contrary, they call for a combination of insight and judgment which requires meticulous attention to detail as well as a grasp of the theory and philosophy of judicial action. Moreover, the products of this effort have a definite, albeit unmeasurable, impact upon the decisional process. Commentators upon the Supreme Court form a part of the law-making process of the Court. Constitutional law is not a completed, but a growing and self-correcting, system. It grows by what Morris Raphael Cohen called “the interaction between social usage and the work of legislatures, courts, and administrative officials, and even legal text writers.” The growing incidence of law review material cited in Supreme Court opinions is testimony of the extent to which legal writers have influence upon the Justices (or, at the very least, of the extent to which Justices consider such writings helpful in buttressing their previously made decisions).

Contribution to the understanding of the Supreme Court and its product will come about when the commentators develop valid descriptive or

94 Reynolds v. Sims, 377 U.S. 533 (1964), is particularly noteworthy in this respect.
predictive rules about constitutional law and its creation and operation as distinguished from rules of constitutional law. As Cohen put it, we should not forget that

law is essentially concerned with norms that regulate, rather than with uniformities that describe, human conduct. The laws that natural science seeks to discover . . . are uniformities which if valid at all cannot be violated. . . . But it is of the very essence of legal rules that they are violable and that penalties or sanctions are provided for their various violations. They do not state what always is, but attempt to decide what ought to be.96

The difference is between the "scientific validity of real rules about law . . . [and] the legal validity of rules of law . . . ."96 Impact analysis permits insight to be attained into the operative rules about law, the rules of how law acts in the social milieu.97

Ignored Areas of Inquiry

Constitutional law degenerates into theology and barren exegeses upon the sacred text of the Constitution unless and until it is tested by its consequences. But for such testing to be accomplished attention must be accorded at least three matters, each of which has received little attention in scholarly commentary upon the Supreme Court: (a) an appreciation of the ends sought to be served by the process called constitutional law (and, accordingly, of the ends of American society itself); (b) a method of ascertaining the causal connection between judicial decision and social change, by no means a self-evident proposition; and (c) knowledge of what may broadly be called the political economy of American constitutionalism (the political science, the economics, the psychology, the sociology).

Merely listing these indicates the poverty of knowledge about the constitutional adjudicative process that is the unhappy present fact. Not only do most commentators fail to take the ends or purposes of law and society into account, some even go so far as to deny vehemently that it is a proper inquiry. The most that can be said for that point-of-view is that it tends to relegate discussion of the Supreme Court and its jurisprudence to the same sort of sterile exercises that characterized theological literature during the Middle Ages: endless discussion about mi-

95 M. R. COHEN, LAW AND THE SOCIAL ORDER 205 (1933).
nute doctrinal points. To be sure, there is some value in doctrinal clarification. To quote Cohen again:

[W]ithout the use of concepts and general principles we can have no science, or intelligible systematic account, of the law or of any other field. And the demand for system in the law is urgent not only on theoretical but also on practical grounds. Without general ideas, human experience is dumb as well as blind.98

The point, however, is that more is needed than concepts and general principles. That “more” is the three matters listed above: the ends of law, the causal connection, the political economy of American constitutionalism.

Just as there is an absence of systematic attention paid to the ends of law, so too is there a paucity of knowledge about the relationship between judicial decision and social change. Many observers make statements of an a priori nature. Others proceed on assumptions, acting as if there were causal connections between Court decisions and social change without examination of the bases of those assumptions. Typical are those who have been called “police-prosecution oriented critics of the Courts”—those who assert that judicial decisions have had the consequence of antisocial behavior. Professor Yale Kamisar in a recent article has effectively shown the untenable factual foundation of such criticism.99 Another example is a former president of the American Bar Association, Mr. John C. Satterfield, who maintained in 1962 that “fundamental changes are being made in our form of government by judicial decisions.”100 But if anything is known about social change, it is that it is not unilinear; changes in societal institutions are brought about by a process of multiple causation, one of which at times may be Court decisions—but only one. There is a poverty of knowledge about the relationship between law and social change.101 However, that does not mean that students of the Court should not make the effort to develop insights along such lines.

The ends of society may be considered to be an aspect of ethics or of moral and political philosophy; the causal relationship between law and social change may be said to concern sociology. Lawyers, then, who comment upon Supreme Court decisions must perforce be aware of the mysteries of those intellectual pursuits. So it is with the third requirement of developing rules about law—knowledge of the political economy of American constitutionalism. Here, again, it is obvious that the bulk

98 M. R. Cohen, op. cit. supra note 93, at 63.
of the commentary makes little or no reference to the insights of the political science or of the economics of given decisions. Writers have busied themselves with the niceties of procedure or with the refinement of doctrine. For example, as Judge Henry J. Friendly has noted, in the field of administrative law there is an almost complete failure to note and criticize the substantive aspects of the public administration.\textsuperscript{102} What Mr. Justice Frankfurter\textsuperscript{103} and Mr. Massel\textsuperscript{104} stated with respect to antitrust decisions is further evidence of the void. The gap may be seen with particular clarity in the plethora of law journal articles which have been produced discussing \textit{Baker v. Carr}\textsuperscript{105} and its aftermath. In this commentary there is an almost complete lack of reference to the manner in which the political system of this nation operates.\textsuperscript{106} Some critics line up on one side, in full bay in their denunciation of the decisions; while on the other side, the defenders stand in measured array, stoutly affirming the Court in the reapportionment cases.\textsuperscript{107} For both sides it may be said that they have made little factual inquiry whatever as to the meaning for the political structure of the cases.\textsuperscript{108}


\textsuperscript{103} FRANKFURTER, SOME OBSERVATIONS ON SUPREME COURT LITIGATION AND LEGAL EDUCATION 17 (1954).


\textsuperscript{105} 369 U.S. 186 (1962).


\textsuperscript{107} The commentators upon the reapportionment decisions seem to proceed by what Holmes once called the “inspirational” method. “I sometimes tell students,” Holmes said in 1899, “that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results.” Holmes, \textit{Law in Science and Science in Law}, in \textit{Collected Legal Papers} 210, 238 (1920). But the question in the reapportionment decisions is not so much the logic as the worth of the postulates from which both the Justices and the commentators proceed.

\textsuperscript{108} But see Goldberg, \textit{supra} note 106; Schattschneider, \textit{supra} note 106; Sindler, \textit{supra} note 106.
State of Scholarly Commentary Today

The 1963 Supreme Court Review\(^\text{109}\) is illustrative, by and large, of the state of scholarly commentary today. Operating under an editorial policy illustrated by quotations from Mr. Justice Frankfurter and Judge Learned Hand, which calls for critical but responsible discussions of the judicial process, the editor, Professor Philip B. Kurland, presents the following: (a) a Harvard Law School professor, Ernest J. Brown, on the School Prayer Cases; (b) an assistant professor of law at the University of Chicago, David P. Currie, on the extension of American labor disputes to ships flying “flags of convenience”; (c) a University of Kentucky law professor, Thomas P. Lewis, on the “sit-in” cases; (d) a University of Chicago economist, George J. Stigler, on “block-booking” of motion pictures; (e) the Dean of the University of Wyoming Law School, Frank J. Trelease, on the Arizona-California water hassle; (f) an assistant professor of law at the University of Michigan, Jerold H. Israel, on the right to counsel in state criminal trials; (g) a professor of law at the University of Chicago, Stanley A. Kaplan, on “insider trading” on the stock market; (h) a professor of political science at Brandeis University, John P. Roche, on the expatriation cases; and (i) extracts from correspondence between Mr. Justice Frankfurter and Professor Nathaniel L. Nathanson of Northwestern University regarding the assertion the Justice once made about the nonexistence of a common law of judicial review of administrative action. Let us turn to an analysis of these papers as leading examples of Supreme Court commentary today. What sort of theory of the judicial process do they reflect? Are they coherent statements of what the Court should do as well as what it has done? In attempting a brief answer to these questions the essays will be considered collectively, with references now and then to specific statements.

By and large, the authors appear to believe that what is important about a judicial decision is the manner in which the judgment is justified in the opinion(s) of the Court. Put another way—and with some exceptions—their main inquiry is whether the authors think the Justices have adequately explained the bases for their decisions. Adequacy of explanation, in turn, seems to be predicated upon whether the opinions are phrased in the methodology and terminology familiar to lawyers.

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\(^{109}\) This is the fourth in an annual hard-cover series of the University of Chicago Press, edited by Professor Philip B. Kurland of that university.
Thus we have Professors Currie and Israel opining, in the time-honored style of law-review editors, that the Court was "right" but for the "wrong" reasons. Professor Currie suggests "the Court may quite possibly have reached the correct result in *McCulloch* and *In re*, but certainly not for any of the reasons it considered important"; and Professor Israel, while approving the result in *Gideon v. Wainwright*, believes that "the Court might have framed an opinion . . . consistent with the accepted image of judicial review." On the other hand, Professor Brown appears to feel that the Court not only used the wrong reasons in the 1963 *School Prayer Cases*, but also reached the wrong result. He bids us to "look to the Constitution" and to find that the plaintiffs in those cases did not have the requisite standing to challenge the validity of the school prayers.

Such analyses overemphasize one aspect of the case and slight other equally important features. By concentrating upon the reasoning of the Justices as displayed in their opinions, the commentators have almost completely neglected both the substantive decision itself and the analysis of its importance in the manner in which values are shaped and shared within the nation. Professor Brown, however, does note that we "cannot explore the minds of Justices, and what they do not put on paper we do not know." There is no impact analysis here, save in the brief note by Professor George J. Stigler, who as an economist presumably has not had the benefits of a legal education, and to some extent in Dean Frank J. Trelease's discussion of the Arizona-California water controversy. The tacit assumption seems to be that if the Justice writing the Court's opinion has phrased it in a manner sufficient to make lawyers feel comfortable, the inquiry can then stop. But is this so? I suggest that it is not even half the job necessary, if such commentary is to further understanding of the constitutional adjudicative process. A part of the additional task is an evaluation of the consequences of the decision. As Roscoe Pound observed in 1908:

Scientific law is a reasoned body of principles for the administration of justice, and its antithesis is a system of enforcing magisterial caprice, however honest,

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113 *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, in *id.* at 1, 32.
and however much disguised under the name of justice or equity or natural law. But this scientific character of the law is a means, —a means toward the end of law, which is the administration of justice. . . . Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.115

Of the papers in the 1963 volume of the Supreme Court Review, only that of the economist (Professor Stigler) makes any attempt to evaluate a Court decision "by the results it achieves, not by the niceties of its internal structure." Quite obviously, this paucity of impact analysis will not do, if ever students of constitutional adjudication are to attain an adequate understanding of that process. That task of understanding, it is to be emphasized, involves something different from the task of advocacy. It is one thing to present legal doctrine so as to achieve a desired end for a client; that, I take it, is the essence of an attorney's job before an appellate court. But it is quite another thing to ask the question of the nature of the adjudicatory process when the goal is that of scholarly understanding, without any interest other than that of furthering human knowledge.116

What may be seen in the commentary upon the Supreme Court is what may be termed "absolutistic legalism."117 In brief, this is the fallacy which maintains that the Court and its jurisprudence is to be equated with an ordinary court of law. Believers in the fallacy parse Supreme Court decisions in much the same way as they would the decisions of, say, the Supreme Court of Missouri in a case involving the formation of a contract or the imposition of tort liability. Without going into the question of whether even those issues require more than "pure" legalistic lore to understand them (I believe they do), "we cannot pretend that the United States Supreme Court is simply a court of law."118 The issues before it depend upon the evaluation of facts of all types, their consequences, and the values which are attached to those consequences. "These are questions of economics, politics and social policy which legal

115 Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908).
117 See M. R. Cohen, op. cit. supra note 93, at 88.
118 Id. at 73.
training cannot solve unless law includes all social knowledge." Adherence to the fallacy of legalism will never produce meaningful insights into the role of law in society or of predictive or descriptive rules about law.

If ever we are to be able to slough off the sterilities of legalism in commentary upon the Court, legal educators, it would seem, must take the lead. And that means that the role and function of the law school must be reexamined. Its position within a university structure is larger than the mere production of specialists who will man the nation’s law offices in the practice of the law. That is, of course, an indispensable element in the task of the law school. But there is more. Without developing the topic fully, it may be said that scrutiny of the questions posed in this subsection is also the responsibility of the law schools. They are not doing it now. But they should. There is no reason to have a law school as part of a university unless it devotes itself to more than turning out legal technicians.120

**Personal Values of the Commentator**

This section is headed by reference to the "disinterested" observer. The word "disinterested" was put in quotes in order to indicate that in scholarly and other commentary upon the jurisprudence of the Supreme Court (or of any other area, for that matter), no one can be wholly impartial or disinterested or neutral. Everyone, that is to say, brings in to his scrutiny of a problem area a set of values which unavoidably colors his research or study—or, in the case of the judge, his decision. The idea of value-free research is a myth; it is unattainable in spite of the best intentions. "Values are an integral part of personality and as long as we are human," a political scientist has said, "we can assume that these mental sets and preferences will be with us."121 That there can be a value-free social science is chimerical. Even when a researcher claims impartiality, "there can be no doubt that he has simply driven his moral views so far underground that even he himself may no longer be aware of them."122

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119 *Id.* at 74.
120 At the very least the requirement is for continuing and meaningful relationships with other parts of the university structure. This has become particularly important with the advent of public law as the principal basis of the legal system. See Miller, *The Impact of Public Law on Legal Education*, 12 J. Legal Ed. 483 (1960).
The idea that personal values inevitably accompany—and color—research in human affairs (including law) is widely accepted by leading social scientists of the era. In like manner, a "disinterested legal science," including that part of it which is devoted to analysis and explanation of the role of the Supreme Court, is nonsense. It is unattainable. What this requires, accordingly, is avowedly "facing the valuations" which are present in all commentary upon the Court. And that requirement, which unhappily is present in almost none of the commentary, has two aspects. It is important, in the first place, in order to permit readers of exegeses upon Supreme Court texts to be able to evaluate them in the light of the admitted value preferences of the writers. And secondly, it is necessary in order for social (and legal) data to be managed—to be organized into a coherent presentation. The first facet is of particular significance in the subject matter of this article, for only when a writer's value premises are set forth expressly and carefully is it possible to determine the validity of conclusions which are reached. The ends of intelligible comment upon such an important societal institution as the Supreme Court are not served by hiding, or by ignoring, the value preferences which are brought to the exposition by all commentators (including, of course, the present writer).

The task of delineating such value premises will not be easy, just as it will be difficult, as noted above, for commentators to set forth with particularity and comprehensiveness the goals of the constitutional adjudicative process. But both jobs are necessary and must be tackled if a full understanding of the Court is to be attained, if valid rules about constitutional law are to be developed.

**Conclusion**

Speaking in 1881, Oliver Wendell Holmes stated that

the philosophical habit of the day, the frequency of legislation, and the ease with which the law may be changed to meet the opinions and wishes of the public, all make it natural and unavoidable that judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end ... 124

Thus the idea that what has herein been called "impact analysis" would be useful in the analysis and explication of the jurisprudence of the Supreme Court is far from novel. In fact, it was not novel even to


Holmes, for Jeremy Bentham said much the same thing earlier in the 19th century. The two Cohens, among others, said it in the 1920's and '30's; writing as important figures in the movement since called "legal realism," Morris Raphael Cohen and his son, Felix, emphasized the need for looking to the ends and purposes of law and the adjudicative process. Others have made similar pleas.

The present article is an effort to update the discussion, to reaffirm the need for more than conceptual analyses, if ever an understanding of the Supreme Court is to be attained, and to point out some of the difficulties of such an undertaking. It will not be an easy task, for it calls for a level of competence and expertise on the part of both judge and commentator that is rare indeed. But it is necessary. One may be pardoned the hope that the on-going discussion of the role and jurisprudence of the Supreme Court will soon encompass deeper and broader studies, studies which will produce the needed rules about constitutional law and the Court, as well as analytical expositions of the Court's doctrine.

COPYRIGHTS, PERFORMERS' RIGHTS AND THE MARCH ON CIVIL RIGHTS: REFLECTIONS ON MARTIN LUTHER KING, JR. v. MISTER MAESTRO

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Employing the King decision as a case in point, the author analyzes the problems involved in attempting to apply antiquated common-law and statutory copyright theories in our modern era of mass communication. He then reviews various performers' rights theories which he contends can be rationally applied in cases such as King, and examines the conflict of laws problems involved therein, particularly between state and federal courts. Recognizing that the ultimate solution lies in legislation, Mr. Krasnow concludes with a commentary on recent proposals for amendment of the copyright laws.

This action for copyright infringement presents us with a picture all too familiar in copyright litigation: a legal problem vexing in its difficulty, a dearth of squarely applicable precedents, a business setting so common that the dearth of precedents seems inexplicable and an almost complete absence of guidance from the terms of the Copyright Act.1

INTRODUCTION

A speech delivered to an audience of nearly a quarter million people and simultaneously broadcast to untold millions presented the United States District Court for the Southern District of New York with a modern-day sequel to the landmark American copyright case of Ferris v. Frohman,2 which held that public performance of a play does not constitute publication. The facts in the case, garbed with all the accouterments of recent technological innovation, squarely raised the issue of whether traditional concepts of public performance and publication are now outmoded in view of scientific advances in the communications process.

The very physical staging of the speech and its widespread dissemination stand in stark contrast to the methods available of presenting performances of The Fatal Card3 to audiences at the turn of the century. A powerful public address system network enabled the assembled throng

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1 Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304 (2d Cir. 1963).
2 223 U.S. 424 (1912); see pp. 416-17 infra.
3 The name of the play involved in Ferris v. Frohman, supra note 2.

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of over 210,000 to witness a live performance of the speech. In addition to domestic television coverage, transmission of the speech was relayed "live" to Europe by Telstar II and telecast in nine West European countries by the Eurovision network and in seven Iron Curtain nations by the Intervision network. Television film crews from countries such as Britain, Japan, France, Canada and West Germany added to the extensive world-wide dissemination of the speech. Hundreds of radio circuits, private lines and direct lines were installed for maximum radio coverage. Reporters for newspapers and magazines, equipped with advance copies of the speech, were able to record both the message and the manner of delivery of the speaker to their vast reading public. All in all, the coverage makes the numbers who attended the performances of The Fatal Card seem, in relative terms, to be of minimal proportions.

In King v. Mister Maestro, Inc., Judge Inzer B. Wyatt was moved neither by the weight of numbers nor by the force of technological innovation. He held that the oral delivery of a speech, no matter how vast the audience, does not amount to a general publication, citing the 1912 Ferris decision, and that providing advance copies of a speech to members of the communications media does not place the work in the public domain.

BACKGROUND AND ANALYSIS OF King v. Mister Maestro, Inc.

The speech in question was delivered by Rev. Martin Luther King, Jr., president of the Southern Christian Leadership Conference. Dr. King delivered this address at the foot of the Lincoln Memorial on the occasion of the "Freedom March on Washington, D.C.," and his "powerful voice swept the reaches from the Lincoln Memorial to the Washington Monument, packed solid with attentive, devoted, somber multitudes." News commentators observed that Dr. King's peroration was the most stirring and impressive of all the speeches delivered at the Freedom March rally, especially his repetition of the words "I have a

dream." Dr. King had used this phrase in a speech, similar in content and theme to his Freedom March oration, delivered on June 23, 1963, at Cobo Hall auditorium, Detroit, Michigan.10

The National March on Washington Committee requested Dr. King, along with other participant speakers, to furnish its Washington, D.C., press liaison with an advance copy of his speech to be made available at a late afternoon press conference scheduled for August 27, 1963. Dr. King was not able to comply with this request, since he did not finish writing the complete text of the speech until four a.m. on the morning of August 28, 1963.11 A copy of his speech was given to the press liaison office on August 28, mimeographed, and inserted, along with other materials, into a "press kit" containing the advance texts or excerpts of the speeches of persons participating in the official program of the Civil Rights March on Washington. The press release contained approximately sixty-two per cent of the total speech actually delivered by Dr. King.12

Excerpts from Dr. King's speech were reprinted in all the major newspapers and news magazines in the United States. 20th Century-Fox Record Corporation, one of the defendants in this case, made a phonograph record of the speeches delivered during the March from the sound track of the newsreel of Movietones, Inc.,13 and on September 18, 1963, began selling these records in an album entitled Freedom March on Washington, August 28, 1963. A similar record, entitled The March on Washington, was made and distributed by Mister Maestro, Inc., also a defendant in this case. On September 1, 1963, the New York Post published the complete text of Dr. King's speech under the title "I Have A Dream." Reprints were offered to the public for sale, ranging in price from one cent per copy for quantity orders to ten cents for a single copy. Dr. King stated that he had not consented in any way to such reprinting but "neither requested nor authorized any person to request that any monies received, or any portion thereof, by the New York Post" from this reprint be paid over to himself individually or to any organization.14

11 Affidavit of Dr. King, Nov. 29, 1963, p. 2.
13 20th Century-Fox Record Corporation and Movietones, Inc. are both subsidiaries of Twentieth Century-Fox Film Corporation.
14 Affidavit of Dr. King, op. cit. supra note 11, at 5.
More than a month after the delivery of the Freedom March speech, on September 30, 1963, Dr. King sent to the Copyright Office a copy of the speech under the title "I Have A Dream" and an application form for a certificate of registration of his claim to copyright in the class C category of unpublished works.  

A class C copyright was subsequently issued by the Copyright Office, showing receipt of the application on October 2, 1963.  

Dr. King filed suit in the United States District Court for the Southern District of New York on October 4, 1963, for a permanent injunction, damages, and an accounting against three defendants, Mister Maestro, Inc., Twentieth Century-Fox, Inc., and Motown Record Corporation.  

Dr. King asserted that he had authorized the Council for United Civil Rights Leadership to issue a record of the Freedom March speech in order to raise funds for promotion of the civil rights movement. He further claimed that issuance by commercial record companies of recordings of this speech would reduce the revenues available to the Council.  

Plaintiff then moved for a temporary restraining order and a preliminary injunction enjoining the defendants from selling phonograph records of his Freedom March speech, or from otherwise infringing the copyright claimed for the speech. On the same day, Judge Frederick van Pelt Bryan denied the application for a temporary restraining order but issued an order to show cause why a preliminary injunction should not be granted. At that time Dr. King was not able to show that a certificate of registration had been issued. Judge Wyatt heard the motion for a preliminary injunction on October 8 and 9, 1963.  

On October 21, 1963,  

16 Copyright Act, 17 U.S.C. § 5(c) (1958). This section of the act lists the various categories of works for which copyrights may be obtained. A class C copyright is issued for "lectures, sermons, addresses (prepared for oral delivery)."  

17 By stipulation, 20th Century-Fox Record Corporation was substituted for Twentieth Century-Fox Film Corporation, the party originally served. 224 F. Supp. at 105.  

18 Involvement of Motown Record Corporation in a multi-defendant infringement suit lodged by the Rev. Dr. Martin Luther King was in error, and the company's name has now been dropped from the suit, according to Motown spokesmen. According to officials of Motown, King and the record company's president, Berry Gordy, Jr., are close friends and that when King's attorney, Clarence Jones, filed the suit, he was not aware of this and of previous agreements made between these two men, and added the name of Motown to those of the other three defendants. . . . Motown says it will soon issue another LP, entitled "The Great March on Washington."  

19 Judge Wyatt, rather than deny Dr. King's motion for injunction or grant him leave to amend, as is the normal procedure when certificate of registration cannot be shown, simply waited until Dr. King could show his certificate of registration and then decided the motion.
the Copyright Office received Dr. King’s application for a class A registration which was subsequently issued to him.  

In an opinion dated December 13, 1963, Judge Wyatt upheld Dr. King’s right to a preliminary injunction on the basis that “there are . . . no principles which prevent relief to plaintiff from what seems the unfair and unjust use by defendants of his speech and his voice.”21 He first decided that the Freedom March speech was original enough to be the subject of a copyright, being “sufficiently different in length, content and otherwise” from the Cobo Hall, Detroit, address so as not to destroy its originality for copyright purposes.22 As to the public nature of the delivery of the speech, “the enormous crowd, the radio and television broadcasts, the movie newsreel pictures,” Judge Wyatt held, as noted above, that the “oral delivery” of the speech, no matter how vast the audience, did not amount to a general publication of Dr. King’s literary work.23 Distinguishing Public Affairs Associates v. Rickover24 where there was a wide distribution of a speech to people who desired copies as well as to the press, the conclusion seemed plain to Judge Wyatt that Dr. King’s distribution of copies of his speech to the press only was a “limited publication.”25 Since Dr. King “has made, or is making arrangements to market phonograph records of his speech through an organization of his own choosing,”26 competition by defendants showed sufficient danger of irreparable injury to justify plaintiff’s right to a preliminary injunction.

This article will analyze the above holdings, as well as other issues presented to the court by Dr. King’s Freedom March speech, namely, the prerequisites for suit on a statutory copyright theory; belated registration and its relation to injunctive relief; and the problems, substantive as well as procedural, contained in suit under various performers’ rights theories, including unfair competition and the right of publicity.

THE FORCE OF “CARDIAC LAW”

As frequently happens in the judicial determination of a case involving the rights of parties in a technical and complex area of the law, decisions

20 Dr. King sought the class A registration in anticipation of the publication of his speech, since the class C registration covers only speeches prepared for oral dissemination.  
21 224 F. Supp. at 108.  
22 Id. at 106.  
23 Id. at 107.  
26 Ibid.
are made viscerally at the outset followed by a search to find sufficient "law" to justify the cardiac judgment. Judge Wyatt seems to have stated this very proposition in the text of his opinion:

As an original proposition, it seems unfair and unjust for defendants to use the voice and the words of Dr. King without his consent and for their own financial profit. Of course, decision cannot be made simply because of such a feeling. This is a Court of law which must look to legal principles established by the Congress and by higher Courts.27

Judge Wyatt devoted his attention at the beginning of the opinion to relating the accomplishments of Dr. King and quoted extensively from a laudatory commentary by James Reston, chief of the New York Times Washington Bureau, on the impact of his Freedom March speech. A judge should not be criticized for honestly depicting his approach to judicial decision-making nor for his attempt to catch the flavor of the Freedom March speech and to describe the importance of Dr. King "in the movement to secure equal rights for negro citizens."28 However, a judge may deservedly be subject to criticism in those instances where his emotion clouds his rational judgment. This seems to be the case in Judge Wyatt's interpolation of the force of the Copyright Act, in which he stated:

The copyright statute itself plainly shows that "oral delivery" of an address is not a dedication to the public. Sections 5(c) and 12 (of Title 17 U.S.C.) taken together show that Congress intended copyright protection for "[l]ectures, sermons, addresses (prepared for oral delivery)" despite such "oral delivery."29

This is a classic non sequitur since the inclusion by Congress of "lectures, sermons, addresses (prepared for oral delivery)"30 as works registrable under the Copyright Act has absolutely no relation to the question of whether an oral delivery of an address is or is not a "dedication to the public."

BELATED REGISTRATION AND INJUNCTIVE RELIEF UNDER
A STATUTORY COPYRIGHT

Both at the time he filed suit and during the hearing before Judge Bryan on the show-cause order, Dr. King had failed to show that his speech had been registered. Section 13 of the Copyright Act explicitly states that registration is the *sine qua non* for maintenance of an action

27 *Id.* at 105.
28 *Id.* at 103.
29 *Id.* at 106.
for infringement of a statutory copyright.\textsuperscript{31} For example, in \textit{Lumiere v. Pathe Exchange, Inc.},\textsuperscript{32} the court affirmed a judgment dismissing \textit{without prejudice} an action for infringement because the copyright owner had deposited with the Register of Copyrights only one copy, instead of two, as the Copyright Act requires. It seems both logical and consistent with cases such as \textit{Lumiere} that Dr. King would have been allowed to amend his pleading and maintain an action under the Copyright Act after he was able to show that proper registration had been procured, had he moved for leave to amend.\textsuperscript{33}

Section 12 of the Copyright Act offers no guidance as to the proper time for the deposit of a copy of an unpublished work, except that the deposit must be accomplished before the reproduction of copies. No mention of performance of the work is contained in section 12 and by its silence, this section seems to allow deposit to be made before, upon or after performance.\textsuperscript{34} Past practice under the section indicates that it is quite common for registration of an unpublished work to be sought after a period of time has elapsed since the initial public performance. A question is raised as to the significance of belated registration and whether statutory copyright protection should be applied retroactively, for it was during the period before registration of the class C copyright, a time during which Dr. King may be said to have been sleeping on his statutory rights, that defendants "copied" the speech and placed records thereof on sale to the public.

While Judge Wyatt noted that plaintiff's suit was based on infringement of his statutory copyright, he apparently did not believe that the issues posed by belated registration and the quantum of relief were of sufficient import to merit even a passing reference. In this connection, a glaring error of omission in the \textit{King} decision is the absence of discussion of the effect of registration of an unpublished speech over a month after

\textsuperscript{31} Copyright Act, 17 U.S.C. § 13 (1958). This section provides in part: "No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with."

\textsuperscript{32} 275 F.2d 428 (2d Cir. 1921).

\textsuperscript{33} See Algonquin Music, Inc. v. Mills Music, Inc., 93 F. Supp. 268 (S.D.N.Y. 1950); Rosedale v. News Syndicate Co., 39 F. Supp. 357 (S.D.N.Y. 1941). The question of whether Dr. King could amend was mooted, however, since Judge Wyatt chose to wait until Dr. King could show his certificate of registration before he decided the motion for preliminary injunction.

performance and more importantly, after defendants placed the Freedom March record on sale. Registration of an unpublished work under the Copyright Act, no matter how long after actual performance, provides a "bundle of rights" to the owner which comes into being upon the date of registration.\textsuperscript{85} Under this reasoning, statutory damages are awarded from the date of registration and in this case, issuance of an injunction under the force of the statutory copyright should be applied only to acts occurring after registration. Since Dr. King sought a preliminary injunction to restrain defendants from selling phonograph records or otherwise infringing the copyright claimed for the speech, the injunctive relief granted under the aegis of a statutory copyright should have been prospective in nature, denying further reproduction of the speech and distribution of records made after the statutory copyright had been registered. An analogous equitable doctrine is found in section 9(b) of the Copyright Act which empowers the President of the United States to grant extensions of time under certain specified circumstances to aliens who are not able to comply with conditions and formalities of the Copyright Act "because of the disruption or suspension of facilities essential for such compliance . . . ."\textsuperscript{86} This section contains the following proviso to safeguard the rights of those who acted prior to the date of the presidential proclamation:

\textsuperscript{[N]}o liability shall attach under this title for lawful uses made or acts done prior to the effective date of such proclamation in connection with such works, or in respect to the continuance for one year subsequent to such date of any business undertaking or enterprise lawfully undertaken prior to such date involving expenditure or contractual obligation in connection with the exploitation, production, reproduction, circulation or performance of any such work.\textsuperscript{87}

The foregoing discussion is somewhat academic in view of the fact that Dr. King might also have been granted the full measure of injunctive relief on the basis of his common-law copyright but the court's silence, far from being golden, serves to obfuscate a rational dichotomy of the effects of performance and substantial infringement before the date of registration.

\textbf{FORFEITURE OF COMMON-LAW PUBLICATION RIGHTS}

The court viewed the central issue in \textit{King} as whether "Dr. King lost any right to copyright protection because what he did in Washington


\textsuperscript{86} Copyright Act, 17 U.S.C. § 9(b) (1958).

\textsuperscript{87} \textit{Ibid}.
placed the speech in the public domain . . . because it amounted to a publication without obtaining a copyright."§8 Section 8 of title 17, U.S.C., provides that "no copyright shall subsist in the original text of any work which is in the public domain . . . ." Thus, Dr. King's speech would have been deemed to have been placed into the public domain and thereby become ineligible for statutory copyright if the court found that there was "publication" before protection of the Copyright Act had been obtained.

Judge Wyatt commented: "The general principles of law here involved are relatively simple; their application in some cases is difficult."§8 However, rather than being a simple abstraction, the concept of "publication" in copyright law "is legally very old and of no one certain meaning."§9 The task of determining what constitutes "publication" of a work prepared for oral delivery is made more difficult by the fact that the concept of publication evolved in earlier times when the public dissemination of copyrightable works was limited to reproduction and distribution of copies. The doctrine of "limited publication," a key issue in this case, was developed by the courts in order to mitigate the harsh rule of complete forfeiture of common-law rights when authors allowed a restricted number of people to view copies of their writings to obtain their opinions thereof or when their manuscripts were shown to publishers to determine their publication value. §10 The early copyright statutes, both here and in England, secured to the author of a literary work only the right to print, publish and republish copies. §11 Thus, the court was faced with the inordinately difficult task of applying traditional concepts of publication, the "old war horse,"§12 developed in an era where the printing of copies of literary works was the major means of dissemination, to a modern-day factual situation where the wonders of electronic communication enabled millions of people to be "eye witnesses" to the performance of the speech.

As the court noted, the intent of Dr. King was "legally irrelevant" in determining whether there was a general publication and "the question is solely what he did."§13 The legal fiction of "intent" which has been

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§8 224 F. Supp. at 106.
§9 Id. at 105.
§10 Marx v. United States, 95 F.2d 204, 206 (9th Cir. 1938).
§12 Act of May 31, 1790, ch. 15, 1 Stat. 124; 8 Anne, c. 19 (1709).
§14 224 F. Supp. at 103.
used by some courts\textsuperscript{45} is an especially inappropriate means of determining whether the creator of an intellectual production has forfeited his rights in his work since, as a practical matter, the creator rarely \textit{intends} such a forfeiture.\textsuperscript{46} After establishing the test as an \textit{objective} determination, the court lapsed into phraseology, such as the following, which is more consistent with the \textit{subjective} formula of intent: "There can be a limited publication, which is a communication of the work to others under circumstances showing no \textit{dedication} to the public. A general publication shows a \textit{dedication} to the public so as to lose copyright."\textsuperscript{47} Although citing \textit{National Comics Publications v. Fawcett}\textsuperscript{48} for the proposition that the element of intent is legally irrelevant, the court apparently did not heed the caveat in that case by Judge Learned Hand, who commented on the inapposite use of the term \textit{"dedication"}:

It is of course true that the publication of a copyrightable \"work\" puts that \"work\" into the public domain except so far as it may be protected by copyright. That has been the unquestioned law since 1774; and courts have often spoken of it as a \textit{"dedication\"} by its \"author or proprietor.\" That, however, is a misnomer, for \textit{"dedication\"}, like \textit{"abandonment\"}, presupposes an intentional surrender, which is in no sense necessary to the \textit{"forfeiture\"} of a copyright.\textsuperscript{49}

In reviewing the conclusions drawn by the court based on its observation of the acts of Dr. King, two methods of dissemination of the speech will be treated separately: (1) relations with the press, including distribution of the speech in the \"press kit\" and the sale of reprints by the \textit{New York Post}; and (2) the public performance of the speech at the Freedom March.

\textbf{Dissemination to and by the Press}

Judge Wyatt held that \"the conclusion seems plain\" that Dr. King's delivery without a copyright notice of an advance text of his speech and its distribution to the press amounted to a limited publication (and thus no publication at all).\textsuperscript{50} He stated that \"the significant and important fact is that the copies were distributed \textit{only to the press} and that the distribution took place only in the \textquoteleft press tent.\textquoteright\textsuperscript{51} This is \"a very dif-

\begin{thebibliography}
\item \textsuperscript{45} E.g., American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907); Waring v. WDAS, 327 Pa. 433, 194 Atl. 631 (1932).
\item \textsuperscript{47} 224 F. Supp. at 106. (Emphasis added.)
\item \textsuperscript{48} 191 F.2d 594 (2d Cir. 1951).
\item \textsuperscript{49} \textit{Id.} at 598.
\item \textsuperscript{50} 224 F. Supp. at 108.
\item \textsuperscript{51} \textit{Id.} at 103.
\end{thebibliography}
ferent situation” from that in the Rickover case where Judge Wyatt stressed there was a wide distribution of the speeches not only to the press but also to people in general who desired copies.52

In determining whether there was a general or limited publication, a very important and significant act of Dr. King was omitted, namely, his acquiescence by silence in the New York Post’s reprint of the entire text of his speech and subsequent sale to the public.53 This fact should be borne in mind in comparing Rickover, where the court of appeals stated:

Certainly when all of Admiral Rickover’s acts of distribution are considered together—performance, distribution to the press, the copies sent to individuals at the recipient’s request and those sent unsolicited, the copies sent in batches of 50 for distribution by the sponsors of speeches—it is difficult to avoid the conclusion that these acts, in their totality, constitute publication of the speeches and their dedication to the public domain.54

The Rickover court forcefully and pungently noted: “That these speeches were open to the entire world could not have been more clearly manifested unless the author had printed upon the copies, ‘All claims to copyright waived.’”55 The facts in King are not so strong and compelling as those in Rickover since Dr. King did not personally provide copies of his speech to the interested public in general. However, to paraphrase the opinion in Rickover, it seems that all of Dr. King’s acts of distribution, when considered together—performance before an audience of millions, distribution of an advance text of his speech to the press, acquiescence in the sale of reprints of his speech to the general public—militate in favor of holding that these acts, in their totality, constitute publication of the speech and its forfeiture to the public domain.

A “limited publication” which does not result in a loss of an author’s common-law copyright has been defined as the communication of the contents of a manuscript “to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale.”56 In determining whether there is a general publication, the courts require that considerably more public dissemination be proved to support such a holding, divesting the creator of his rights in material, than would be necessary to uphold a copyright which has been sought through pub-

52 Id. at 107.
53 Id. at 104. Judge Wyatt mentions the New York Post sale of reprints in his statement of facts but not in his discussion of the decisional facts.
55 Ibid.
56 White v. Kimmell, 193 F.2d 744, 746-47 (9th Cir.), cert. denied, 343 U.S. 957 (1952).
lication with notice under the Copyright Act.\textsuperscript{57} The acts of Dr. King are to be viewed with the above standards in mind. In allowing advance copies to be distributed to the press, Dr. King was implicitly granting recipients permission to reproduce and distribute these copies in any manner they might deem appropriate. Thereafter, Dr. King did not take any action to discourage or prevent the \textit{New York Post} from reprinting his speech and selling copies to the public for a profit. In \textit{White v. Kim-mell},\textsuperscript{58} it was held that failure of the lecturer to enforce his stated restriction resulted in a general, divestitive publication. In \textit{Nutt v. National Institute Inc. for the Improvement of Memory},\textsuperscript{59} a case cited by Judge Wyatt, the court of appeals in order to conclude that there was a limited publication, found an implied limitation on the use that members of the lecturer’s audience could make of the copies of their notes, namely, that they could not sell them. Here, such an implied limitation was negated by Dr. King’s acquiescence in allowing the \textit{New York Post} to sell copies of the full text of his speech to the public. Concurring in this observation is Melville Nimmer, described by Judge Wyatt as a “recognized authority in the field,” who states:

A more difficult problem is presented where no restrictions are put on the use of the work, but copies of the work are offered to only a limited group. Since in such a situation the limited group originally receiving the work may freely copy and disseminate it, ultimately the group receiving the work will be unlimited. The courts are therefore justified in holding, as they have, that a publication will be general, rather than limited, unless the restriction is restricted both as to persons and purpose.\textsuperscript{60}

Setting aside the factor of acquiescence in the sale of reprints of the speech, the distribution of advance copies to the press, without anything more, poses not only a closer case for the courts to decide but also raises very important policy questions involving the goals and conflicting interests of copyright law and the free, untrammelled dissemination of news. In \textit{Rickover} it is not certain whether the court of appeals would have reached the same result if the distribution of speeches were limited to an advance press release.\textsuperscript{61} Judge Wyatt quoted the portion of Judge

\textsuperscript{57} \textit{E.g.}, American Visuals Corp. v. Holland, 239 F.2d 740 (2d Cir. 1956).
\textsuperscript{58} 193 F.2d 744 (9th Cir.), \textit{cert. denied}, 343 U.S. 957 (1952).
\textsuperscript{59} 31 F.2d 236 (2d Cir. 1929).
\textsuperscript{60} Nimmer, \textit{Copyright Publication}, 56 Colum. L. Rev. 185, 200 (1956).
\textsuperscript{61} Nor do we have any problem as to limited use of the addresses by the press for fair comment. The press was free to use the speeches in whole or in part for their news value. But such ephemeral use is far different from the unlimited distribution to anyone
Washington's dissent in Rickover\textsuperscript{62} where he states that speeches of "men in the forefront of public life are unique among literary products" because they may be of "news" as well as of literary value.\textsuperscript{63} Judge Washington contended that the public interest in the news value of an author's work may be preserved by allowing the author to make copies available to other interested persons without extinguishing his right to publish commercially after the immediate news importance has passed.\textsuperscript{64} In support of Judge Washington's view, it may be argued that since a well-informed electorate is essential to the functioning of a democratic government, statements of great public interest, although otherwise copyrightable, should be free from the monopolistic limitations of copyright because of that interest.\textsuperscript{65} Furthermore, permitting the dissemination of advance copies of a speech to the press may insure more complete and accurate news coverage, thus protecting the public from inaccurate and incomplete condensations.\textsuperscript{66}

There are a number of serious limitations inherent in the implementation of Judge Washington's view which nullify its noble purpose. First, there is a grave question whether the courts would be able to devise a reasonable formula to designate those people in the forefront of public life. If this class is defined broadly, it loses all of its vitality since it is difficult to conceive of a situation where an author's unpublished speech or play would be recorded or reprinted unless he is in the public eye. If the term is defined narrowly, the courts will be forced to make traditionally nonjudicial decisions as to who are in the forefront of public life at a given point in time. Judge Washington's standard poses the further question as to whether the rationale of the copyright law should apply in equal measure to public figures as well as to others, and if not, what compelling public interest considerations support such a distinction. Moreover, a special class of authors or added copyright protection is not needed to encourage the free circulation of newsworthy ideas, since the doctrine of

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\textsuperscript{62} Id. at 139, 284 F.2d at 273 (dissenting opinion).

\textsuperscript{63} 224 F. Supp. at 107.

\textsuperscript{64} 109 U.S. App. D.C. at 139, 284 F.2d at 273.

\textsuperscript{65} See 73 Harv. L. Rev. 1219, 1220 (1960).

\textsuperscript{66} Id. at 1221.
"fair use" already permits liberal quotation and summary for purposes of reporting, review or analysis.67

Public Performance

Judge Wyatt, after a cursory reference to the major cases holding that performance is not publication, stated that it has never been suggested that the number of persons in the audience had any effect on the decision in these cases and concluded that size was an irrelevant consideration. He then quoted from Nimmer's article: "This analysis suggests that a sine qua non of publication should be the acquisition by members of the public of a possessory interest in tangible copies of the work in question."68 However, Nimmer's next sentence was omitted in which he admits that this rule has never been expressly formulated by any court and in certain cases has been tacitly denied.69 Before discussing the application of precedents to the facts in King, a brief review of the state of the law in this area is called for.

The landmark case of Ferris v. Frohman70 involved an action brought to restrain the production of a play which had been substantially copied from the original. The original play was registered for copyright in England but not in the United States, where it had been publicly performed. Mr. Justice Hughes, speaking for the Supreme Court, held:

The public representation of a dramatic composition, not printed and published, does not deprive the owner of his common-law right, save by operation of statute. At common law, the public performance of the play is not an abandonment of it to the public use.71

The Ferris case has been criticized on several grounds by various commentators. First, it is contended that the enactment by Congress in 1909 of section 11 of the Copyright Act,72 providing copyright protection for unpublished works, overturns the holding of Ferris, which although decided in 1912, arose on facts occurring before 1909. The significance of Mr. Justice Hughes' phrase "save by operation of statute" is interpreted as meaning that the Court's holding was impelled by the fact that an author of an unpublished work did not have any statutory right and that the Copyright Act of 1909 evidenced a congressional intent to prevent an

69 Ibid.
70 223 U.S. 424 (1912).
71 Ibid. at 435.
unpublished work from being economically exploited by performance forever, or of limited duration only, depending on the decision of the author. Selvin criticizes the Court’s reliance on cases it cited for the proposition that at common law, performance did not “dedicate” and believes that a contrary conclusion is called for. The Court’s decision has also been criticized for being “curiously deficient in analysis of the interests involved; there was no discussion of the constitutional clause nor of the purpose of the Copyright Act, nor of the adequacy of the traditional test of publication [for] works exploited in non-traditional ways. One commentator, noting that neither the Court nor the briefs of counsel posed the constitutional “limited times” question, conjectures that the Court might have decided against granting plaintiffs a perpetual monopoly had the policy expressed in the Constitution been urged upon the Court. Professor Kaplan’s criticism of the Ferris holding is more basic, namely, “that it is abhorrent to the central theme of copyright to permit the dramatist (or composer) to exploit his work, and that in a way most appropriate to the medium, without exacting the usual limits on monopoly.”

In spite of the above-noted learned criticism, the courts have consistently followed the Ferris rule that public performance does not result in publication. In Uproar Co. v. National Broadcasting Co., it was held that a radio performance did not constitute a general, divestitive publication. Although state courts are no longer bound by cases such as Uproar since the Supreme Court’s decision in Erie v. Tompkins, most have fol-

73 Selvin, Should Performance Dedicate?, 42 Calif. L. Rev. 40, 44 (1954). But see Nimmer, supra note 60, at 195 n.92. Nimmer states that “this position loses much of its persuasiveness by reason of the practical difficulties of deposit and registration which must be undertaken in order to obtain protection under § 12.” Ibid. In addition, the kind of statute that the Court was referring to in Ferris was probably the English statute cited in the opinion which provides unequivocally that performance of a drama amounts to a dedication to the public. 223 U.S. at 434.
74 Selvin, supra note 73, at 47-48.
75 U.S. CONST. art. 1, § 8.
77 Walker, Publication and the Copyright Law Revision, 50 Calif. L. Rev. 672, 675 (1962).
78 Kaplan, supra note 34, at 479.
There are only a few cases holding that performance may result in forfeiture. In *Blanc v. Lantz*, the rendition of a "musical laugh" in radio broadcasts and in films was held to be a general publication; this case is weakened by the court's reliance on the fact that copies in the form of motion pictures were distributed. In a Montana case involving the use of CATV, the court construed a state copyright statute to mean that an original broadcast destroyed all property rights in the material broadcast. However, in the above cases, the courts were interpreting state copyright statutes which contained the phrase "makes it public." In California, section 983 of its Civil Code was changed from "makes it public" to "publishes" and thereafter California courts adopted the rule that performance does not forfeit common-law rights.

The general principle that performance does not dedicate is probably too well established to change without legislation. Nevertheless, the court in *King* might still have held that Dr. King's performance at the Freedom March rally forfeited his common-law rights without overruling past precedent. The size of an audience should not be determinative, since such a test might degenerate into a numbers game by the courts. However, the purpose of the speech and the manner in which the audience is invited as well as the nature of their attendance should be relevant factors. The purpose of the speech, as stated in a message signed by Dr. King, was to make the entire March, including the speeches, a "living petition" for all Americans. It is difficult to categorize the throng of 210,000 who gathered in Washington, D.C., for the March as a "limited audience," not merely because of the vast numbers but because of the broad solicitation to the general public to attend the Freedom March program. The extensive television, radio, newspaper, magazine and newsreel coverage certainly should have put the court on notice that the leaders of the March, including Dr. King, helped to facilitate and expected to receive as much public dissemination of the speeches as possible.

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85 "Rights of great value, no doubt, have vested in reliance on what it has been supposed is the law." Selvin, supra note 73, at 51.
The Freedom March speech is thus distinguishable from other types of performances, such as the production of stage plays and lectures by academic instructors, which have been held not to constitute a "general" publication. The dissemination in stage plays and lectures is to a limited audience (a limited group of ticket purchasers or students) and the purpose is the limited one of either instruction or entertainment of the immediate audience.

Judicial Guidelines

If the author of an unpublished work refrains from making copies thereof or registering it, his work is protected from the cradle to beyond the grave even though he becomes a multimillionaire in the process of publicly exploiting his work. The determination of the difference between a general publication which will forfeit the work to the public and a limited publication which will not, presents a thorny problem of balancing the interests promoted by the copyright law and the equities of the parties. The "limited audience-limited purpose" standard provides a reasonable balance between protection of the author's common-law right in the product of his own effort and the public interest in the widest possible dissemination of information. However, it is in the uneven application of this standard and the tendency of the courts to interpret these standards liberally in favor of protecting so-called unpublished works in perpetuity that this delicate balance is upset. It is submitted that courts should apply the "limited audience-limited purpose" test strictly, especially in view of the availability of statutory copyright protection, and because, to paraphrase Professor Kaplan, permitting a dramatist, composer or lecturer to exploit his work in a way most appropriate to the medium without exacting the usual time limits on a monopoly is abhorrent to the central theme of copyright law. By such an interpretation, namely, predating publication on uses which are plainly public rather than private, the courts will be able to foster the public's right to the widest possible dissemination of information and culture without being unduly harsh on the rights of authors in protecting the product of their own efforts.

88 Selvin, supra note 73, at 40-41.
90 See text accompanying note 78 supra.
Performers' Rights and Rev. Martin Luther King, Jr.

King was litigated and decided solely on an infringement of copyright theory. Although neither counsel nor the court mentioned the possible application of any of the varying forms of the so-called "performers' right" theories, Dr. King might well have been afforded relief under such a cause of action. Apart from literary property rights, the protection of a performer against unauthorized use of his performance is usually based on one or more of the following doctrines: (1) unfair competition;92 (2) the right of privacy, which has recently been supplemented by the right of publicity;93 (3) moral right;94 or (4) the so-called competitive tort, such as interference with contractual relations and interference with employer-employee relations.95 Professor Kaplan's comment eight years ago that the question of such rights has been discussed in copious literature but has emerged for decision in relatively few cases96 is still true today.

Of all the theories mentioned above, it seems that Dr. King would most likely have prevailed in an unfair competition action, especially since the United States District Court for the Southern District of New York would apply New York law.97 The doctrine of unfair competition

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97 However, two recent Supreme Court cases cast a shadow on the likelihood of such a theory prevailing in an action involving an infringement of a copyright. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 254 (1964). A recent decision from the United States Court of Appeals for the Ninth Circuit indicates that an unfair competition theory may not be sustained in light of the above-noted decisions. Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348 (9th Cir. 1964). The court stated that the holding of the Supreme Court in the Sears and Compco cases was that, except to the extent that protection is available under the copyright laws, anyone may freely and with impunity avail himself of literary and intellectual works to any extent he may desire and for any purpose whatever provided he does not steal good will or deceive others into thinking that the creations represent his own work. Id. at 351. But see New York World's Fair 1964-1965 Corp. v. Colourpicture Publishers, Inc., 21 App.
has gone through four distinct phases, with the latest and most liberal phases developed in New York courts. At first, unfair competition covered any limitation or appropriation of a property right of another in a trademark. The doctrine was then expanded to include cases of "palming off," where a merchant sought to delude or confuse the consuming public into believing that the goods in question were those of a competitor.

In 1918, the Supreme Court enlarged this concept further in *International News Serv. v. Associated Press.* The Court held that INS's action in taking news items off the boards of its competitor news service and flashing them westward for prior publication under its own byline constituted an unlawful "misappropriation." Under the misappropriation or "free ride" theory of INS, unfair competition was expanded by a concept of unjust enrichment whereby three elements had to be shown to obtain relief, namely, a quasi-property right, competition and damage. Although a few jurisdictions have rejected the INS misappropriation theory and others have accorded it only a grudging and limited acceptance, some courts have further extended and expanded the INS rule. In *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.,* the court indicated that relief under unfair competition might be granted although both competition and palming off were not established. Since the court found the existence of both competition and palming off in the facts of that case, the statement is dictum and cannot be held to be conclusive on this point. However, in *Gieseking v. Urania Records, Inc.,* unfair competition was held to apply to a "dubbing" situation where neither palming off nor direct competition were present. In a very recent case, *Columbia Broadcasting Sys., Inc. v. Documentaries Unlimited, Inc.*, the New York Supreme Court held that a record company's unauthorized use in a documentary record about President John F. Kennedy, entitled *JFK, the Man, the President,* of a network announcer's wire-service based report of the assassination, constituted an infringement of the network's

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88 See Chafee, supra note 92, at 1291-96.


100 248 U.S. 215 (1918).

101 See cases cited in *Developments in the Law—Competitive Torts,* supra note 95, at 934 nn. 12 & 13.


103 17 Misc. 2d 1034, 155 N.Y.S. 2d 171 (Sup. Ct. 1956).

common-law copyright. Although the court stated its ultimate holding on the basis of infringement of common-law copyright, Judge Geller spoke in terms more consonant with an unfair competition theory. He first established that the matter protected was not the news release, but the announcer’s "own composition," and more important, his voice and style of talking constituted "his personality, a form of art expression, and his distinctive and valuable property." In the concluding sentence of his opinion, Judge Geller stated that this "is a clear case of appropriation for commercial profit of another's property rights."

On the basis of the foregoing review of the cases, Dr. King might also have argued that the sale of records of his Freedom March speech, which not only included his literary creation but also his distinctive style and manner of speaking, was done without his consent and amounted to a clear case of appropriation for commercial profit by the defendants of his valuable property rights, an attempt to reap where they had not sown. However, a number of complex problems of federal-state relations is posed by this approach.

**THE FEDERAL-STATE ENIGMA**

The court rested its jurisdiction in King on the fact that the action was one arising under an act of Congress "relating to . . . copyrights." However, even if Dr. King were not able to prove copyright registration, the court still had jurisdiction under "diversity of citizenship," as Dr. King is a citizen of Georgia and the two defendants, New York and Delaware corporations respectively, had their principal places of business in New York.

The initial question, raised in the preceding section, is whether a federal court has jurisdiction to act on an unfair competition theory when it is joined with a copyright infringement cause of action. Title 28 of the Judicial Code was amended in 1948 so as to erase any doubt as to whether such an action might be joined with a valid statutory copyright claim: "The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trade-mark laws."

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105 Id. at 725, 248 N.Y.S.2d at 811.
106 Ibid.
If a case is decided on the basis of infringement of copyright, the issue of unfair competition for all practical purposes becomes moot. However, if a court is unable to find for the plaintiff under a common-law or statutory copyright theory and issues relief on the basis of unfair competition, the thorny problem of federal-state relations must be wrestled with. Some commentators contend that when an author “publishes” a copyrightable work without or before obtaining a statutory copyright, state law should not be applied so as to provide an alternate remedy against an unauthorized copying of the work. Judge Learned Hand asserts that allowing relief under an unfair competition theory in such an instance does violence both to congressional intent and constitutional purpose. In a well-known dissent in Capitol Records, Inc. v. Mercury Records Corp., Judge Hand concluded that because recorded performances are “writings” and are therefore constitutionally eligible for copyright protection, federal law must be applied. He interpreted the failure of Congress to provide for the protection of performers’ rights in the Copyright Act as demonstrating that states are not given the power to create a perpetual monopoly which would thereby defeat the constitutional requirement that protection be granted only for “limited times.” According to this reasoning, if Dr. King were deemed to have forfeited his common-law copyright and an injunction were issued under an unfair competition theory, the effect would be to permit the state to create a perpetual monopoly in favor of the uncopyrighted work in excess of the monopoly afforded by Congress in the Copyright Act.

Judge Hand admitted that his view was harsh and that legislation might be the appropriate solution. This view has generally not been followed by the courts. In the Metropolitan Opera case, the court enjoined the unauthorized recording of opera broadcasts on the basis of a misappropriation theory and did not avert to the Copyright Act in its decision. The majority opinion in Capitol Records did not even discuss Judge Hand’s preemption objection in enjoining a record company from distributing musical recordings in the public domain.

A judicial solution to this controversy might lie in a concentrated effort by the courts to distinguish carefully between the two common-law theories, unfair competition and copyright, in determining whether


111 221 F.2d 657, 664-67 (2d Cir. 1955).

112 See Developments in the Law—Competitive Torts, supra note 95, at 944.
the plaintiff is asserting two separate rights. This difference between the two theories has been explained as follows:

a. A work may be protected by a common law copyright only if it constitutes an original intellectual creation. The work need not be eligible for a statutory copyright, but it must embody some creative intellectual or artistic contribution. A common law copyright confers complete protection against unauthorized use, and this protection ordinarily lasts as long as the work remains unpublished.

b. The theory of unfair competition recognizes a property right in business assets which have been acquired by the expenditure or investment of money, skill, time, and effort. The work need not be original, new, or creative to be protected. The concept of unfair competition does not confer a monopoly, but protects only against unfair use in business. It is not affected by publication.113

Thus, the issue in *King* would be whether the plaintiff had two separate common-law property rights in his speech: his creative, intellectual work in the writing of the Freedom March speech affords him a common-law copyright and his investment of time, effort, money and skill is the basis of an independent right against unfair competition. In addition, his "right of publicity" allows him commercially to exploit his name and his voice and enjoin actions which impair the marketability of this asset.

Judge Hand's dissent poses the further question as to whether the copyright clause of the Constitution and the Copyright Act preempt state law. Addressing himself to the question of whether publication is a matter of state law, Judge Hand said:

[The states] could grant to an author a perpetual monopoly, although he exploited the "work" with all the freedom he would have enjoyed, had it been copyrighted. I cannot believe that the failure of Congress to include within the Act all that the [constitutional] Clause covers, should give the states so wide a power. To do so would pro tanto defeat the overriding purpose of the Clause, which was to grant only for "limited times" the untrammeled exploitation of an author's "Writings."114

Judge Hand's argument is indeed persuasive insofar as state common-law protection provides a work, not published in copies, with perpetual protection which does seem to run counter to the constitutional policy of national uniformity and protection limited in time. Nimmer concurs in this view, stating that such determinations are contrary to expressed federal policy and constitute a violation of the supremacy clause of the Constitution.115 Determining what is state law is a complex task for

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114 221 F.2d at 667.

federal judges since *Erie*, because in some cases a court may be called upon to determine the state conflict of laws rule, which state laws apply, what the various state laws are, and how to resolve conflicts between the applicable state laws. Modern communication enables renditions of a performance to be broadcast simultaneously in each of the fifty states and thereby presents courts with insuperable conflict of laws problems when an infringing use of a literary or musical property has a damage impact in each of the states.

Although the above reasoning is very compelling, a large body of case law and section 2 of the Copyright Act weigh heavily against the finding of preemption or time limitation. A leading article on federal-state protection of literary property takes strong exception to Judge Hand’s reasoning:

> It is submitted that the limited-times policy is not applicable to the states. A contrary view would probably mean that state grants of perpetual protection of unpublished works are invalid, a conclusion which opposes many years of practice and general assumption. The words of the clause do not refer to the states, and traditionally courts have refused to apply constitutional limitations to governmental units not specifically included within the scope of the limitation.

This very issue was recently before the New York Supreme Court when it denied a request for reargument of *Columbia Broadcasting Sys., Inc. v. Documentaries Unlimited, Inc.*, holding that two cases recently decided by the Supreme Court, extending the doctrine of federal preemption in patent and copyright cases, did not take common-law copyright and unfair competition out of its hands. As to unfair competition, Judge Geller noted that the decisions in these cases “pointed out that state law, statutory or decisional, may in appropriate circumstances grant relief where deceptive or fraudulent practices are shown, such as in palming off one’s goods as those of another or in labeling of goods.”

He felt that it was equally clear that state protection of common-law copyright remains unaffected by either the holdings or the principles set forth in the two opinions. This view is grounded on section 2 of the Copyright Act which explicitly states that nothing in the copyright law “shall

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117 Sargoy, *supra* note 87, at 8.
121 42 Misc. 2d at 726, 248 N.Y.S.2d at 812.
be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.122 It is submitted that, despite Judge Hand's eloquent plea for the contrary view, this is the view generally accepted by the courts today.123

A NECESSARY RETREAT TO LEGISLATION

According to Nimmer, "the temptation of legal writers to solve problems by calling for new legislation is in a sense a retreat from reality."124 Heedful of this advice, this writer has concentrated in the preceding sections on proposing a judicial approach to the problems presented by King. However, many of the perplexing issues posed in King can only be resolved by legislation.

Essentially, the King case demonstrates the complexities arising from our unique dichotomous system of common-law and statutory protection for unpublished works whereby the law of each of the fifty states, "with their possibly varying internal judicial interpretations and statutes,"125 determines whether so-called unpublished works, fully exploited for commercial profit by performance, should be accorded perpetual protection. Since the Copyright Act offers no guidance as to the meaning of "publication," courts must rely on judicial precedents which evolved at a time "when the publication of copies was virtually the only means of making a work available to the public."126 The facts in King graphically illustrate the revolutionary devices man has developed for "exploiting" his literary and artistic works since the invention of the Gutenberg press and, for

123 The Massachusetts Supreme Judicial Court recently held that the Sears and Compco cases did not go so far as to eliminate common-law copyright. Edgar H. Woods Associates, Inc. v. Skene, 197 N.E.2d 886 (1964); see Capitol Records, Inc. v. Greatest Records, Inc., 252 N.Y.S.2d 553 (Sup. Ct. 1964). The Skene court, referring to the portion of the Sears opinion wherein the Court alluded to "that section of the Copyright Act [17 U.S.C. § 2 (1958)] which expressly saves state protection of unpublished writings," 376 U.S. at 231 n.7, concluded that the "availability of federal copyright protection for published material does not require the abandonment of the separate protection afforded to unpublished material by the common law." 197 N.E.2d at 895. One wonders whether the court was cognizant of the fact of the availability of federal copyright protection for unpublished as well as published material.
124 Nimmer, Copyright Publication, 56 Colum. L. Rev. 185, 201 (1956).
125 Sargoy, supra note 87, at 8.
that matter, since Marconi, Morse and Bell. Nevertheless, courts have generally followed the rule of *Ferris v. Frohman* that performance does not forfeit common-law rights, even though such a result has been criticized as being in derogation of the constitutional “limited times” mandate and as abhorrent to the central theme of copyright.

Selvin concluded that relief or change from the doctrine of perpetual protection of unpublished performances of literary and artistic works—if it comes at all—will probably have to come from Congress. Even Nimmer, adhering to the logic of Judge Hand’s dissent in *Capitol Records*, believes that determinations as to unpublished works should be governed by a single federal statute rather than left to the vagaries of common-law interpretations in the fifty states. Morrison sums up the need for up-dating the definition of “publication” concisely and forcefully: “this old ‘war horse’ has had its day.”

Beginning in 1955, the Copyright Office of the Library of Congress, pursuant to ear-marked appropriations by Congress, has been conducting comprehensive studies of copyright law and practices. One of these studies, entitled “Protection of Unpublished Works,” by William Strauss, provides a “valuable contribution to a better understanding of copyright law and practice and will be extremely useful in considering the problems involved in proposals to revise the copyright law.” The study explores the history of protection of unpublished works, both at common law, in early state statutes and in federal statutes, the case materials on what constitutes publication, the various legislative attempts to bring unpublished works into our statutory system, how other countries have solved the problem, its relation to the Universal Copyright Convention and comparative treatment under other Conventions. Three alternative proposals for the revision of the present system of protecting unpublished works are discussed:

(1) To continue the system of alternative protection under the common law or by voluntary registration under the statute, but with the privilege of registration being extended to all classes of unpublished works.


(2) To extend the concept of publication to include all methods of public dissemination, by protecting under the statute all works made available to the public in any manner, and to limit common law protection to works which have not been made available to the public.

(3) To eliminate protection under the common law and to provide only for statutory protection for all unpublished as well as published works from creation.131

Alternative No. 1, which proposes the least radical change, would "end the discrimination against those classes of unpublished works not now enumerated in Section 12, so that authors or owners of all classes of unpublished works would be entitled to secure statutory copyright voluntarily."132 However, as Strauss points out, the presently existing uncertainties in regard to what constitutes publication would remain, and unpublished works not voluntarily registered, though widely disseminated by performance or exhibition, would continue to have perpetual protection under the common law. Alternative No. 3 differs from alternative No. 2 in that it would discontinue common-law protection entirely, even as to works not publicly disseminated in any manner, and extend the statute to cover all works from their creation. Strauss poses the question whether control and use of private papers, before public dissemination, are local matters that should be left to state regulation and trial in the state courts.133

This writer agrees with the choice of alternative No. 2, made in 1961 by the Register of Copyrights,134 as the soundest solution to the problems of public performance discussed in earlier sections of this article. Alternative No. 3 is now favored by the Register of Copyrights and has been incorporated in the omnibus copyright revision bill,135 which was introduced on July 20, 1964, by Representative Emanuel Celler, Chairman of the House Judiciary Committee, and Senator John L. McClellan, Chairman of the Senate Patents, Trademarks and Copyrights Subcommittee. Although alternative No. 3 is very appealing from the point of view of symmetry and clarity, it seems that "there are overbalancing reasons to preserve the common law protection of undisseminated works until the author or his successor chooses to disclose them."136 There is

131 Strauss, supra note 128, at 28.
132 Id. at 37.
133 Id. at 41.
some merit to the arguments that "we should go slow in trying to replace a traditional word like 'publication' with a word like 'dissemination'"\textsuperscript{137} and that we "don't know where we're heading . . . if a brand new concept of dissemination is injected into the law."\textsuperscript{138} A suggestion which merits further study is framing a clear definition of "publication,"\textsuperscript{139} without the necessity of creating another word, "dissemination," which would embrace any method by which a work may be communicated to the public, including reproduction and distribution of visual or acoustic copies, "live" or recorded or broadcast public performances, or public exhibition. Furthermore, a hearing should be conducted to determine the validity of the contention that the transitory and evanescent nature of the performance of some works, such as plays and speeches, makes such a proposal administratively unworkable and impractical.

In the meantime, the courts should strive to achieve a better accommodation of interests in applying the traditional concept of "publication" to modern-day methods of dissemination of literary and artistic works. We end, as we began, with the statement that the \textit{King} case presented the court with a picture all too familiar in copyright litigation: a legal problem (procedural, jurisdictional as well as substantive) vexing in its difficulty; a dearth of squarely applicable modern-day precedents to a business setting made common by twentieth-century technological innovation; and an almost complete lack of guidance from the terms of the Copyright Act. It is to these problems that Congress must address itself in any revision of the copyright law.

\textsuperscript{138} \textit{Id.} at 78.
\textsuperscript{139} \textit{Id.} at 74.
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THREE-JUDGE COURT PRACTICE UNDER SECTION 2281

INTRODUCTION

Throughout the history of three-judge federal district courts1 litigants have been plagued by the preliminary matters which determine whether or not a particular case might properly be heard and decided by three judges. The advantage of trial by a three-judge court lies in the special appellate statute2 granting a right of direct appeal to the Supreme Court, which right arises only in cases of the type required to be heard by three judges which are in fact heard by a three-judge court. Thus, should a single district judge erroneously assume jurisdiction and decide a case which should have been heard by a three-judge court, there is no right of direct appeal,3 the proper review traditionally being by way of mandamus from the Supreme Court.4 Likewise, if a three-judge court is convened and decides a case which actually required only a single district

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1 The first statute to require a three-judge court applied to any suit seeking an interlocutory injunction to restrain the enforcement of a state statute on the ground of unconstitutionality. Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557. This statute was amended to include orders of state administrative boards and commissions as well as statutes, Act of March 4, 1913, ch. 160, § 266, 37 Stat. 1013, and to include applications for permanent as well as interlocutory injunctions, Act of Feb. 13, 1925, ch. 229, § 238, 43 Stat. 938. The present statute is 28 U.S.C. § 2281 (1958), which reads:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.


4 Ex parte Bransford, 310 U.S. 354 (1940); Ex parte Williams, 277 U.S. 267 (1928); Ex parte Metropolitan Water Co., 220 U.S. 539 (1910).
judge for its determination there is no right of appeal to the Supreme Court;⁶ if this error is noticed for the first time by the Court the appeal will merely be dismissed for lack of jurisdiction.⁸ While it is well established that once a case falls within the scope of a three-judge statute a single district judge is powerless to decide the case on the merits,⁷ it is also clear that when such a judge is presented with an application for a three-judge court he alone has jurisdiction to pass on the preliminary issues which determine whether a statutory panel is required:⁸ (1) whether ordinary federal jurisdiction is present,⁹ and (2) whether the allegations of the complaint satisfy the terms of the three-judge statute.¹⁰ Of necessity, every decision delineating the boundaries of single-judge jurisdiction is also determinative of the avenues of appellate review available to the litigants.

This Note explores the statutory and jurisdictional problems with which a single federal district judge is confronted upon receiving an application for a three-judge court, in addition to the appellate procedures utilized in section 2281 litigation.

Preliminary Jurisdictional Requirements

In 1933 the Supreme Court held in Ex parte Poresky¹¹ that the same jurisdictional rules which are applicable to ordinary district court cases when jurisdiction depends on federal subject matter,¹² and not diversity of citizenship, are also applicable to cases involving three-judge courts. In Poresky, the plaintiff sued state officials to enjoin the enforcement of a compulsory automobile liability insurance statute on the ground that it

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⁸ Ex parte Poresky, 290 U.S. 30 (1933); Powell v. Workmen’s Compensation Bd., 327 F.2d 131 (2d Cir. 1964); German v. South Carolina State Ports Authority, 295 F.2d 491 (4th Cir. 1961); Stuard v. Wilson, 282 F.2d 539 (5th Cir. 1960), aff’d per curiam, 371 U.S. 576 (1963).
⁹ Ex parte Poresky, supra note 8.
¹⁰ Ex parte Buder, 271 U.S. 461 (1926).
¹¹ Ex parte Buder, 271 U.S. 461 (1926).
violated the fourteenth amendment. The district court dismissed the complaint as presenting no substantial federal question. On petition to the Supreme Court for a writ of mandamus to compel the district judge to convene a three-judge court, the dismissal was upheld, the Court holding that when the complaint in a three-judge court case fails to present a substantial federal question the single district judge must dismiss the complaint for lack of federal jurisdiction. Citing prior Supreme Court cases\(^\text{18}\) not involving three-judge courts, the Court recited the usual rule:

[T]he question may be plainly insubstantial either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the position sought to be raised can be the subject of controversy.\(^\text{14}\)

Prior to \textit{Poresky} there had been three Supreme Court decisions sustaining, under the state police power, statutes regulating the use of automobiles on state highways.\(^\text{15}\) The Court considered that the prior decisions dealing with the same general subject matter foreclosed the contentions urged in \textit{Poresky}.

It follows that a contention of unconstitutionality may be insubstantial, so as to preclude federal jurisdiction, in one of two ways: (1) where the statute in question, or another statute so similar as to be considered identical, has been directly upheld by the Court on the grounds presently urged;\(^\text{16}\) or (2) where there is no direct precedent on the statute in issue, but there are prior decisions of the Court on statutes either dealing with the same subject matter or so closely related to the present controversy as to leave no doubt as to the constitutionality of the statute.\(^\text{17}\) Lower federal courts have extended the foreclosure doctrine by denying jurisdiction where the Supreme Court, although not having decided a case contrary to the plaintiff's theory, has declined to review a lower federal


\(^{14}\) 290 U.S. at 32.


\(^{17}\) See \textit{Ex parte} Poresky, 290 U.S. 30 (1933).
court decision to that effect.\textsuperscript{18} Jurisdiction has also been denied where in the opinion of the district judge the question has already been correctly decided by a court of appeals of another federal circuit.\textsuperscript{19}

The complications attendant the ascertainment of the presence of a substantial federal question were recently demonstrated in \textit{Schneider v. Rusk}.\textsuperscript{20} The plaintiff, a naturalized citizen of the United States, by reason of residence in foreign countries for periods which Congress had provided would result in the loss of United States citizenship, was declared to have lost her citizenship. When the district judge was presented with an application for a three-judge court to review the expatriation order, he denied the application and dismissed the complaint, holding that the court had no jurisdiction for lack of a substantial federal question. In so deciding, he relied on \textit{Lapides v. Clark};\textsuperscript{21} where the United States Court of Appeals for the District of Columbia Circuit had upheld the forerunner of the expatriation statute in question, which decision was followed by a denial of certiorari. The Supreme Court reversed the dismissal in \textit{Schneider} and remanded the case for trial before three judges. The Court noted that while the \textit{Lapides} case, upon which the district court relied, might have appeared to have foreclosed the question, two later Supreme Court decisions demonstrated that there was a substantial federal question involved.\textsuperscript{22} The cases to which the Court referred were \textit{Trop v. Dulles}\textsuperscript{23} and \textit{Perez v. Brownell};\textsuperscript{24} both decided in 1958, nine years after \textit{Lapides}. In \textit{Trop}, the plaintiff was declared to have lost his citizenship under a federal statute for having been convicted by a military court-martial of desertion during wartime. The Court, in a five to four decision, struck down the statute, pointing out that it gave military authorities complete discretion to decide who would upon conviction lose his citizenship.\textsuperscript{25} The Court found that the statute was in no way designed to solve international problems but rather imposed the sanction of loss of citizenship merely as a punishment—a punishment which was cruel and unusual and thus prohibited by the eighth amendment.\textsuperscript{26} In \textit{Perez}, the plaintiff was declared to have lost his citizen-

\textsuperscript{18} \textit{E.g.}, Waddell v. Chicago Land Clearance Comm'n, 206 F.2d 748 (7th Cir. 1953).
\textsuperscript{19} Wicks v. Southern Pac. Co., 231 F.2d 130 (9th Cir. 1956).
\textsuperscript{20} 372 U.S. 224 (1963).
\textsuperscript{22} 372 U.S. at 225.
\textsuperscript{23} 356 U.S. 86 (1958).
\textsuperscript{24} 356 U.S. 44 (1958).
\textsuperscript{25} 356 U.S. at 90.
\textsuperscript{26} \textit{Id.} at 93.
ship by remaining outside the country during wartime to avoid the draft and by voting in a foreign election. The Court held that Congress, under its power to regulate foreign affairs, could remove citizenship for the commission abroad of acts which would tend to embarrass the Government. Noting that it was the plaintiff's voluntary choice to participate in the foreign election, the statute was held valid by the Court.

*Schneider* clearly illustrates the present uncertainties involved in a district judge's decision as to the existence of a substantial federal question. It is difficult to see how the judge could have been informed by *Perez* that the question was substantial, for that case, like *Lapides*, upheld a statute imposing loss of citizenship on the ground that Congress, by virtue of its powers to regulate foreign affairs, could impose such a sanction for voluntary acts which might bring about a situation of potential conflict with foreign governments. *Trop*, on the other hand, dealt with a statute in no way designed to regulate affairs with foreign governments but rather which imposed cruel and unusual punishment for conviction by a court-martial. The only indications that either *Trop* or *Perez* could have provided for the revitalization of the question urged in *Schneider* were (1) that each dealt with the general subject of loss of citizenship under a federal statute, and (2) that the majority and dissenting opinions expressed some concern as to when and how citizenship could be involuntarily forfeited.

A dismissal for lack of a substantial federal question will preclude the hearing of the application for three judges. Conversely, any judgment, whether by one or three judges, subsequent to an erroneous finding of federal jurisdiction will be void. As demonstrated by *Schneider*, the question of foreclosure may depend ultimately on the mood of the Supreme Court. The resultant inconvenience or uncertainty in an individual case would seem, however, to be the product of a defect inherent in any judicial system which seeks to adapt itself to a changing society.

**Statutory Requirements Under Section 2281**

Once the single district judge has concluded that there is ordinary federal jurisdiction, he must examine the allegations of the complaint to determine whether the statutory requirements of section 2281 are satisfied. The purpose of section 2281 is to protect against unwarranted

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27 356 U.S. at 66.
federal encroachment upon state sovereignty. The statute was intended to embrace a limited class of cases and is, therefore, applied "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."

The strict construction of section 2281 is necessitated not only by the burden imposed on the lower federal courts but also by the direct right of appeal to the Supreme Court.

BASIS FOR EQUITABLE RELIEF

A three-judge court will be convened only when the complaint seeks injunctive relief. Under section 2281 the issuance of the injunction is decided by the three-judge court. It appears to be within the province of the single district judge to dismiss an application for a three-judge court if the requirements of equity jurisdiction are clearly lacking on the face of the complaint. Thus, a single judge has dismissed the complaint where there is no showing of irreparable injury, where there is an adequate remedy in the state courts, or where the plaintiff has "unclean hands." In making this determination the single judge will apply the rules of equity jurisdiction to the facts alleged in the complaint.

In civil cases, the success of the injunctive prayer is determined by ordinary equity jurisprudence. It is clear, however, that the requirements of equity jurisdiction are applied more stringently in criminal cases. Thus, it has traditionally been held that federal courts, as a gen-

30 As stated in Phillips v. United States, 312 U.S. 246, 250 (1941): "It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation from invalidation by a conventional suit in equity."
34 Phillips v. United States, 312 U.S. 246, 251 (1941).
38 Linehan v. Waterfront Comm'n, supra note 37.
41 See generally Pomeroy, Equity Jurisprudence §§ 1337-410 (5th ed. 1941).
eral rule, will not interfere with enforcement of a state criminal statute.\textsuperscript{42} Although this proposition is still articulated as a rule of law,\textsuperscript{43} it has long been subject to the qualification that certain exceptional circumstances will warrant the issuance of an injunction against the enforcement of a state penal statute.\textsuperscript{44} The boundaries of the exception were drawn in \textit{Spielman Motor Sales Co. v. Dodge},\textsuperscript{45} as encompassing only cases in which "the danger of irreparable loss is both great and immediate."\textsuperscript{46} This policy of restriction is grounded on the common-law principle that courts of equity have no jurisdiction in criminal matters\textsuperscript{47} but is more often justified on the ground that the principles of federalism and comity require that federal courts refrain whenever possible from interference in the administration of justice within the states.\textsuperscript{48} Whatever the origin of the policy, its effect is that the equity jurisdictional requirements of irreparable injury and inadequacy of state remedy are strictly applied by federal courts in cases attacking state criminal statutes.

As a result, the burden of showing inadequacy of remedy in the state judicial system is a highly demanding one. The courts have approached very closely the position that the state remedy is always adequate, pointing out that the constitutionality of a criminal statute may be tested in the state courts by a motion to quash the indictment, by defense at

\begin{thebibliography}{99}
\item \textsuperscript{43} See \textit{e.g.}, Dombrowski v. Pfister, \textit{supra} note 42.
\item \textsuperscript{45} 295 U.S. 89 (1935).
\item \textsuperscript{46} \textit{Id.} at 95; accord, Ackerman v. International Longshoremen's Union, 187 F.2d 860 (9th Cir. 1951), \textit{cert. denied}, 342 U.S. 859 (1951).
\item \textsuperscript{47} See \textit{In re Sawyer}, 124 U.S. 200, 210-11 (1888).
\end{thebibliography}
trial or by a motion in arrest of judgment. 49 Thus, it is ordinarily held that a plaintiff must subject himself to arrest under the allegedly unconstitutional statute in order to test its validity, 50 for "no person is immune from prosecution in good faith for his alleged criminal acts." 51 This requirement is dispensed with only when the penalties which the plaintiff must risk to test the statute are unusually severe. 52 Perhaps the only situation in which a federal court will clearly be satisfied that the state remedy is inadequate is the rare case where the criminal penalties do not apply to the party challenging the statute. Illustrative of such a situation is Crown Kosher Supermarket, Inc. v. Gallagher, 53 where a food market, three of the market's customers, and a rabbi attacked the constitutionality of a Massachusetts Sunday closing law. It was held that the state remedy was inadequate as concerned the customers and the rabbi since the statute in question provided penalties only for store owners, who were thus the only parties capable of testing the statute through its violation.

Similar problems arise in fulfilling the requirement of irreparable injury in a case involving a criminal statute. It has been held that the mere threat of arrest and subjection to the state criminal process does not constitute such irreparable injury as to require a finding of equity jurisdiction and the convening of a three-judge court. 54 The irreparable injury requirement is met, however, in situations where compliance with

51 Douglas v. City of Jeannette, supra note 50, at 163.
52 Ex parte Young, 209 U.S. 123, 147 (1908) (directors, officers, agents and employees of plaintiff company subject to $5,000 fine and five years imprisonment); see Fass v. Roos, 184 F. Supp. 353 (D.N.J. 1960).
the statute will cause great financial loss, and noncompliance will result in extreme criminal penalties.\textsuperscript{65}

The apparent justification for the strictly applied requirements of equity jurisdiction is that the federal courts must assume that a particular defendant will be fairly treated in the state courts and that an unconstitutional statute will be struck down by the state judiciary.\textsuperscript{66} This becomes especially true where the statute has not yet been construed by the state courts.\textsuperscript{67} The only conclusion to be drawn is that a plaintiff who attacks the constitutionality of a state criminal statute will meet a difficult task in satisfying the initial requirements of equity jurisdiction, \textit{i.e.}, irreparable injury and inadequacy of state remedy.

An obvious lack of any basis for equitable relief should permit a single judge, in applying the foregoing principles, to dismiss the complaint. To restrict this determination to the facts alleged in the complaint clearly provides maximum protection against consideration by one judge of factual issues which may relate to the merits of the injunction and are thus required to be decided by three judges. It would seem, however, that the single judge should be permitted to go beyond the face of the complaint. Where the facts prove to be relatively few and simple, allowing only for the interpretation that equity jurisdiction is clearly lacking, one judge should be empowered to dismiss. Under this theory, a determination requiring the exercise of discretion would still lie beyond the scope of single-judge authority. The effect would be to preclude the convening of a three-judge court, and the resultant burden on the district court docket,\textsuperscript{68} to pass on what is essentially an unmeritorious issue. An occasional abuse of this increased jurisdiction would then be reviewable in the same manner as any other section 2281 determination.


\textsuperscript{68} The potential burden on the district courts has long been a motivation for narrowing the jurisdiction of the three-judge court. See, \textit{e.g.}, Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co., 292 U.S. 386, 391 (1934); Note, \textit{The Three-Judge District Court and Appellate Review}, 49 Va. L. Rev. 538, 545-46 (1963); Note, \textit{The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships}, 72 Yale L.J. 1646, 1648-49 (1963).
"STATE STATUTE"

"State statute," as used in section 2281, has occasionally been defined in broad terms to include "all enactments, however adopted, to which a state gives the force of law."59 Generally, however, the term has been narrowly construed. One convincing reason for such a restrictive interpretation is found in the original purpose for the three-judge procedure, which was to guard against "improvident state-wide doom by a federal court of a state's legislative policy."60 The courts have seen fit, and reasonably so, to restrict utilization of the three-judge court to cases in which this purpose would be furthered. Thus, it is required as an element of section 2281 jurisdiction that the statute attacked be one of "general application" and of "state-wide interest and concern."59

The requirement that the statute be one of "general application" means that a single judge will not convene a three-judge court to test the validity of laws local in origin or enforcement. In 1912 Cumberl and Tel. & Tel. Co. v. City of Memphis62 concluded that it would be an unreasonable presumption that the legislature, in enacting a predecessor statute of section 2281, intended to burden the district courts with potential controversies over the constitutionality of innumerable ordinances and rules, many of which would be of minor importance.63 Since Cumberl and, the courts have consistently excluded city64 and county65 ordinances

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61 Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 94 (1935); accord, City of Cleveland v. United States, 323 U.S. 329 (1945); Rorick v. Board of Comm'rs, 307 U.S. 208 (1939); see Ex parte Collins, 277 U.S. 565 (1928). It has been suggested, however, that a better criterion in furtherance of the purpose of § 2281 would be whether the particular statute is meant to regulate social or economic affairs. Comment, "State Statute" Under the Three-Judge Act, 12 J. Pub. L. 440-43 (1963).

62 198 Fed. 955 (W.D. Tenn. 1912).


64 E.g., City of Cleveland v. United States, 323 U.S. 329 (1945); Ex parte Collins, 277 U.S. 565 (1928); United Steelworkers v. Fuqua, 152 F. Supp. 591 (W.D. Ky. 1957). The exclusion has been held to apply to a city ordinance passed under a state enabling statute which is permissive, rather than mandatory, in nature. Davis v. City of Little Rock, 136 F. Supp. 725 (E.D. Ark. 1955).

65 E.g., Borges v. Loftis, 87 F.2d 734 (9th Cir.), cert. denied, 301 U.S. 687 (1937);
from the scope of section 2281, in the interest of preventing such an extraordinary burden and in deference to the purposes underlying the three-judge procedure.

The requirement that a particular statute be of "state-wide interest and concern" is not easily defined; the case law provides no clear mechanical guidelines. The only evident criterion, and one apparently used by the courts, although not articulated as a rule of law, is whether the statute in question is of that character which section 2281 was intended to protect.66 It follows that a statute will be of sufficient "state-wide interest and concern" if expressive of a legislative policy so sacred that its impairment by an ordinary federal district court would be considered by the populace as a serious encroachment upon states' rights.67

The existence of a trend broadening the "state statute" concept to encompass local statutes or ordinances has been suggested,68 but the recent decision in Griffin v. County School Bd.69 dictates a contrary conclusion. In Griffin, the Supreme Court held that a suit for an injunction against an order of a county school board was properly heard by a single-judge district court, on the ground that the case concerned a situation which was unique to a single county.70 The fact that the order in question was adopted with the acquiescence and cooperation of the Commonwealth of Virginia was immaterial, since the order was not one of "general application."71

Section 2281 also requires that a three-judge court be convened in actions to enjoin "the enforcement of . . . an order made by an administrative board or commission acting under State statutes." An order attacked merely as unauthorized by statute does not fall within the terms of section 2281.72 It is required that the allegedly unconstitutional order be made pursuant to its underlying statute.73 Subject to this one limita-

66 See Phillips v. United States, 312 U.S. 246 (1941); Ex parte Collins, 277 U.S. 565 (1928).
68 Ibid.
70 Id. at 227-28.
71 Id. at 228.
tion, it would appear that any administrative order which meets the tests of "general application" and "state-wide interest and concern" is within the scope of section 2281.  

"STATE OFFICER"

It is also necessary for the convening of a three-judge court under section 2281 that the complaint seek an injunction to restrain the action of a "state officer" in the enforcement of the allegedly unconstitutional statute or administrative order. As with the judicial definition of "state statute," the term "state officer" has been restricted to exclude officers with only local functions, since the real basis of distinction is the interest involved, not the political status of the particular agency of employment. Thus, in City of Cleveland v. United States, a city official collecting a state tax was held to qualify as a "state officer" since the tax statute in question engendered state-wide concern. In Ex parte Public Nat'l Bank on the other hand, a city official collecting a tax imposed by state statute but applied for strictly local purposes was held not to qualify under section 2281. "State officer" thus was defined in Rorick v. Board of Comm'rs as one who performs a state function embodying a policy of state-wide concern.

Those judicial guidelines, set out above, which are available concerning the "state statute" and "state officer" requirements of section 2281 jurisdiction are, since framed in generalities, at best not always helpful. The plaintiff who is uncertain as to whether the facts of his particular case meet the definitional requirements will do well to approach his problem in light of the original purpose for the three-judge procedure. Thus, if it can be said that widespread resentment would be aroused were the state-wide policy defined in the particular statute controverted by a single-

75 Rorick v. Board of Comm'rs, 307 U.S. 208 (1939); Ex parte Public Nat'l Bank, 278 U.S. 101 (1928); Ex parte Collins, 277 U.S. 565 (1928); Henrietta Mills Co. v. Rutherford County, 26 F.2d 799 (W.D.N.C. 1928).
77 323 U.S. 329 (1945).
79 278 U.S. 101 (1928).
80 307 U.S. 208 (1939).
judge district court, it might also be safely said that the situation is one in which a "state officer" and a "state statute" are involved within the meaning of section 2281.81

"UPON THE GROUND OF THE UNCONSTITUTIONALITY"

Unconstitutionality must be the basis of any suit to enjoin the operation of a state or federal82 statute, in order to obtain three-judge jurisdiction;83 the claim must rely on the federal, and not merely a state, constitution.84 Three judges are not required (1) if the action complained of is not attributable to the statute alleged to be unconstitutional;85 (2) if the injunction is sought only against an unconstitutional application of a statute not itself attacked;86 or (3) when the real question in issue is not the constitutionality of the statute itself but rather its applicability to the subject matter of the litigation.87

An additional situation in which three judges are unnecessary is analogous to the Poresky rule of foreclosure of a substantial federal question. After Brown v. Board of Educ.,88 the onslaught of litigation attacking state segregation statutes frequently involved cases seeking an injunction against a statute similar or identical to one already declared unconstitutional in another jurisdiction. Plaintiffs seeking three-judge courts in these cases relied on a strict reading of section 2281. The lower federal courts adopted various methods to avoid this burdensome practice. Some turned to Poresky, holding that the question had been foreclosed by prior decisions so that there was no substantial federal question, apparently referring to an insufficient claim of unconstitutionality, to support jurisdiction under section 2281.89 This would appear to be a mistaken application of the Poresky doctrine, which relates only to ordinary federal jurisdiction under section 1331. By another approach it was simply

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82 Where an injunction is sought against enforcement of a federal statute, three judges are required by 28 U.S.C. § 2282 (1958).
83 Ex parte Buder, 271 U.S. 461 (1926).
87 Maizon v. Confederated Tribes, 314 F.2d 169 (9th Cir. 1963).
"obvious" that three judges were not required.90 A third group of courts took the better view that section 2281 did not apply to this type of case since the unconstitutionality of the statute, which had already been decided, did not play an active role in the litigation.91 This approach, although leading to the result achieved by reliance on Poresky, would appear to be better grounded in legal theory. In 1962 the Supreme Court adopted this view in Bailey v. Patterson,92 where an injunction was sought to restrain state statutes imposing segregated seating in public transportation facilities. Three judges were convened but abstained from decision pending state construction of the challenged statutes, whereupon the plaintiffs appealed directly to the Supreme Court. After first noting that the question had already been decided and was foreclosed as a litigable issue,93 the Court drew an analogy between Poresky, where a similar statute had previously been declared constitutional, and the instant case, where similar statutes had been declared unconstitutional.94 The Court held that while in Poresky the three-judge court had no federal jurisdiction, in Bailey section 2281 did not apply because the policy underlying the three-judge procedure was not involved. The Bailey Court considered the tendered constitutional issue as "essentially fictitious,"95 permitting one judge to hear the case.

Supremacy Clause Attacks

The supremacy clause exception to attacks on constitutionality under the three-judge statute was derived from case law under the Act of March 3, 1891.96 The act granted an exclusive right of appeal from district courts and the now-defunct circuit courts to the Supreme Court in cases involving the construction or application of the Constitution and cases in which any federal or state law was alleged to be unconstitutional.97 The courts of appeals were established with jurisdiction over all other cases coming from the district or circuit courts which were not directly appealable to the Supreme Court.98 It was decided under the act that

93 Id. at 33.
94 Ibid.
95 Ibid.
96 Ch. 517, 26 Stat. 826.
when questions of both unconstitutionality and statutory construction were involved in a single suit, the litigant had a choice of appealing to the Supreme Court or to the court of appeals, such a case falling within the appellate statute of each court.\footnote{Spreckels Sugar Ref. Co. v. McClain, 192 U.S. 397 (1904).}

The supremacy clause exception in three-judge court litigation was pronounced for the first time in \textit{Ex parte Bransford},\footnote{Id. at 359.} where a state statute was attacked as contrary to an applicable federal statute. Holding that three judges were not required, the Court reasoned that "the declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment."\footnote{Id. at 76-77.} The Court cited \textit{Lemke v. Farmers Grain Co.}\footnote{258 U.S. 50 (1922), affording 273 Fed. 635 (8th Cir. 1921). Although the application for a temporary injunction was heard by three judges, a single-judge court passed on the application for a permanent injunction, in accordance with the 1891 act. \textit{Id.} at 52.} for the proposition that supremacy clause questions are not constitutional questions within the meaning of a three-judge statute, ignoring the fact that \textit{Lemke} did not involve such a court. The \textit{Bransford} Court thus failed to examine the relationship of supremacy clause issues to the policy considerations behind the three-judge court procedure.

In 1960 the Court reviewed a case combining both a direct constitutional attack and a supremacy clause attack upon a state statute. In \textit{Florida Lime & Avocado Growers, Inc. v. Jacobsen},\footnote{310 U.S. 354 (1940).} the plaintiffs contended that a California statute violated the commerce and equal protection clauses of the Constitution, as well as a federal statute. After dismissal of the complaint by a three-judge court a direct appeal to the Supreme Court challenged the jurisdiction below. The Court, assuming that the supremacy clause question was a nonconstitutional attack,\footnote{262 U.S. 73 (1960).} held that section 2281 plainly indicates that a three-judge court is required in any case where an injunction may be granted on the ground of federal unconstitutionality. The result was to confine the supremacy clause exception to cases involving a question dependent solely upon that clause, and no other constitutional provision, for its adjudication.

The classification of supremacy clause questions as problems of statutory interpretation, rather than attacks on constitutionality within the
meaning of the three-judge statute, was followed in the federal courts

105 until Kesler v. Department of Pub. Safety.106 In that case the plaintiff, pursuant to a state statute, had been deprived of his motor vehicle operator's license by reason of an unsatisfied judgment against him for negligent operation of an automobile. Subsequent to a discharge in bankruptcy the return of his license was denied by the state agency, which demanded full payment of the judgment as required by the statute. Claiming that the state law was invalid with respect to his discharge in bankruptcy, the plaintiff then brought an ancillary proceeding to reacquire his license. On appeal from a decision by three judges, the Supreme Court refused to dismiss for lack of a constitutional issue, although the case clearly presented only a supremacy clause question, on the ground that "neither the language of § 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim because of the supremacy clause from the comprehensive language of § 2281."107 The Court distinguished the case from precedent by finding an "immediate controversy," i.e., whether a discharge in bankruptcy under federal law ousts the state police power from relevant safety measures, rather than a question of state and federal statutory construction which could eventually lead to a constitutional question.108 After thus declaring that no issue of statutory construction was involved in the controversy, the Court devoted most of its opinion to an examination of the state statute and its history, concluding that an injunction was proper.

The "immediate controversy" test has been criticized109 and may well raise more problems than it solves. Kesler apparently sought to dilute the supremacy clause exception but to avoid its express repudiation. Since failing to indicate how clearly the statutes must be in conflict before it can be said that an "immediate controversy" exists, Kesler only adds to the difficulties facing district judges presented with applications for three-judge courts.110

The Kesler requirement of immediate controversy has been avoided


107 Id. at 156.

108 Id. at 157-58.

109 Id. at 177 (dissenting opinion), 15 Stan. L. Rev. 565, 571 (1963).

110 The Kesler "immediate controversy" has been held not to exist where the problem is not one of statutory construction but rather an issue of fact determinative of the applicability of statutes not themselves in conflict. Bartlett & Co., Grain v. State Corp. Comm'n, 223 F. Supp. 975 (D. Kan. 1963).
through the use of a complaint similar to that in *Florida Avocado* but containing an illusory direct constitutional claim. In *United States v. Georgia Pub. Serv. Comm’n* the Government sued to enjoin the operation of a Georgia statute prohibiting lower rates to the Government for moving civilian employees. The complaint utilized two modes of attack: (1) the statute imposed a direct prohibition on the agencies of the federal government; and (2) it was invalid under the supremacy clause since contrary to a federal statute authorizing a federal administrator to negotiate transportation rates on behalf of executive agencies. An examination of the *Georgia Pub. Serv. Comm’n* complaint reveals that in substance there was but one issue, the conflict between the state and federal statutes; clearly the prohibition imposed by the state statute upon the government agency would be governed by a construction of the state statute in relation to the federal law in question. The Court, however, looked to the face of the complaint, sustaining the jurisdiction of three judges under the first formal allegation, then deciding the case for the Government by finding a conflict between the two statutes. Thus, by combining a direct, although illusory, constitutional challenge with a supremacy clause attack, the Government was able to have a three-judge court convened in the same manner as would have been possible had the constitutional issue been one of substance.

The significance of *Kesler* is thus greatly reduced since future litigants seemingly may, in most cases, avoid its application by careful pleading, assuming that the Court continues to summarily accept a formal direct constitutional allegation as in *Georgia Pub. Serv. Comm’n*. Notwithstanding this apparent outlet, it makes little sense to require litigants to follow a circuitous route in order to avoid a pitfall which neither has its origin in nor is designed to promote the policy underlying the three-judge statute. Since resolution of conflicts between state and federal statutes involves the same problems of federalism encountered in other constitutional adjudication, there is no justification for denying the statutory panel in any case arising solely under the supremacy clause.

**The Exercise of “Substantive Jurisdiction”** by the Single Judge

The threshold determinations examined in the preceding section clearly lie within the province of the single judge. There follows a consideration

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of decisions rendered by the single judge either on the merits or closely allied with the merits, viz. abstention, concerning the availability of the injunction.

AUTHORITY OF THE DISTRICT JUDGE

In Stratton v. St. Louis So. W. Ry.,\textsuperscript{118} under a predecessor of the present three-judge statute, a district judge was presented with a bill for a preliminary injunction to restrain the enforcement of a state statute on the ground of its alleged unconstitutionality. Subsequent to the issuance of a temporary restraining order, the order was dissolved and the bill dismissed. On appeal from the court of appeals the Supreme Court, presented with the question of the district judge's authority to dismiss, held that (1) the single judge had no jurisdiction to entertain a motion to dismiss on the merits; (2) the authority of the single judge was limited to the issuance of a temporary restraining order; (3) if the single judge either dismissed on the merits or granted an injunction there was no right of direct appeal to the Supreme Court; and (4) when a three-judge panel was mistakenly not convened, the litigants' recourse was to the Supreme Court for a writ of mandamus. The Court reversed the dismissal and remanded to the court of appeals with directions to dismiss for want of jurisdiction, on the ground that to allow a decree by a single judge to be followed by an appeal to a court of appeals would be to frustrate the procedure clearly outlined by the statute.

The ability of a single judge to dismiss a case on the jurisdictional ground that the federal question presented is not substantial was established in Ex parte Poresky.\textsuperscript{114} Since the passage of the 1942 amendment to section 2284 providing that in a three-judge case "a single judge shall not . . . dismiss the action,"\textsuperscript{115} the validity of Poresky has been challenged.\textsuperscript{116} The courts, however, have continued to hold that the convening of a three-judge court is not an automatic procedure but one subject to the threshold scrutiny of a single judge.\textsuperscript{117} There have been isolated indications that the competency of a single judge to entertain

\textsuperscript{118} 282 U.S. 10 (1930).
\textsuperscript{114} 290 U.S. 30 (1933).
\textsuperscript{117} E.g., Eastern States Petroleum Corp. v. Rogers, \textit{supra} note 116; Jacobs v. Tawes, 250 F.2d 611 (4th Cir. 1957); Wicks v. Southern Pac. Co., 231 F.2d 130 (9th Cir.), \textit{cert. denied}, 351 U.S. 946 (1956).
threshold questions, in particular abstention,\textsuperscript{118} is broader than that found in \textit{Poresky}\.\textsuperscript{119} Only \textit{Voege v. American Sumatra Tobacco Corp.}\textsuperscript{120} has gone so far as to hold the abstention doctrine as even an alternative ground for refusal to convene a three-judge court. In \textit{Voege} the court treated abstention as a matter of procedural jurisdiction:

Before the threshold of the constitutional question, an intervening question of state law has been raised . . . . Since Delaware has not been asked to construe its . . . statute on the point raised, it would seem that a three-judge court should not be convened until this question is settled by Delaware courts.\textsuperscript{121}

\textit{Idlewild Bon Voyage Liquor Corp. v. Rohan}\textsuperscript{122} witnessed an attempt to expand the \textit{Poresky} threshold jurisdiction of the single judge to include abstention. The \textit{Idlewild} plaintiff was a vendor of tax-free alcoholic beverages to departing international airline travelers at a New York airport. Orders were accepted only from travelers whose tickets indicated their imminent departure, the customers receiving only a receipt at the time of payment, with liquor thereafter transferred directly to the departing aircraft and not delivered to the customer until arrival at his foreign

\textsuperscript{118} Federal courts abstain from adjudication while retaining jurisdiction in cases involving the interpretation of a state statute considered to be uncertain; such deference to the appropriate state court effectively avoids unwarranted interpretation, as well as unnecessary and hypothetical constitutional adjudication, by the federal court. See generally \textit{Note, Judicial Abstention From the Exercise of Federal Jurisdiction}, 59 Colum. L. Rev. 749 (1959); Note, 108 U. Pa. L. Rev. 226 (1959). If the state court passes on the constitutional issue in addition to interpreting the statute in question, the plaintiff attacking constitutionality will thereafter be relegated solely to an exhaustion of state judicial remedies, after which he may seek review by the Supreme Court of the United States. \textit{England v. Louisiana Bd. of Medical Examiners}, 375 U.S. 411 (1964). The policy of abstention is bottomed on concerns of federalism and state sovereignty. \textit{Alabama Pub. Serv. Comm'n v. Southern Ry.}, 341 U.S. 341 (1951); \textit{Railroad Comm'n v. Pullman Co.}, 312 U.S. 496 (1941); \textit{Hart & Wechsler, The Federal Courts and the Federal System} 854 (1953); \textit{1A Moore, Federal Practice} \S 0.203(1) (Supp. 1963). Against this factor is balanced the expense, delay and inconvenience to the litigants. \textit{County of Allegheny v. Frank Mashuda Co.}, 360 U.S. 185, 196-97 (1959); \textit{Idlewild Bon Voyage Liquor Corp. v. Epstein}, 212 F. Supp. 376 (S.D.N.Y. 1962), \textit{aff'd sub nom. Hostetter v. Idlewild Bon Voyage Liquor Corp.}, 377 U.S. 324 (1964).


\textsuperscript{120} 192 F. Supp. 689 (D. Del. 1961).

\textsuperscript{121} \textit{Id.} at 692-93.

destination. In response to an inquiry by the plaintiff, the state attorney general and the defendants, members of the New York State Liquor Authority, informed the plaintiff that its business violated state law. Claiming that the statute was violative of the supremacy clause, because of federal preemption, and of the commerce and import-export clauses, the plaintiff sought an injunction and a three-judge panel. Considering the dispute to be hypothetical and tentative, particularly insofar as the issue had not been reviewed by the state courts, the single district judge abstained pending state court adjudication, without considering or denying the application for three judges.123

Although the Idlewild judge did not refer to Stratton in invoking the abstention doctrine, it would seem that his decision rested upon the ground that an abstention order is not a dismissal on the merits under Stratton. The court of appeals, reasoning from the opposite premise and applying Stratton, held that it lacked jurisdiction to hear the appeal since a three-judge court was required. Arguing that the decision to abstain presupposed that the court had jurisdiction to determine the controversy, which determination, under Stratton, was for a three-judge court alone, the court opined that a decision to abstain could be made only by a three-judge court.124 In an inferential reference to the dichotomy of jurisdiction under modern three-judge Poresky interpretation,125 the court noted that it considered the jurisdictional aspects of the substantial federal question as different from those of abstention.126

Despite the sympathy of the court of appeals for the plaintiff’s cause, the single judge to whom the renewed request for a three-judge court was made denied that request in reliance upon Stratton, treating the appellate court’s opinion as dictum.127 The Supreme Court, simulta-

123 Although it is clear that the district judge, while refusing to convene a three-judge court, did not in fact deny the application therefor, see 188 F. Supp. at 436, the court of appeals considered the application as having been so denied, 289 F.2d at 427. The Supreme Court subsequently characterized the decision below in the same manner. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 714 (1962).
124 289 F.2d at 429 (dictum); accord, Marshall v. Sawyer, 301 F.2d 639, 644 (9th Cir. 1962) (dictum).
neously granting certiorari to the court of appeals and a motion from the district court for a hearing on mandamus, agreed that a three-judge court should have been convened, holding that section 2281 jurisdiction must be the immediate area of inquiry for a district judge upon receiving an application for a three-judge bench. By a footnote reference to a single-judge abstention case and the statement that in three-judge cases one judge cannot decide the merits "either by granting or by withholding relief," the Court obliquely held that one judge cannot abstain. It would seem that the Court by its silence agreed with the court of appeals as to the dissimilarity of the federal question and abstention issues and, therefore, refused to analogize the case to Poresky.

COURT OF APPEALS REVIEW

When the abstention and the denial of the three-judge court in Idlewild were appealed to the court of appeals, it was noted that the case fell within the provisions of section 2281, whereupon the appeal was dismissed under Stratton. In the light of Stratton, it was unquestionable that the court of appeals had no jurisdiction to hear the appeal on the merits. Noting, however, that Stratton "does not stand for the broad proposition that a court of appeals is powerless ever to give any guidance when a single judge has erroneously invaded the province of a three-judge court," the Court in Idlewild held that the district judge was bound to convene a three-judge court when his jurisdictional error was discovered by the court of appeals.

Considering the availability of court of appeals review as a convenient check on the threshold findings of a district court, the holding in Idlewild has been interpreted as pointing "in the direction of an enlarged area of determination by a single judge." In light of the Court's treatment of the abstention question, this direction seems to be an unlikely one.

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128 370 U.S. at 715 n.3.
129 Chicago, Duluth & Georgian Bay Transit Co. v. Nims, 252 F.2d 317 (6th Cir. 1958).
130 370 U.S. at 715. (Emphasis added.)
133 370 U.S. at 716.
Although the *Poresky* decision did not establish that an appeal would lie to a court of appeals from a single-judge dismissal for lack of federal jurisdiction, subsequent decisions have interpreted the case to authorize such an appeal, concurrently establishing those matters under the aegis of the single judge's threshold power. The exercise of "substantive jurisdiction" by a single judge has been properly appealable only by way of mandamus from the Supreme Court. A significant ramification of *Idlewild* would seem to lie in the fact that the court of appeals is now given the power to correct improper single-judge decisions which transgress upon the area of "substantive jurisdiction," *i.e.*, jurisdiction to enter judgment on the action.

**THE EFFECT OF PLEADING ON SINGLE-JUDGE JURISDICTION**

In ruling that the single judge in *Idlewild* exceeded his jurisdiction, the Supreme Court distinguished *Chicago, Duluth & Georgian Bay Transit Co. v. Nims*. In *Bay Transit* the plaintiff, a passenger boat concern making both intrastate and interstate stops, requested a district court to enjoin the operation of a state tax statute as inapplicable to food served to its interstate passengers. Alternatively the complaint requested the convening of a three-judge court to decide whether the statute was unconstitutional as violative of the commerce clause, if it were found that the statute was applicable. The district court refused to construe the statute or to rule on the three-judge request, concluding that it did have jurisdiction over the cause but could not act until the state court provided a clear indication of the applicability of the statute to the plaintiff, until which time the federal court would retain jurisdiction. In response to the plaintiff's contention that a three-judge court should have

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135 German v. South Carolina State Ports Authority, 295 F.2d 491, 493 (4th Cir. 1961) (dictum).
136 See Jacobs v. Tawes, 250 F.2d 611, 614 (4th Cir. 1957); Wicks v. Southern Pac. Co., 231 F.2d 130, 134 (9th Cir.), cert. denied, 351 U.S. 946 (1956); Haines v. Castle, 226 F.2d 591, 594 (7th Cir. 1955), cert. denied, 350 U.S. 1014 (1956); Van Buskirk v. Wilkinson, 216 F.2d 735, 737 (9th Cir. 1954); J. B. Schermerhorn, Inc. v. Holloman, 74 F.2d 265, 266 (10th Cir. 1934), cert. denied, 294 U.S. 721 (1935).
been convened, the court of appeals affirmed the single judge as being "right in concluding that the [plaintiff's] . . . request for a three judge court was premature," on the ground that the district judge, passing only on the issue of statutory applicability, had not yet reached the application for a three-judge bench in the alternative count. Clearly, then, one judge could abstain, as in an ordinary district court case.

The Supreme Court in *Idlewild* relied upon the alternativeness of the complaint and the contingent nature of the request for a three-judge court in distinguishing *Bay Transit*. It is conceivable that the Court might have utilized the case only to emphasize that its prohibition of a single judge's "withholding relief" should be interpreted as including abstention on the *Idlewild* facts, not merely as a restatement of the *Stratton* prohibition of a "dismissal on the merits" by a single judge. Nonetheless, the Court's statement, "This is not a case like *Bay Transit*," would seem to indicate tacit approval of that case. In any event, it appears that a plaintiff who is doubtful of the applicability of a state statute and desires a three-judge hearing without suffering the threshold delay of a single-judge abstention would be wise to draft a unitary *Idlewild* complaint.

In light of the strict reading afforded the complaints in both *Idlewild* and *Bay Transit* it cannot be said that either case produces an inherently illogical result, although the former seemingly grants priority to the purpose of the three-judge procedure, *i.e.*, to protect the interest of the state, while the latter places greater emphasis on the strict jurisdictional construction of section 2281. It is readily seen that a plaintiff may, to some extent, control the respective spheres of single- and three-judge jurisdiction simply by the drafting of his pleading. Whatever tactical advantage this would seem to provide is, realistically, of little import to a plaintiff aware of the *Idlewild-Bay Transit* dichotomy; the unbiased deliberated decision of three judges on all substantive issues, enhanced

140 *Id.* at 319.
141 "This is not a case like *Bay Transit* . . . , where a three-judge court was requested only in the event that it should first be held that the state statute was by its terms applicable to the plaintiff's business operations." 370 U.S. at 715 n.3.
143 370 U.S. at 715 n.3.
144 Notes 30 & 60 supra and accompanying text.
145 Note 32 supra and accompanying text.
by the direct right of appeal to the Supreme Court, will undoubtedly influence the plaintiff to draft an *Idlewild* complaint in nearly every case.

*Idlewild* and *Bay Transit*: Critique

It would seem, however, that pleading alone should not be determinative of the allocation of jurisdiction between one and three judges. Because the three-judge statute is limited by its specific purpose and is strictly jurisdictional in nature, its application in a particular case is not affected by the pleadings.\(^{146}\) The methodology of the principle cases would appear to place undue emphasis on pleading, for the issue of statutory applicability was equally material in both *Idlewild*\(^ {147}\) and *Bay Transit*.

A more desirable procedure, it is proposed, would be to permit the single judge to look into the substance of the controversy to determine whether the interpretation of the statute attacked is in issue. Finding in the affirmative, one judge would be empowered to abstain prior to convening a three-judge court. This power, however, would not extend to a decision on the merits of that issue, since its determination could, in many cases, be intimately related to the constitutional question, which in the federal judicial system is exclusively within the jurisdiction of three judges.\(^ {148}\) Although, insofar as three judges may themselves abstain, single-judge abstention could be considered as an "[invasion of] the province of a three-judge court,"\(^ {149}\) it is submitted that single-judge abstention in itself would ideally fulfill the purpose of the three-judge procedure.\(^ {150}\) The three-judge federal court is not the exclusive tribunal for the adjudication of state statutes as unconstitutional. Section 2281 procedure is designed only to protect the interest of the state where a plaintiff seeks relief in the federal system, not to preempt the jurisdiction of state courts over constitutional questions. Thus, even should a single-judge abstention culminate in a state court decision on the

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146 Borden Co. v. Liddy, 309 F.2d 871 (8th Cir. 1962), cert. denied, 372 U.S. 953 (1963); Riss & Co. v. Hoch, 99 F.2d 553 (10th Cir. 1938).

147 It is clear that the three-judge court in *Idlewild* would have abstained had it not been for the great delay in litigation. 212 F. Supp. at 380.

148 In this respect, the *Bay Transit* rationale that the district judge had not yet reached the application for three judges when he abstained, which rationale apparently would also have allowed a single-judge decision as to statutory applicability, is undesirable.


stitutional issue, as well as statutory construction, and relegate the plaintiff to an exhaustion of state judicial remedies,151 no injustice would result; section 2281 does not purport to protect any basic right of individual litigants.

Under the proposed procedure, a single-judge abstention would be appealable to the court of appeals in the same manner as other district court orders. Further, if one judge should refuse to abstain, this would not preclude abstention by three judges. In any event, since state court adjudication of an uncertain issue of interpretation may render unnecessary any constitutional decision by a federal court, it would seem more efficacious not to convene a three-judge court, but rather to make it contingent upon single-judge abstention power. The result would be to minimize the extraordinary burden imposed on the district courts,152 without unduly frustrating the operation of section 2281.

Implicit in the foregoing analysis is the premise that the *Idlewild* classification of abstention as a decision on the merits is unwarranted. *Stratton*, on its face, prohibits single-judge decisions on the merits only with respect to the issuance or denial of an injunction on the ground of unconstitutionality. Although in a broad sense a single-judge abstention might ultimately determine such merits, this defect would be more than offset by the fact that the interest protected by the three-judge procedure is only promoted by state adjudication. Furthermore, abstention involves a retention of jurisdiction; it is not technically a decision on the merits.153

The suggested procedure would seem to strike a proper balance between *Idlewild* and *Bay Transit*, and thus between the strict construction of section 2281 jurisdiction and the protection of state sovereignty.

**Idlewild: Analysis**

Upon the refusal of a single district judge to convene a three-judge court, exclusive appellate review has been by writ of mandamus from the Supreme Court.154 In *Stratton* the Court held that, although lacking jurisdiction to review a decision of a single district judge who had passed on the merits of a three-judge case, it did have the power to correct the jurisdictional error below by remanding the case to the proper court for trial. The *Idlewild* Court held that the court of appeals should exercise the same power.

151 Note 118 *supra*.
152 See note 58 *supra*; note 33 *supra* and accompanying text.
153 Note 142 *supra*.
154 Cases cited note 4 *supra*. 
It has been suggested that, under *Idlewild*, review of every denial of a three-judge court is available in the court of appeals,\(^{155}\) which review is now an alternative to mandamus from the Supreme Court.\(^{156}\) In *Idlewild*, however, the Court's holding that the court of appeals had the power to correct the jurisdictional error in the district court was based upon the fact that the abstention order was final within the appellate statute of the intermediate court.\(^{157}\) A denial of an application for three judges, standing alone, will not be sufficient to permit the court of appeals to entertain an appeal therefrom, because (1) such a denial is not a final decision under section 1291,\(^{158}\) and (2) it does not qualify under section 1292\(^{159}\) since it is not a refusal of an injunction and since direct Supreme Court review is available. The power of the court of appeals recognized by *Idlewild* is thus limited to cases where one judge has entered a decision on the merits, constituting a *Stratton* jurisdictional error, which is also a final appealable decision or order.\(^{160}\)

Furthermore, *Idlewild* would not appear to grant a technical power of review to the court of appeals. Since it is the decision on the merits, not the denial of the three-judge court, which enables the court of appeals to entertain the case, to raise the latter in that court would be to contradict the admission of appellate jurisdiction which is implicit in the appeal from the former, a situation in which the appellant might argue himself out of court. A more accurate characterization of the *Idlewild* appellate power would seem to be that it is the power of *correction*, not the power of *review*, the exercise of which may occur when the jurisdictional error is raised by the appellee, as in *Idlewild*, or by the court's own motion.

The suggestion has also been made that the operation of a Supreme


\(^{156}\) Id. at 306.

\(^{157}\) See 370 U.S. at 715 n.2.

\(^{158}\) "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . . , except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1958).

\(^{159}\) "The courts of appeals shall have jurisdiction of appeals from . . . interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1292(a)(1) (1958).

\(^{160}\) The *Idlewild* appellate power has been extended, with respect to § 2282, to include the correction of an improper single-judge stay of proceedings by writ of mandamus from the court of appeals, the normal method of review for such an order. Svejkovsky v. Tamm, 117 U.S. App. D.C. 114, 326 F.2d 657 (1963).
Court rule of procedure\textsuperscript{161} will preclude mandamus from the Court whenever the court of appeals may correct a jurisdictional defect under \textit{Idlewild}.\textsuperscript{162} This result would seem doubtful, however, in that the Court has always considered review in three-judge cases as a matter of its own particular concern;\textsuperscript{163} it is even more unlikely when it is considered that appeal to the court of appeals is on the merits, with no guarantee that the denial of the three-judge panel will ever be raised and adjudicated. This lack of certainty and the difference between the theories of appeal to the Supreme Court and the court of appeals would seem to prevent a finding that the lower appellate review is equivalent to that in the Court.

It must be concluded that the implications of \textit{Idlewild} as to the power of the court of appeals in three-judge court litigation are not nearly as extensive or significant as might first appear. The case is limited, by necessity, to situations with facts substantially identical to its own, namely, (1) a single-judge decision on the merits; (2) a final, appealable decision or order under section 1291 or 1292; and (3) the raising of the jurisdictional error by someone other than the appellant. Any other reading would be unfounded not only in the context of the \textit{Idlewild} opinion but also in light of applicable appellate statutes. The result of a broader interpretation would also be to restrict direct Supreme Court control in an area in which it is most desirable.

**THE ADMINISTRATIVE CONFERENCE ACT**

**BACKGROUND**

In September 1949 the Chairman of a Special Subcommittee of the House Judiciary Committee requested Mr. Chief Justice Vinson to have the Senior Council of Circuit Judges "endeavor to develop some time-saving procedures, especially in the antitrust laws."\textsuperscript{1} This request initiated

\textsuperscript{161} U.S. Sup. Ct. R. 31(3) (petition for mandamus must state why other relief is unavailable).

\textsuperscript{162} Note, \textit{The Three-Judge District Court: Scope and Procedure Under Section 2281}, 77 Harv. L. Rev. 299, 310 & n.87 (1963).

\textsuperscript{163} See Note, 46 Harv. L. Rev. 91, 95-96 (1932).

\textsuperscript{1} \textit{Hearing Before Subcommittee No. 3 of the House Committee on the Judiciary, 88th Cong., 2d Sess., ser. 10, at 23} (1964). While the initial congressional inquiry was directed at prolonged antitrust proceedings, the subsequent studies were soon expanded to include administrative proceedings in general. See generally Yankwich, "\textit{Short Cuts} In Long Cases, 13 F.R.D. 41 (1951); \textit{Judicial Conference of the U.S., Procedure in Anti-Trust and Other Protracted Cases}, \textit{id.} at 62. Insofar as the problems were administrative in nature, they were separately studied. \textit{id.} at 65.
a long process of development which culminated in the passage, on August 30, of the Administrative Conference Act of 1964.2

The Chief Justice presented this problem of procedural reform to the Judicial Conference of the United States3 which, at its September 1949 meeting, adopted a resolution calling for the creation of a committee to consider means whereby administrative procedures could be made more effective and expeditious and, at the same time, less expensive. Accordingly, the Chief Justice appointed a committee of ten judges to study the problem.4

After its first meeting, the committee informed the Chief Justice that, because of limited experience in the field of administrative law and procedure, its members were ill equipped to cope with the problems and recommended the appointment of a second section of the committee composed of persons more knowledgeable in the field. The Chief Justice thereupon authorized the appointment of an advisory committee "composed of persons in and out of the government familiar with the problems of administrative agency procedure." Such a committee was appointed on June 29, 1950, and was composed of twelve members.5

During the next nine months the committee conducted an investigation of administrative procedure and practices and, on March 30, 1951, submitted a report which contained, inter alia, a recommendation for the creation of an "Administrative Agency Conference."6 The Judicial Conference, at its September 1951 meeting, adopted a resolution calling for a "Conference of Representatives of the Administrative Agencies" consisting of the agencies "having adjudicatory and substantial rule-making functions" as well as "representatives [of] the federal judiciary and the bar."7 Mr. Chief Justice Vinson transmitted this resolution to President Eisenhower who, on April 29, 1953, called such a conference.

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At the President's request the Attorney General prepared a list of all departments and administrative agencies within the ambit of the Judicial Conference's resolution. A representative from each such agency or department, together with three federal judges, three administrative hearing examiners and twelve practicing lawyers, was appointed to the Conference. So composed, the President's Conference on Administrative Procedure consisted of seventy-five members.8

The President's Conference created a "Committee on Organization and Procedure" which designed the structure of the organization and formulated rules of procedure. Nine other standing committees were appointed.9 Studies were conducted, hearings were held and in due course the Conference issued thirty-five recommendations and a resolution proposing that a similar conference be established on a permanent basis.10 The President acknowledged receipt of the report and resolution on March 3, 1955, and forwarded them to the Attorney General for further study.11

The proponents of the Conference received prestigious support. In March 1960 the Judicial Conference adopted a resolution calling for the establishment of an Administrative Conference.12 The Chief Justice, in an address to the American Law Institute, strongly endorsed the idea.13 The American Bar Association14 and the Federal Bar Association15 adopted resolutions similar to that of the Judicial Conference. Mr. Justice Clark, writing to practitioners of administrative law, supported the proposal.16 And, on August 25, 1960, the chairmen of six of the large independent administrative agencies forwarded a letter to the President.

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9 Hearing Before Subcommittee No. 3 of the House Committee on the Judiciary, supra note 1, at 24-25. The committees thus appointed were prehearing, pleadings, evidence, trial problems, hearing officers, judicial review, uniform rules, office of federal administrative procedure, and style. Ibid.
10 Hearing Before Subcommittee No. 3 of the House Committee on the Judiciary, supra note 1, at 24; see Conference on Administrative Procedure, Report, in 19 F.R.D. at 45.
15 S. Doc. No. 24, op. cit. supra note 11, at 1.
which stated the need for a permanent conference and outlined proposals for its implementation.\textsuperscript{17}

On August 29, 1960, the President formally concurred in the proposal and authorized initial arrangements for the organization of such a conference. An organizational committee was appointed and several weeks later submitted a proposed set of bylaws. Further action was temporarily postponed because of the national elections.

Promptly after his election, President-elect Kennedy asked Dean James M. Landis to prepare a report on the administrative agencies and their problems. In his report, submitted in December 1960, Dean Landis discussed the progress that had already been made toward the establishment of the Conference. He urged the President-elect to:

Promote the organization of the Administrative Conference of the United States and subject to the approval of its by-laws initially by executive order and subsequently by legislation provide for the creation of a Secretariat to the Conference, transferring to that Secretariat duties now performed by the Office of Administrative Procedure within the Department of Justice, which would thus be abolished and transferring from the Civil Service Commission to the Secretariat duties now exercised by the Commission with respect to the qualifications and grading of hearing examiners.\textsuperscript{18}

President Kennedy agreed with that portion of Landis’ recommendations concerning the establishment of the Conference; on April 13, 1961, he sent Congress a Special Message on Regulatory Agencies, stating that:

The results of such an Administrative Conference will not be immediate but properly pursued they can be enduring. As the Judicial Conference did for the courts, it can bring a sense of unity to our administrative agencies and a desirable degree of uniformity in their procedures. The interchange of ideas and techniques that can ensue from working together on problems that upon analysis may prove to be common ones, the exchanges of experience, and the recognition of advances achieved as well as solutions found impractical, can give new life and new efficiency to the work of our administrative agencies.\textsuperscript{19}

President Kennedy, at that time, informed the Congress that he was establishing the Administrative Conference of the United States by Executive order.\textsuperscript{20}

\textsuperscript{17} S. Doc. No. 24, \textit{op. cit. supra} note 11, at 1. The agencies were the Civil Aeronautics Board, Federal Trade Commission, Federal Power Commission, Federal Communications Commission, Securities and Exchange Commission and Interstate Commerce Commission. \textit{Ibid.}

\textsuperscript{18} \textit{Staff of Senate Comm. on the Judiciary, 86th Cong., 2d Sess., Report on Regulatory Agencies to the President-Elect} 82 (Comm. Print 1960).

\textsuperscript{19} 107 Cong. Rec. 5522 (1961).

The next day the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee returned a report which stated, in part:

The subcommittee recommends that every assistance should be given in making permanent an Administrative Procedure Conference, and that Congress should provide the Office of Administration and Reorganization with funds to provide a permanent secretariat for that conference.\(^{21}\)

The "Kennedy Conference"\(^{22}\) recommended the creation of a permanent conference in its final report,\(^{23}\) and this proposal was translated by the Bureau of the Budget into the form of a proposed bill which was introduced into the Senate by Senator Long of Missouri.\(^{24}\)

After referral to the Committee on the Judiciary which reported it with amendments and recommended its passage,\(^{25}\) the bill passed the Senate without objection on October 30, 1963.\(^{26}\) In the House the bill was referred to the Committee on the Judiciary where, after amendments,\(^{27}\) it was reported with a recommendation that it pass.\(^{28}\) The bill was passed by the House,\(^{29}\) the Senate concurred in the amendments\(^{30}\) and the bill was approved by the President on August 30, 1964.\(^{31}\)

**The Kennedy Conference**

The passage of the Administrative Conference Act was due in large part to the enthusiasm generated for the conference approach by the performance of the Kennedy Conference. The Kennedy Conference evoked general approbation because it was acceptable to the agencies as a method of approaching procedural problems, and because it was surprisingly effective. It served as an experimental model for those who drafted the act and provides a basis for predicting the effectiveness of a permanent conference.


\(^{22}\) The title commonly given to the Administrative Conference established by the President by Executive order.

\(^{23}\) Hearing Before Subcommittee No. 3 of the House Committee on the Judiciary, supra note 1, at 31.


\(^{26}\) Id. at 20602-03.

\(^{27}\) See pp. 472-74 infra.


\(^{30}\) Id. at 19221 (Aug. 17, 1964).

PURPOSE

The stated purpose of the Administrative Conference of the United States, created by President Kennedy in 1961, was "to assist the President, the Congress and the administrative agencies and executive departments in improving existing administrative procedures." To accomplish this, the Kennedy Conference was to "conduct studies of the efficiency, adequacy and fairness of procedures by which Federal executive departments and administrative agencies protect the public interest and determine the rights, privileges and obligations of private persons." The mandate of the Conference was limited to the correction of inefficiency and unfairness in administrative procedure; it had no authority to examine substantive problems. Its creation was apparently to a great extent a recognition that the victims of inadequate administrative procedure are often relatively small private interests which too frequently are without any practical recourse in the face of agency determinations.

The Conference was presented with the dilemma of attempting simultaneously to improve both the efficiency and the fairness of agency procedures. In practice these two aspects often conflict. A balancing of the competing interests is required in each instance based upon value judgments and policy decisions; this was the task of the Conference.

One of the most serious problems which faced the Conference was an appalling lack of available information concerning operations of the agencies. It was often impossible to define "delay" in any given procedure because there were few existing standards for determining the length of time which a given procedure should take to complete. The accomplishment of the primary purpose of the Conference—the submission

33 Ibid.
34 Ibid.
37 Address by Mr. Chief Justice Warren, Federal Bar Association Annual Convention, Sept. 24, 1949, excerpted in Hearing Before Subcommittee No. 3 of the House Committee on the Judiciary, supra note 1, at 26; see Texaco, Inc. v. FTC, 336 F.2d 754, 763 (1964), where the court noted that long delays "exceeded permissible limits and have had unreasonably harassing and oppressive effects upon the companies under attack." But see id. at 764-68 (dissenting opinion). See generally Note, Judicial Acceleration of the Administrative Process: The Right to Relief From Unduly Protracted Proceedings, 72 Yale L.J. 574 (1963).
of recommendations for the improvement of agency procedures—was entirely dependent upon the gathering of meaningful information and statistics. For this reason it was necessary that scholars familiar with research techniques in this field be included in the Conference. Without a complete analysis of any given agency procedure, any proposed change would be but a shot in the dark or mere superficial tinkering.

APPROACH

The conference approach to procedural problems is one whereby agencies may "cooperatively, continuously, and critically examine their administrative processes and related organizational problems . . . , with a sufficient infusion of outside experts to assure objectivity and variety of views." This approach allows the agencies to attack their own problems with the aid of outside practitioners and scholars, so that the members are correcting themselves rather than being ordered to change their procedural ways by a mentor composed predominantly or totally of outside personnel. In accordance with this concept, a majority of the members of the Conference, rather than the Chairman or the Council, had final authority.

It was felt that this approach would provide the atmosphere most conducive to effective results. The agencies would naturally be more cooperative with a policing body of which they comprised the majority. Also the first-hand knowledge and experience of the agency members would be reflected in the recommendations of the Conference. Such proposals would not be vulnerable to rejection by the agencies on the grounds that they were unrealistic or based on misinformation. Moreover, implementation of the recommendations would be facilitated because those who approved them as Conference members, would, as agency members, be in a position to see that they were carried into effect. The final report of the Conference expressed satisfaction with the conference approach.

The Conference proved that the agencies, with outside conferees, are ready, able, and willing to undertake delicate and difficult tasks. It proved that they will aggressively attack their own shortcomings. . . . [T]his Conference adopted recommendations on the delegation of decision-making which had been the subject of differences of opinion both in the Congress and between the Executive and Congress, recommendations concerning ex parte contacts with which committees of the Congress have long been concerned, and recommendations relating to such

controversial matters as rights to counsel and to official papers. It unabashedly studied in depth the procedures of individual agencies governing particular functions and made suggestions in respect to them.\(^{39}\)

It might be expected that in such a conference, the agency representatives and the nonagency representatives would polarize into two entrenched and constantly disagreeing factions, the latter attacking the existing procedures from their detached perspectives and demanding sweeping reforms, while the former, with the weight of numbers in their favor, quashed every suggested change of the status quo. In fact, however, this did not materialize. As one Conference member stated:

\[\text{[T]here is no doubt about the participation and effectiveness of the non-Government members during the recent sessions. Their voices were heard frequently in the discussions, their influence was strong in committees, and specific effects of their urgings are clear from the record. They also were in a preponderance on the Council. There was widely expressed appreciation of the quality of their thought and of the willingness of members of the bar in private practice to attend meetings despite the absence of compensation for time irretrievably lost from normal professional work. Very occasionally, intra-government attitudes, once crystallized in the Conference, perhaps became unduly inflexible; but even then the division between government and non-government members was not clearcut. Indeed, transitions into and out of the Government, exemplified in the careers of many members of the Conference, strikingly reduce the likelihood of inability on the part of either group to understand the concerns of the other.}^{40}\]

**COMPOSITION**

The Kennedy Conference had a total of eighty-eight members, and included a Council and an Assembly. The Council was the managerial organ composed of eleven members appointed by President Kennedy. In addition to the Chairman, there were three members from the federal agencies, four practicing lawyers, two professors of law and one professor of political science. Significantly, this gave the nonagency members a majority.

The duties of the Chairman, as indicated by the Executive order, were those of naming the nonagency members of the Conference with the approval of the Council, appointing committees and presiding over meetings. However, this does not adequately indicate the many duties which the Chairman actually performed. The Administrative Conference Act by prescribing a list of twelve powers entrusted to the Chairman\(^{41}\) reflects

\(^{39}\) S. Doc. No. 24, op. cit. supra note 11, at 5-6.
\(^{40}\) Fuchs, supra note 38, at 21-22.
\(^{41}\) ACA § 6(c), 5 U.S.C.A. § 1045d(c) (Supp. 1964).
what the task of the Chairman actually became in the Kennedy Conference. The Chairman was the chief executive officer of the Conference. He determined what matters were worthy of attention, represented the Conference in external relations, encouraged compliance with recommendations, directed research studies and reports and carried out the many other duties required of the chief executive of a large organization.

The Assembly was the main body of the Conference, and all members of the Conference were members of the Assembly. The Assembly had ultimate authority over all activities of the Conference and was composed predominately of agency people. Members were appointed by thirty-three government agencies which were for the most part engaged in activities which required "the determination of rights, privileges, and obligations of private individuals through adjudication and rulemaking."42 The Secretary of each Cabinet department named one member unless there were several agencies within the departmental structure, in which case the Secretary named two.43 These appointees totaled sixteen. Each chairman of the seven large independent agencies44 designated two members. Sixteen other agencies also named one member each.45

Thirty-one nonagency appointees were named by the Council. Two of these were hearing examiners, twenty-one were practicing lawyers,46 three were law faculty members, two were professors of political science, one was an accountant and two were members of state regulatory commissions. There were also six congressional representatives who designated alternates from congressional committee staffs to sit in at the meetings of the Conference. The Director of the Office of Administrative Proce-

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43 Two members each were named to represent the Departments of Commerce, Agriculture, Justice, Health, Education, and Welfare, the Treasury, and the Interior. See S. Doc. No. 24, op. cit. supra note 11, at 33-35.
46 The lawyers selected were all experienced in administrative law. They were chosen so as to give diversity of representation in regard to geographical location, types of clients (including business, public utilities, labor organizations and individual citizens), and size of law firms. S. Doc. No. 24, op. cit. supra note 11, at 4.
The course of operation was:
(1) A subject was suggested for study. Such suggestion might come from anywhere or anybody.\(^4\)
(2) The Council selected the subject from those suggested and proposed its assignment to a committee.
(3) The assembly approved the Council assignment.
(4) The committee considered the subject and directed the research necessary.
(5) The research was conducted by the committee staff director and the Conference staff.
(6) The committee staff director prepared a staff report.
(7) The committee studied the staff report and prepared a recommendation on the subject, supported by a committee report, usually, of course, based upon the staff report. The committee recommendation and the supporting report were two separate documents, one succinct and the other somewhat extensive.
(8) The Council, coordinating the work of all of the committees, considered the recommendation, determined whether it was fully developed and thereby ready for consideration by the assembly, and if so, passed it on to the assembly. Both the committee recommendation and the supporting report were circulated to the entire membership and to other persons indicating an interest.
(9) The assembly debated the recommendation in a public plenary session and voted on it.
(10) If adopted by the assembly, the recommendation was transmitted to the President.\(^5\)

\(^4\) Forty agency lawyers were assigned to the Conference to assist committee reporters and the Conference hired expert consultants and scholars who performed special work. Four lawyers in private practice and four professors of law served as reporters for the committees of the Conference. Fuchs, *supra* note 38, at 7.

\(^5\) Suggestions of subjects for study and recommendations for improvement come to the Conference from widespread and different sources. Some are originally posed by interested, perhaps outraged, individual citizens. Many are advanced by an agency, or a number of agencies. Some come from practicing lawyers or organized groups of lawyers. Some are drawn from congressional studies. Some arise from students of government. Some originate in academic legal studies. Some are recurrent, even ancient, puzzles.


\(^5\) Id. at 3-4.
RESULTS

The Final Report of the Kennedy Conference contained thirty formal recommendations, most of which embodied several specific proposals. Most of these recommendations could be implemented by agency action alone, but some required legislation. No comprehensive study concerning the success of the recommendations is yet available; however, some preliminary indication as to the progress of these proposals was given in the testimony of Mr. Seidman before the House subcommittee.

In 510 instances where evaluation of a recommendation was completed, 398 or 78 percent of the agency responses expressed complete approval of the recommendation; another 56 or 10 percent expressed approval in principle although some modification was deemed necessary to achieve the objective of the recommendation in the responding agency. Recommendations were disapproved for use in the agency in only 20 instances, approximately 3 1/2 percent of the total on which evaluation was completed.

Reports on the status of action to carry out the recommendations were equally gratifying. Of 331 approved recommendations which the individual agencies had authority to carry out immediately, 75 percent were in effect prior to June 13, 1963, and action was underway or had been definitely scheduled in another 20 percent.

The studies and reports made by the Conference must be considered invaluable and lasting accomplishments. The topics of the studies included decisional authority; ex parte communication; ratemaking; licensing of trucks, airplanes and broadcasting; judicial review of NLRB and ICC orders; status and compensation of hearing examiners; the federal legal career service; discovery and subpoena power; government contracts; and a statistical study made of the time required for adjudication of all cases. These studies, made by some of the most distinguished scholars in the field, serve at least as a beginning response to Mr. Chief Justice War-
ren's plea for meaningful information about the administrative process. They should, in the long run, have a more permanent value and a more widespread effect than the recommendations. The studies and reports of the Conference often constitute the only thorough examinations of various areas of the administrative process, and as such, they transcend their immediate purpose—the supporting of Conference recommendations—and constitute a valuable collection of permanent reference materials.

The Conference also had a number of so-called "intangible" results. The very existence of the Conference caused the agencies to examine seriously their own procedures. During the exchange of ideas between representatives of the various agencies, it was not infrequently discovered that a problem presently confounding one agency had been solved several months, or even years, earlier by another; but the previous lack of interagency communication had prevented the information from being circulated. The exposure of the procedural shortcomings of an agency before a conference composed of its sister agencies often had the not-surprising effect of encouraging unilateral reform. The Conference allowed each agency to draw upon the experience of the others and often to implement time and money saving procedures long before a solution might otherwise have been discovered. Moreover, the reports and recommendations of the Conference present the composite agency view on the topics considered. Thus, a congressional committee considering legislation concerning agency matters need not solicit the testimony of all the potentially affected agencies; the Conference report presents it with a thoroughly researched and publicly debated consensus which precisely states the predominating view of the majority of the administrative agencies.

The reports and recommendations of the Kennedy Conference have apparently had a significant effect upon the judiciary in at least one instance. In *Gonzales v. Freeman*, a private corporation and its affiliates had been debarred for five years from participating in any programs of the Commodity Credit Corporation, or from purchasing any surplus government commodities for resale. Prior to the debarment an officer of

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* 334 F.2d 570 (D.C. Cir. 1964).
the corporation had pleaded guilty to a misdemeanor concerning the misuse of official inspection certificates. However, the notice of debarment gave no reason or grounds for the disciplinary action. After finding that the appellants had standing to challenge their debarment and that Congress had provided for a judicial review of Commodity Credit actions imposing debarment on a contractor, the court concluded:

[ Although the Act vests Commodity Credit with power to impose debarment for misuse of official inspection certificates, we cannot agree that Congress intended to authorize such consequences without regulations establishing standards and procedures and without notice of changes, hearings, and findings pursuant thereto. Absent such procedural regulations and absent notice, hearing and findings in this case, the debarment is invalid; to reach any other conclusion would give rise to serious constitutional issues. 56

The precedent-making decision is in complete accord with Recommendation No. 29—even even the language is similar, 57 and the court cites the report of the Conference’s Committee of Adjudication of Claims 58 which is concerned with debarment and suspension of persons from government contracting. It seems safe to conclude that the recommendation and the report did influence the court in reaching its decision, and that it is not unlikely that courts will continue to take note of the reports and recommendations of the Kennedy Conference as well as those of the permanent Conference, and consider them, when appropriate, in making future decisions concerning administrative procedure.

The Administrative Conference Act

The Kennedy Conference and the Administrative Conference are different manifestations of a widely recognized need for procedural reform in administrative practice. The primary difference between the two is indicated by their respective modes of creation. The Kennedy Conference, created by Executive order, 59 had only a limited period in which to effect its purpose. But the Administrative Conference, created by legislation, has at least a semipermanent existence—Congressional satisfaction with its performance being the standard by which its longevity will be determined.

A permanent conference was thought to be necessary because only by persistent attention to many minor defects which collectively create

56 Id. at 579.
57 See S. Doc. No. 24, op. cit. supra note 11, at 60-63.
58 334 F.2d at 576-77 n.11.
major faults can an adequate satisfaction of the need be fashioned. It
was also thought that only a permanent conference would have sufficient
time and resources to devote itself to particular problems and to create
experimental or tailor-made solutions. A temporary conference, on the
other hand, would be limited to broad declarations of policy which would
soon be outdated. Finally, it was thought that a permanent conference
would eliminate any necessity for time-consuming reorganizations re-
quired by periodic creation of temporary conferences.

MEMBERSHIP

The permanent Conference will consist of a maximum of ninety-one
and a minimum of seventy-five persons, selected by various methods and
representing diverse interests. The Chairman will be appointed to a
five year term by the President with the approval of the Senate. The
President will also appoint the Council members who automatically be-
come members of the Conference. The chairman of each independent
regulatory board or commission and the head of each executive depart-
ment or administrative agency designated by the President, or a person
designated by them, will also be a member of the Conference. Finally,
the Council may authorize the appointment of one or more persons from
any board, commission, department or agency, such appointee to be
designated by the head of that organization.

In lieu of automatically including the head of each regulatory body,
the legislation creating the Administrative Conference gives these persons
the option to either attend in person or appoint someone to attend in
their stead. President Kennedy's Executive order stipulated, however,
that heads of regulatory bodies should designate members to represent
their particular organization. This variance is the result of an apprehen-
sion on the part of the drafters of the legislation that the automatic ap-
pointment of agency heads would decrease the effectiveness of the Con-

60 Hearing Before Subcommittee No. 3 of the House Committee on the Judiciary, supra
note 53, at 35 (testimony of Prettyman, J.).
64 ACA § 6(b), 5 U.S.C.A. § 1045d(b) (Supp. 1964).
ference, as these people, due to other pressing duties, might not be able to give the Conference adequate and continuous attention. But it was also thought that agency heads should be allowed to participate if they were willing to assume the added burden, since their expertise would be of great value in effectuating the purposes of the Conference.\textsuperscript{70} Consequently, allowing an agency head either to serve in person or appoint a delegate should result in the optimum of informed and continuous participation.

As was the case in the Kennedy Conference, the Chairman, with the approval of the Council, has the power to appoint nonagency members.\textsuperscript{71} One of the major controversies which arose in drafting the legislation is reflected in restrictions placed upon the Chairman's power of appointment. The dispute developed between those who believed that any successful conference had to be composed predominantly of agency members—a government conference—and those who believed that a conference of private individuals recommending procedural reforms to the agencies was necessary to protect public rights.

President Kennedy's Executive order gave the Chairman authority to appoint any number of nongovernment members so long as they did not become a majority in the Conference.\textsuperscript{72} The legislation establishing the permanent Conference, on the other hand, restricts the Chairman to a maximum of thirty-six public appointments provided that they compose not less than one-third nor more than two-fifths of total Conference membership.\textsuperscript{73} These restrictions guarantee that a majority of Conference members will be chosen from among government personnel so that the predominant influence in the Conference will be the very organizations under scrutiny. As the "responsibility for assuring fair and efficient administrative procedure is inherent in the general responsibilities of officials appointed to administer Federal statutes\textsuperscript{74} it was thought that they should be given a predominant influence in shaping Conference recommendations.

The second restriction placed upon the Chairman's power of appointment was an apparent concession to those who desired a conference with a majority of public members. Nongovernment members of both conferences were to be selected so as to

\textsuperscript{70} S. Rep. No. 621, \textit{op. cit. supra} note 61, at 3.
\textsuperscript{73} ACA § 4(b)(6), 5 U.S.C.A. § 1045b(b)(6) (Supp. 1964).
\textsuperscript{74} ACA § 2(c), 5 U.S.C.A. § 1045(c) (Supp. 1964).
provide broad representation of the views of private citizens and utilize diverse experience, and they shall be members of the practicing bar, scholars in the field of administrative law or government, or others especially informed by knowledge and experience with respect to Federal administrative procedure.75

This clause guarantees that the nongovernmental minority of the Conference membership will contain a broad cross section of views and attitudes, thus making possible the representation and defense of private interests.

The Senate included a provision76 in the bill, also found in the Executive order,77 that all representatives were to participate as individuals, on the theory that the purpose of the Conference was simply "to provide a forum in which persons learned in this field may gather and deal with the problems in this field."78 The House deleted this stipulation, however, because it believed that such a provision might "be thought to prohibit agency personnel or, for that matter, non-Government personnel from recognizing problems encountered by their own agency or outside organizations."79 By this action, the House implicitly recognized that the members will naturally tend to represent the preconceptions and practices of their own backgrounds. Therefore, the presence or absence of a provision of this nature would seem to make little concrete difference in actual Conference operation. Nevertheless, its deletion, coupled with the provision establishing government personnel as a majority of the membership, indicates that the framers envisioned a conference where agency views predominated, though tempered by public attitudes and interests.

It is said that the Judicial Conference is successful because the judges who compose it desire the implementation of their own procedural recommendations. By analogy, therefore, it seems that the Administrative Conference, to be equally effective, should be a government conference so as to make the agencies more receptive to recommended reforms.

In drafting this legislation, Congress endeavored to create an organizational structure that would permit continuous attention to administrative procedure. One part of this structure is the provision for staggered terms of membership by which the Chairman is to serve for five years, Council

78 Hearings on S. 1664 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 117 (1963) (testimony of Ashley Sellers, Vice Chairman, American Bar Association Special Committee on Legal Services and Procedure).
members for three years and general members for two years.\textsuperscript{80} Furthermore, the terms of Council members may be overlapped by the President who has the power to appoint original Council members for terms of one, two or three years; but thereafter, only for uniform three-year terms.\textsuperscript{81} Thus the President, by appointing initial Council members to unequal terms, may increase continuity within the membership, resulting in a corresponding increase in Conference effectiveness.

**ORGANIZATION OF THE ADMINISTRATIVE CONFERENCE**

The permanent Conference retains the tripartite organization of the Kennedy Conference with a Chairman, a Council and an Assembly. However, the powers and duties of each branch of the Administrative Conference are set out with more specificity.

**Assembly**

The Assembly, composed of the entire membership, is to meet in plenary session at least annually,\textsuperscript{82} and has ultimate authority over the activities of the Conference.\textsuperscript{83} As in the Kennedy Conference, recommendations for procedural reform will result from studies conducted by members of the Assembly with assistance from retained experts. The Assembly has authority to adopt any bylaws and regulations or form any committees that it deems necessary to carry out the functions of the Conference.\textsuperscript{84} Unlike the Executive order, the act stipulates that each Conference member will be privileged to submit a dissent to any majority recommendation.\textsuperscript{85}

The Administrative Conference has no power to enforce its proposals for procedural reform. Like the Kennedy Conference, it is purely a recommendatory body; its influence must come from the quality of its work and the collective stature of its members rather than from a Congressional grant of authority. The Conference may make recommendations to the President, Congress, or the agencies and departments whenever it is appropriate to do so,\textsuperscript{86} and must report to the President and Congress.

\textsuperscript{80} ACA §§ 4(b)(1), 6(b), 4(b)(6), 5 U.S.C.A. §§ 1045b(b)(1), 1045d(b), 1045b(b)(6) (Supp. 1964).

\textsuperscript{81} ACA § 6(b), 5 U.S.C.A. § 1045d(b) (Supp. 1964).

\textsuperscript{82} ACA § 6(b), 5 U.S.C.A. § 1045d(b) (Supp. 1964).

\textsuperscript{83} ACA § 6(a), 5 U.S.C.A. § 1045d(a) (Supp. 1964).


\textsuperscript{86} ACA § 5(a), 5 U.S.C.A. § 1045c(a) (Supp. 1964).
at least annually.\textsuperscript{87} In the Senate bill there was a provision that the Conference would report on the extent of agency compliance with recommended reforms.\textsuperscript{88} But the House deleted this provision because of an apprehension that it would appear to give Conference recommendations the force of law when in fact this was not intended.\textsuperscript{89} Indeed, since the Conference will be dominated by the agencies, enforcement powers would seem unnecessary.

Notwithstanding this lack of institutionalized enforcement mechanisms, however, in those instances in which it may become necessary, the Conference has available a number of informal methods by which to encourage a recalcitrant agency's favorable consideration of a recommendation. For example, public disclosure by the Conference of inefficient or inequitable procedures, personal connections within the agency concerned, and other repositories of influence inherent in a flexible and complex society, may be utilized for this purpose. Furthermore, if it has sufficient influence in Congress, the Conference may utilize the threat of a reduced appropriation to urge agency implementation of a recommendation. By the same token, however, an agency could utilize its Congressional supporters as a buffer between itself and a reform-minded Conference. It is interesting to note in this connection that unlike the permanent Conference, the Kennedy Conference included as representatives three Senators and three members of the House.\textsuperscript{90} To this extent therefore, it would seem that the permanent Conference might tend to have less influence in Congress than its predecessor.

It bears reemphasis, however, that these are only informal methods by which the Conference may secure the implementation of its recommendations. As such, the more often they are used the less effective they become and, therefore, the ultimate success of the Conference must be based upon the voluntary responsiveness it engenders among the agencies.

\textbf{Chairman}

The authority to appoint public members\textsuperscript{91} and committees\textsuperscript{92} with the approval of the Council was the only specific grant of authority to the Chairman of the Kennedy Conference by the Executive order. The

\begin{itemize}
    \item \textsuperscript{87} ACA § 6(c)(12), 5 U.S.C.A. § 1045d(c)(12) (Supp. 1964).
    \item \textsuperscript{88} S. Rep. No. 621, \textit{op. cit. supra} note 61, at 4.
    \item \textsuperscript{89} H.R. Rep. No. 1565, \textit{op. cit. supra} note 79, at 3.
    \item \textsuperscript{90} \textit{Hearing Before Subcommittee No. 3 of the House Committee on the Judiciary, supra} note 53, at 34.
    \item \textsuperscript{91} Exec. Order No. 10934, § 3, 26 Fed. Reg. 3233 (1961).
    \item \textsuperscript{92} Exec. Order No. 10934, § 6, 26 Fed. Reg. 3233 (1961).
\end{itemize}
remainder of his authority came as a result of his position as Chairman of the Council. The legislation designed to establish a permanent organization, however, gives the Chairman a number of specific powers including both those expressly granted and those actually assumed by the Chairman of the Kennedy Conference. The Chairman is empowered to create and administer clerical and research facilities\(^93\) which the Executive order provided through the Office of Administrative Procedure in the Department of Justice.\(^94\) He is also authorized to gather from agency and department heads such information as is necessary for the proper functioning of the Conference and can be revealed in compliance with law; to act as spokesman for the Conference and to encourage adoption of recommended reforms; to recommend to the Council appropriate subjects for study; and to conduct initial studies into matters he deems important for Conference consideration. Presumably, these recommendations will be transmitted to the Assembly under section 6 of the act which gives the Council the power to "make recommendations to the Conference or its committees upon any subject germane to the purposes of the Conference.\(^95\) Although the Executive order gave the Council a similar power,\(^96\) it did not explicitly authorize the Chairman to make preliminary investigations. Therefore, although this new authority does not give the Chairman complete control of the agenda, at the very least it gives him great influence in its formation.

Like the Kennedy Conference, the Administrative Conference is only advisory, and therefore much of its success in implementation as well as creation of procedural reforms will depend upon the Chairman's interest, intelligence and determination. The fact that his five year term is longer than those of other Conference members should increase the ability of the Conference to give continuous attention to particular problems—a major objective underlying the creation of a permanent Conference.\(^97\) "A full-time Chairman of recognized stature and prestige is needed to assure that the Conference pursues its objectives energetically and that its recommendations are fully understood and appropriately considered by responsible authorities.\(^98\)

\(^{96}\) Exec. Order No. 10934, § 6(f), 26 Fed. Reg. 3233 (1961), gave the Council the power "to propose to the Conference the matters concerning which the Conference and its committees shall conduct investigations and studies."
\(^{98}\) Hearings on S. 1664, supra note 78, at 86 (testimony of Elmer B. Staats, Deputy Director, Bureau of the Budget).
Council

The councils of both conferences, with one exception, have identical organization. Unlike the Executive order, the act stipulates that no more than five of the President's appointments to the eleven-member Council may be personnel of the administrative agencies; the remainder are to be chosen from the public. Therefore, the government-public ratios in the Council membership and the Assembly will not correspond, because in the Assembly, the minimum permissible number of government people is three-fifths of the total membership. If, however, the Council is evenly divided between government personnel and public representatives, the background of the full-time Chairman may be determinative of whether the Council suggests consideration of problems most vexing to the agencies or to the public. Therefore, this provision may tend to increase the extent of nongovernmental influence in the Conference if the Council assumes an important role in determining what problems are to be considered.

In addition to certain less significant administrative powers, the Council of the Administrative Conference is authorized to (1) determine the time and place of at least one meeting each year of the entire Conference, (2) propose bylaws and procedural rules for the use of the Assembly, (3) consider committee reports and submit them to the plenary session of the Conference with their recommendations, (4) approve the Chairman's appointments to Conference membership and committees and (5) make recommendations to the Conference germane to the purposes of the Conference.

AUTHORITY AND JURISDICTION OF THE CONFERENCE

As was true of its predecessor, the authority of the Administrative Conference is strictly limited to recommendations of procedural reform and to certain other complementary functions necessary to creation of effective recommendations. The Conference has no authority to make recommendations as to the substantive law which these agencies have

100 ACA § 6(b), 5 U.S.C.A. § 1045d(b) (Supp. 1964).
created or which they administer.\textsuperscript{106} It is undeniable, however, that procedure affects the ability to assert substantive rights. If the procedural situation is such that a substantive right cannot be enforced, it is, for all practical purposes, no right at all. Therefore, a recommended procedural reform that would allow this right to be asserted successfully would be tantamount to giving a substantive right where none existed before, and to this extent at least, the Conference will affect substantive matters.

The act states that the authority of the Conference is coextensive with that of the Administrative Procedure Act,\textsuperscript{107} except that it does not include any military, naval or foreign affairs function.\textsuperscript{108} Administrative procedure is defined as any “procedure used in carrying out an administrative program”\textsuperscript{109} which in turn is defined as “any Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rulemaking, adjudication, licensing or investigation . . .”\textsuperscript{110} Since 108 agencies conduct hearings to determine the rights of private persons,\textsuperscript{111} but the maximum possible number of agencies represented will only be fifty-eight,\textsuperscript{112} it would seem that certain of the smaller agencies might be affected by Conference recommendations and yet have no voice in their formation. To this extent, therefore, Conference recommendations may provoke objection by an unrepresented administrative body. Complete representation of agencies, however, would produce an unwieldy group which as a consequence would be less effective.

\textbf{Conclusion}

There does not appear to be any major difference between the Administrative Conference and the Kennedy Conference. The differences that are apparent, however, emanate from their different modes of creation. The Administrative Conference established by legislation,

\textsuperscript{106} ACA § 3(c), 5 U.S.C.A. § 1045a(c) (Supp. 1964).
\textsuperscript{108} ACA § 3(a), 5 U.S.C.A. § 1045a(a) (Supp. 1964).
\textsuperscript{109} ACA § 3(c), 5 U.S.C.A. § 1045a(c) (Supp. 1964).
\textsuperscript{110} ACA § 3(a), 5 U.S.C.A. § 1045a(a) (Supp. 1964).
\textsuperscript{111} Hearing Before Subcommittee No. 3 of the House Committee on the Judiciary, 88th Cong., 2d Sess., ser. 10, at 35 (1964) (testimony of Prettyman, J.).
\textsuperscript{112} This number is based on a total Conference membership of ninety-one, less the Chairman who is a full time appointee, less the minimum of five Council members who must be selected from the public, less the minimum of one-third of the general membership of eighty who also must be selected from the public.
is intended to be permanent and consequently is organized with more specificity than the Kennedy Conference, which was established on an experimental basis to discover whether this was a feasible method by which to approach these problems.

In both instances a three level organizational pyramid was created with directive power in a small group—the Council under the leadership of the Chairman, and creative power in a large group—the general membership. The Council is in a position to direct the creative powers of the membership working in committees toward solution of specific problems. This appears to be an effective utilization of the talent of the membership because a division of labor is created whereby the smaller group determines the direction of creative force which is applied by the larger group. Consequently, if this division is maintained, the experts, working as members within the scope of the assigned problems, should enjoy an unfettered opportunity to fashion those solutions which in the light of their experience and expertise appear to be most just and feasible.

The stated purposes of the Administrative Conference Act are succinctly set forth in the House report which recommended its passage.

The purpose of [the act] . . . is to provide permanent machinery whereby the Federal agencies, with assistance from non-Government authorities on administrative practice, will be able to formulate recommendations to improve Government procedures, cutting down time and costs, while preserving due process of law. A permanent Conference will provide continuity for the kind of work performed by the two temporary Administrative Conferences appointed by President Eisenhower and President Kennedy respectively. The Conference would stand in similar relationship to the agencies as the Judicial Conference stands to the Federal courts.113

There can be little doubt that the stated objectives are valid or that the administrative ills sought to be cured are real.114 The question, therefore, is whether the Conference, as provided for by the act, will make worthwhile contributions in the area. It is believed that it will.

Of course, there are some such as Louis J. Hector, former member of the Civil Aeronautics Board who have argued for an entire overhaul of the administrative system.115 Hector would divide administrative func-

tions into separate areas of policy decisions and quasi-judicial proceedings. However, there is no indication that the Conference might not determine that changes, along the line that Hector and others have recommended, are needed. And it can hardly be gainsaid that such a proposal coming from the agency-dominated Conference would have vastly more weight.

Leaving drastic alteration of the system aside, several standard objections to the Conference have been generally advanced. It has been suggested that the preponderance of government representatives on the membership rolls will prevent real achievement in the streamlining of administrative procedure from being realized. It has been further suggested that the lack of authority to enact or enforce its recommendations will lead to a disregard of Conference proposals. And, finally, it is argued that the enactment of the Administrative Conference Act will prevent additional legislation in the administrative field.

It is clear that, from the outset, the Conference was designed as an "agency conference." However, since the act makes sufficient provision for nongovernment membership, with the right to file separate views specifically reserved, any objection seems unwarranted. It is proper that the agencies actually concerned have the greatest voice in the discussions and recommendations. It seems only logical that the administrative agencies would more readily observe recommendations which they themselves proposed. On the other hand, as has been noted, outside participation will prevent a one-sided view of the problems and should serve to ensure that the viewpoint of the private litigant and practitioner are put before the Conference. Especially when the alternative to non-action seems to be judicial intervention, it is submitted that the govern-


118 Chairman's Page, 14 AD. L. REV. 225 (1962).

119 See, e.g., Hearing Before Subcommittee No. 3 of the House Committee on the Judiciary, supra note 111, at 37 (1964) (testimony of Prettyman, J.).


ment members on the Conference will be sincere in their participation and recommendations.

The fact that the Conference has no rule-making authority itself is not viewed as a serious objection. As a matter of fact, neither does the Judicial Conference.\textsuperscript{123} If seriously and diligently pursued, the Conference's recommendations can, in time, achieve the same force and dignity as those of the Judicial Conference. And it is not unlikely that, in time, additional legislation will clarify the Conference's recommending powers.\textsuperscript{124}

The short answer to the contention that the Administrative Conference Act will prevent additional legislation in the administrative field\textsuperscript{125} is simply that there is no evidence that this is so. Since the Conference must submit periodic reports\textsuperscript{126} and its initial appropriation is only for one year,\textsuperscript{127} it is submitted that the Conference will be anxious to show concrete results. It may be expected that if the Conference proves worthless it will soon be abandoned by Congress. On the other hand, if it makes real and worthwhile contributions toward the elimination of delay and expense in administrative proceedings, it may be that additional legislation is not needed. In any event, this objection seems premature.

From time to time various proposals have been advanced which would radically alter the existing administrative system. Thus, for example, some have urged the creation of a congressional "watch-dog" committee,\textsuperscript{128} while the proposal for the creation of an administrative court has received the strong support of others.\textsuperscript{129} Of course, the Conference does not accomplish anything nearly as sweeping but it may be argued that by enacting the Administrative Conference Act Congress determined that the existing problem areas in administrative law and procedure would be corrected from within. Whether or not the Conference will be the ultimate solution remains to be seen, and much would appear to hinge on the effectiveness of the Conference itself. Should the Conference


\textsuperscript{125} Chairman's Page, supra note 118.

\textsuperscript{126} ACA § 6(c), 5 U.S.C.A. § 1045d(c) (Supp. 1964).


\textsuperscript{128} E.g., Schwartz, Legislative Oversight: Control of Administrative Agencies, 43 A.B.A.J. 19 (1957).

arrive at useful, remedial recommendations and should the agencies themselves conscientiously apply those recommendations so that real and lasting improvements are forthcoming, it may be assumed that any proposal for more drastic reform will have little chance of congressional approval. On the other hand, should the Conference prove ineffective, the proponents of radical reforms will have another string in their bow when they ask Congress to approve alternative remedies for deficiencies in administrative procedure.

On balance, it is submitted that the Administrative Conference Act enables the administrative agencies, for the first time, to launch a permanent program of internal improvement with sufficient funds and outside talent to aid its success. It is not unreasonable to expect that the legislature and the President will extend every possible assistance to the Conference and will accord its recommendations the most serious consideration. If this is so, achievement can be anticipated.

FTC PROCEEDINGS AND SECTION 5 OF THE CLAYTON ACT

Ever since 1914, commencement of a Justice Department action brought to enforce the antitrust laws has suspended the running of the statute of limitations applicable to a private right of action for damages sustained by an individual as a result of the same violation of the antitrust laws alleged in the Justice Department action. In the past eighteen months, four cases have been decided which deal with the question of whether a Federal Trade Commission proceeding also has this effect. Three of these cases, in accordance with the generally accepted view, held that it did not. The fourth answered the question in the affirmative. It is the purpose of this Note to consider the issue raised by this conflict.

The antitrust enforcement machinery which has been developed by Congress is unique in as much as it encourages private litigation to aid the Government in its enforcement function. It is this unique arrangement

which gives rise to the question. President Woodrow Wilson in an address to a joint session of Congress on January 20, 1914, said:

I hope that we shall agree in giving private individuals who claim to have been injured by these processes [antitrust infractions] the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government . . . . It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He cannot afford, he has not the power, to make use of processes of inquiry the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience.4

This forceful request was part of a speech which directed Congress to pass a general regulatory scheme of legislation in the field of antitrust law. Congress responded to the President’s appeal by passing the Clayton Act,5 and section 5 of that act6 contained Congress’ reply to the President’s specific request that private parties be allowed to use the facts7 and judgment8 established in a government suit against the same defendant as evidence in their private action for damages.9 It provided in part:

4 51 Cong. Rec. 1979 (1914).
7 Originally there was some controversy regarding the extent to which the record of the former proceeding could be admitted into evidence. See Eastman Kodak Co. v. Southern Photo Co., 295 Fed. 98 (5th Cir. 1923), aff’d, 273 U.S. 359 (1927). The question apparently was resolved by the Supreme Court when it said: “We think that Congress intended to confer, subject only to a defendant’s enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit.” Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951); accord, Eagle Lion Studios, Inc. v. Loew’s, Inc., 248 F.2d 438 (2d Cir. 1957), aff’d, 358 U.S. 100 (1958); Monticello Tobacco Co. v. American Tobacco Co., 197 F.2d 629 (2d Cir. 1952); Orbo Theatre Corp. v. Loew’s, Inc., 156 F. Supp. 770 (D.D.C. 1957), aff’d, 104 U.S. App. D.C. 262, 261 F.2d 380 (1958), cert. denied, 359 U.S. 943 (1959); cf. Barnsdall Ref. Corp. v. Birnamwood Oil Co., 32 F. Supp. 308 (D. Wis. 1940). See also 2 TOULEMIN, ANTI-TRUST LAW § 17.8 (1949); id. § 17.1 (Supp. 1964).
8 Prior to 1914 evidence of the judgment or decree obtained by the Government in an antitrust suit was not admissible against the same defendant in a subsequent action for damages brought by the private party. See Buckeye Powder Co. v. DuPont Powder Co., 248 U.S. 55, 63 (1918).
That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . .

To further effectuate the purpose of the section, i.e., to minimize the burdens of litigation for injured private parties, section 5 also provided for the tolling of the statute of limitations during the pendency of the government action. Combinations in restraint of trade had been rendered unlawful by the Sherman Anti-Trust Act, and were susceptible to treble damage suits under section 7 of that act; yet if a private party waited until the conclusion of the government action, he risked the possibility that his action would be barred by the statute of limitations. Therefore, in order that a private party would not be required to bring his action before it was determined by the government action that the defendant had violated the antitrust laws, and also in order to save the private party from a drawn-out action without the important evidence of the Government's judgment or decree, a provision was included in section

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10 Clayton Act, ch. 323, § 5, 38 Stat. 731 (1914). Since consent decrees are not actually based on findings of fact, it was provided that evidence of such decrees entered against a defendant in a government action would be inadmissible if they were entered before testimony had been taken. Clayton Act § 5(a), 69 Stat. 283 (1955), 15 U.S.C. § 16(a) (1958), amending 38 Stat. 731 (1914); see 51 Cong. Rec. 15825, 15938, 16046 (1914). In the original House bill only judgments and decrees in government equity proceedings would have been admissible in subsequent suits. H.R. 15657, 63d Cong., 2d Sess. (1914); see H.R. Rep. No. 627, 63d Cong., 2d Sess. 4 (1914). The Senate also considered a version which was limited to equity actions and which made no mention of criminal judgments. See S. Rep. No. 698, 63d Cong., 2d Sess. 58 (1914). In conference, however, the section was written to provide that final judgments in criminal as well as equity proceedings should be admissible as prima facie evidence in subsequent private suits. See S. Doc. No. 585, 63d Cong., 2d Sess. 4 (1914); H.R. Rep. No. 1168, 63d Cong., 2d Sess. 2 (1914). Congressional debate on § 5 seems to have been limited to the questions of the admissibility of consent decrees and the inclusion of criminal actions.


12 Sherman Anti-Trust Act, ch. 647, § 7, 26 Stat. 210 (1890) (now Clayton Act § 4, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 15 (1958)). Section 4 of the Clayton Act permits suit by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." Also provided is "threelfold" recovery of "damages by him sustained."

5 to toll the statute of limitations. This provision received only passing reference in the debates, and seemed accepted as an essential counterpart of the prima facie evidence provision.

For many years, however, the effectiveness of section 5 was plagued by a deficiency in the antitrust laws. Since these laws did not specify a statute of limitations for private damage actions, local statutes were applied. This caused problems both in determining which state's law would govern and the appropriate state statute to be applied to the private treble-damage proceedings. In 1953 the Attorney General's National Committee to Study Anti-trust Laws made specific recommendations to obviate this confusion. It recommended that a uniform statute of limitations be established and that the tolling provision of section 5 be amended. In the same year Congress acted upon these recommendations, adding section 4B to the Clayton Act to provide a uniform four year statute of limitations. It also divided section 5 into two parts, providing in subsection 5(b) for the suspension of the statute of limitations during the pendency of a government suit and one year thereafter and adding a reference to the new four year period. In addition to these changes, the words "criminal prosecution or in any suit or proceeding in equity" which appeared in the original act were changed to "civil or criminal proceeding," and other minor changes were made in what became section 5(a). As amended, section 5 provides:

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the

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14 It provided that "whenever any suit or proceeding in equity or criminal prosecution" was instituted by the Government "to prevent, restrain or punish violations of the antitrust laws," the statute of limitations should be tolled as to a private suit based "in whole or part" on such violations "during the pendency" of the government suit. Clayton Act, ch. 323, § 5, 38 Stat. 731 (1914).

15 See 51 Cong. Rec. 9489 (1914) (remarks of Representative Floyd).


antitrust laws to the effect that a defendant has violated said laws shall be
prima facie evidence against such defendant in any action or proceeding
brought by any other party against such defendant under said laws or by the
United States under Section 4A, as to all matters respecting which said
judgment or decree would be an estoppel as between the parties thereto: 
Provided, That this section shall not apply to consent judgments or decrees
entered before any testimony has been taken or to judgments or decrees
entered in actions under section 4A.

(b) Whenever any civil or criminal proceeding is instituted by the United States
to prevent, restrain, or punish violations of any of the antitrust laws, but
not including an action under 4A, the running of the statute of limitations
in respect of every private right of action arising under said laws and based in
whole or in part on any matter complained of in said proceeding shall be
suspended during the pendency thereof and for one year thereafter: Provided,
however, That whenever the running of the statute of limitations in respect
of a cause of action arising under section 4 is suspended hereunder, any
action to enforce such cause of action shall be forever barred unless com-
menced either within the period of suspension or within four years after the
cause of action accrued.24

Section 5 has not been amended since 1955, but its scope has recently
been challenged. The reason for this challenge is that the Federal Trade
Commission and the Attorney General have concurrent responsibility
for the enforcement of the antitrust laws,25 but traditionally only a
court action brought by the Attorney General has been thought to be
within the purview of section 5 of the Clayton Act. The first attempt
to bring an order of the FTC within the ambit of section 5 was made in
1923 in Proper v. John Bene & Sons.26 In Proper the plaintiff as-

makes the Attorney General and the Federal Trade Commission each responsible for the
enforcement of §§ 2, 3, 7 and 8. In addition, the FTC has jurisdiction to declare that
conduct tending to restrain trade is an unfair method of competition under Federal Trade
FTC v. Cement Institute, 333 U.S. 683, 693 (1948); FTC v. Beech Nut Packing Co., 257
U.S. 441, 453-54 (1922). To thus provide the Government with “cumulative remedies” was
supported by “a strong congressional purpose not only to continue enforcement of the
Sherman Act by the Department of Justice . . . but also to supplement that enforcement
through the administrative process of the new Trade Commission.” FTC v. Cement Institute,
supra at 692-95. See also United States v. Great Atl. & Pac. Tea Co., 67 F. Supp. 626, 677
(E.D. Ill. 1946), aff’d, 173 F.2d 79 (7th Cir. 1949). The body created to assist in this
enforcement has been deemed “specially competent . . . by reason of information, experi-
ence and careful study of business and economic conditions . . . [to treat] special questions
serted that a proceeding before the FTC was a proceeding in equity on behalf of the United States under the antitrust laws, and, relying on section 5, asserted that the findings of fact made by the Commission should be conclusive against the defendant in the private action. The court, however, decided that an FTC order was not a final judgment or decree within the meaning of section 5 because it “has no effect in itself, unless made operative by the Circuit Court of Appeals, which has the power of review,” and therefore would not admit the FTC’s findings into evidence. For many years this decision was dispositive of any attempt to include an FTC proceeding within section 5.

Although there had been discussion in 1914 in favor of making the FTC order final, the procedure finally adopted by Congress provided that if the FTC ordered discontinuance of unfair competition, and the order remained unobeyed, the agency would have to make application in the form of a separate suit in the appropriate court of appeals for enforcement of the order. The inability of the FTC to render a final order was remedied for most purposes by subsections 3(c)-(g) of the Wheeler-Lea Act of 1938 which amended section 5 of the Federal Trade Commission Act. The amendment provided that cease and desist orders of the FTC would become final upon the expiration of the sixty day time period allowed for filing a petition of review, and that when such orders became final, either through the lapse of time or by court affirmance, their violation would become punishable by fine, recoverable in a civil suit brought by the United States. The prime purpose of the amendment was to make the time when such orders became final “definite and certain.”

In 1945, in Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp., the court over a vigorous dissent which relied in part

27 Id. at 731.
28 Id. at 732.
30 51 Cong. Rec. 1468-70 (1914) (remarks of Representative Cummins).
31 Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 720 (1914); see 51 Cong. Rec. 1468 (1914) (remarks of Representative Cummins).
33 Ch. 311, 38 Stat. 720 (1914).
35 150 F.2d 69, rev’d on rehearing, 150 F.2d 74 (2d Cir.), cert. denied, 326 U.S. 757 (1945).
on Proper,\textsuperscript{36} sustained the contention that an FTC order, with conclusions of law and findings of fact, should have been admitted into evidence at trial. The majority cited the 1938 amendment to section 5 of the Federal Trade Commission Act\textsuperscript{37} and noted that since the FTC order had not been appealed within sixty days, it had ripened into a judgment or decree within the meaning of section 5 of the Clayton Act.\textsuperscript{38} However, in a per curiam opinion on rehearing,\textsuperscript{39} the court reversed itself on this point, concluding that the 1938 amendment affected only the Federal Trade Commission Act and not the Clayton Act; as to Clayton Act violations an FTC order could not become final without court action.

For more than twenty years the FTC sought legislation similar to that under the Federal Trade Commission Act so that it would have adequate enforcement procedure in Clayton Act violations.\textsuperscript{40} The need for amendatory legislation became more immediate when the Supreme Court in FTC v. Ruberoid\textsuperscript{41} ruled that the appellate courts had no jurisdiction to issue a judicial order to enforce a Clayton Act cease and desist order until the FTC had first established that its order had been violated. Prior to Ruberoid the FTC was able to obtain a finalization of its order from the court of appeals by means of a cross-petition when the respondent petitioned for judicial review; after the decision the FTC had to initiate a separate court proceeding to finalize its order.\textsuperscript{42} This decision accentuated the inadequate and cumbersome procedure which had plagued the FTC in the enforcement of Clayton Act orders. In 1959 Congress amended section 11 of the Clayton Act\textsuperscript{43} with the purpose of making "final cease-and-desist orders issued by the commissions and boards . . . in the same manner as cease-and-desist orders now become final when issued by the Federal Trade Commission pursuant to the procedures that are set forth in section 5 of the Federal Trade Commission Act."\textsuperscript{44} This meant that the petition for review of the order had to be filed within sixty days after service of the order\textsuperscript{45} or it would become

\textsuperscript{36} Id. at 73 (dissenting opinion).
\textsuperscript{38} 150 F.2d at 72.
\textsuperscript{39} 150 F.2d at 74.
\textsuperscript{40} H.R. REP. No. 580, 86th Cong., 1st Sess. 5 (1959).
\textsuperscript{41} 343 U.S. 470 (1952).
\textsuperscript{42} See id. at 479-80.
\textsuperscript{44} H.R. REP. No. 580, 86th Cong., 1st Sess. 3 (1959).
If an appeal were taken from the order, it would become final only upon affirmance by a court of appeals. The 1959 amendment making FTC orders final without separate court action would seem to have removed the obstacle recognized by the Brunswick court and the main objection raised by the Proper court to the inclusion of FTC orders within section 5. In fact, in New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., the only court which has specifically considered the effect of the 1959 amendment concluded that this amendment operated to bring an FTC proceeding within the ambit of section 5. It drew support for its holding from Brunswick by deciding that the 1959 amendment had precisely the effect that was attributed to the 1938 amendment of the Federal Trade Commission Act by the Brunswick court before it reversed itself on rehearing.

Three other cases involving private suits for treble damages were decided at approximately the same time on essentially the same facts as were present in Minnesota Mining but all three, without mentioning the 1959 amendment, reached the opposite conclusion. In the four recent cases the issue of whether an FTC proceeding could qualify under section 5 was presented in a slightly different posture than it was in Proper and Brunswick. The latter cases were concerned with the prima facie evidence provision found in what is now subsection 5(a), while the four recent cases all involved a defendant's claim that the suit was barred by the statute of limitations and an attempt by the plaintiff to avoid the effect of the statute by employing the tolling apparatus of 5(b). In each case the alleged unlawful acts had occurred more than four years prior to the filing of the complaint, but in every instance there was an intervening FTC proceeding chronologically situated so that it would effectively toll the statute if the action of the Commission were deemed to be within

48 The Proper court also expressed doubt as to whether an FTC order met any of the other requirements of § 5. 295 Fed. at 731.
49 332 F.2d 346 (3d Cir.), cert. granted, 85 Sup. Ct. 146 (1964).
50 See Brunswick-Balke-Collender Co. v. American Bowling & Billiard Co., 150 F.2d 69, 73, rev'd on rehearing, 150 F.2d 74 (2d Cir.), cert. denied, 326 U.S. 751 (1945). Minnesota Mining distinguished Proper on the ground that Proper was dealing with an FTC proceeding under the Federal Trade Commission Act, not one under the Clayton Act. 332 F.2d at 358.
5(b). To evaluate the problem presented by these cases, both subsections (a) and (b) must be examined.

The principal objection to an interpretation which would include FTC proceedings within section 5 arises from the assertion that when Congress, pursuant to President Wilson’s request, made provision for the use of facts established in a government action as prima facie evidence in a private suit, it did not consider an FTC proceeding as being the contemplated type of government action. Proponents of this position contend that the 1955 amendment to section 5, which changed the words “criminal prosecution or in any suit or proceeding in equity” to “civil or criminal proceeding,” did not contemplate the inclusion of an FTC proceeding, but was merely meant to conform the language of section 5 to the terminology used in the Federal Rules of Criminal and Civil Procedure. Moreover, it has been stated that the traditional distinction between administrative and judicial bodies militates against the inclusion of an FTC proceeding within section 5.

The latter objection is based upon the manner in which FTC investigations and hearings are conducted, and upon the internal organization of the Commission. It has been said, for example, that the initial complaints issued by the FTC, at least in Robinson-Patman cases, fail to evidence the establishment of a clear enforcement policy, and are issued, in the main, against small businesses rather than against the big buyer, the intended target of Congress. The reason for this is claimed to be the “numbers game” by which Congress measures the success of the FTC. Some members of the congressional appropriations committee are said to gauge the FTC’s financial deservedness on the basis of the number of complaints and orders issued, and because of this the distinctions

52 See text accompanying note 4 supra.
54 FED. R. CRIM. P. 1; FED. R. CIV. P. 2.
55 See Wright v. Carter Prods., Inc., 244 F.2d 53, 59 n.4 (2d Cir. 1957); Brunswick-Balke-Collender Co. v. American Bowling & Billiard Co., 150 F.2d 69, 73, rev’d on rehearing, 150 F.2d 74 (2d Cir.), cert. denied, 326 U.S. 757 (1945) (dissenting opinion).
57 See Loughlin, supra note 56, at 762; Rowe, supra note 56, at 434-35.
among the investigative, prosecuting, and judicial functions of the FTC are alleged to have become blurred,\(^{58}\) the three branches operating as a team to produce more complaints and orders so as to expand and perpetuate the Commission.\(^{59}\) Although the investigators are supposed to be impartial finders of fact, "there is an understandable tendency for them to approach the investigational process as an arm of the prosecution."\(^{60}\)

In addition to the specific criticisms aimed at the internal organization of the FTC, an FTC proceeding is an administrative proceeding, so its "hearing [is] conducted according to its own rules of evidence."\(^{61}\) Courts have held that the Commission is not restricted by the rigid rules of evidence that are required in an ordinary action.\(^{62}\)

While such objections based on the distinction between a judicial and an administrative proceeding may present strong policy reasons for not including an FTC order as evidence in a subsequent judicial proceeding, it can be argued in rebuttal that it would not seem to make such inclusion

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\(^{58}\) See Barton, *The Federal Trade Commission and the Need for Procedural Impartiality*, 64 COLUM. L. REV. 390 (1964) (suggesting as a possible solution complete separation of the prosecuting branch from the judicial branch of the FTC).

\(^{59}\) See Rockefeller & Wald, *Antitrust Enforcement by the Federal Trade Commission and the Department of Justice: A Primer for Small Businesses*, 66 DICK. L. REV. 251 (1962). With regard to the manner of conducting investigations the authors state:

As an ordinary rule, the investigator will appear at the offices of the company without prior notice, explain the purposes of his investigation, and request an opportunity to examine documentary evidence relating to the matters under investigation. . . .

In many cases the failure of companies under investigation reasonably to assert their right to limitation of the investigation and to require an orderly course of procedure conducted through counsel, has severely prejudiced the companies and has permitted investigators to obtain information to which they might not otherwise be entitled.

In recent years the Commission has made aggressive use of its inquisitorial powers. In a series of cases, the courts have sustained the Commission's broad subpoena powers and its authority to require corporations to file sworn reports and answers in writing to specific questions. In particular, the Commission has enthusiastically adopted this latter investigative device.

*Id.* at 256. See also Loughlin, *supra* note 56, at 762.

\(^{60}\) *Ibid.* The Commission has also been accused of many additional failings including a general tendency to hold that the antitrust laws have been violated; to read the applicable statute like a dictionary, or in a strained manner to support a contemplated order; to violate § 8 of the Administrative Procedure Act, 60 Stat. 242 (1946), 5 U.S.C. § 1007 (1958), by preventing the formation of a record for appeal; or even to remand a proceeding in order to give its prosecuting arm another chance to prove its case. See Barton, *supra* note 58, at 391-98.

\(^{61}\) Wright v. Carter Prods., Inc., 244 F.2d 53, 59 n.4 (2d Cir. 1957).

\(^{62}\) See, e.g., FTC v. Cement Institute, 333 U.S. 683 (1948); Rhodes Pharmacal Co. v. FTC, 208 F.2d 382 (7th Cir. 1953); Concrete Material Corp. v. FTC, 189 F.2d 359 (7th Cir. 1951); Phelps Dodge Ref. Corp. v. FTC, 139 F.2d 393 (2d Cir. 1943); John Bect & Sons v. FTC, 299 Fed. 468 (2d Cir. 1924).
prohibitive from the standpoint of the language of section 5, since an
FTC order has long been accorded a res judicata effect as between the
Government and the defendant in FTC proceedings, and all that is
required by section 5, in order that the facts and judgment established at
the prior government proceeding be included as prima facie evidence in
the private action, is that the evidence be such as would work an estoppel
between the original parties at the government proceeding. Furthermore,
significant protection is afforded the defendant in an FTC proceeding
by his right to secure appellate review of the FTC order. It should
also be noted that an FTC proceeding is conducted in much the same
manner as a court of equity, where the judge sitting without a jury can
hear evidence which would not be admissible in a jury trial, so long as he
does not base his decision on such inadmissible evidence, and further

63 United States v. Williard Tablet Co., 141 F.2d 141 (7th Cir. 1944); see Annot.,
152 A.L.R. 1198 (1944).
64 See Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 560 (1951).
see, e.g., C. E. Niehoff & Co. v. FTC, 241 F.2d 37 (7th Cir. 1957) (standard to be applied
on review is whether conclusions reached are supported by substantial evidence). Furthermore,
the same court indicated that for the protection of the defendant, in reviewing orders
of the FTC a broader standard would be applied than in review of a decision by an equity
court.

Section 11 of the Clayton Act gives this court power, inter alia, to modify an order
of the commission. . . . We have held that the power of a court of appeals to enforce,
set aside or modify the Commission's order is an exercise of original jurisdiction,
rather than appellate jurisdiction, and that the court may by its own orders protect
the rights of the parties in any manner in which any trial court of equity of general
jurisdiction might do . . . .

Id. at 42. See also Standard Oil Co. v. United States, 337 U.S. 293, 310 n.13 (1949); FTC
66 McCormick, Evidence ch. 6, § 60 (1954); see, e.g., Frank Adam Elec. Co. v. West-
inghouse Elec. & Mfg. Co., 146 F.2d 165 (8th Cir. 1945); State ex rel. Carter County v.
Lewis, 294 S.W.2d 954 (Mo. 1956); cf. Hoffman v. United States, 87 F.2d 410 (9th Cir.
1937); Indian Fred v. State, 36 Ariz. 48, 282 Pac. 930 (1929) (adoption of federal standard

The fact that administrative agencies may not be bound by strict rules of evidence will
be taken into account by the reviewing court.

The obvious purpose of this and similar provisions is to free administrative boards
from the compulsion of technical rules, so that the mere admission of matter which
would be deemed incompetent in judicial proceedings would not invalidate the ad-
ministrative order. But this assurance of a desirable flexibility in administrative pro-
cedure does not go so far as to justify orders without a basis in evidence having rational
probative force. Mere uncorroborated hearsay or rumor does not constitute substantial
evidence.

Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229-30 (1938) (opinion of Hughes, J.).
See generally 1 Wigmore, Evidence § 4(c) (1940).

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that there are safeguards provided by the Federal Trade Commission Act, 67 the Administrative Procedure Act, 68 and by the Commission's promulgated Rules of Practice. 69

The objections which are based on a literal reading of the statute and a consideration of the legislative discussion in 1914 are more serious. However, an FTC proceeding seems to fit certain of the conditions of section 5 without much difficulty. An FTC proceeding can now be classified as one "by or on behalf of the United States," 70 if indeed, it was not considered as such from the beginning. 71 The requirement of finality imposed by section 5 has been held to be satisfied, with respect to a court order, either through action by a court of last resort or by passage of the statutory time provided for appeal. 72 It appears, therefore, that by applying the same attributes of finality to an FTC order as are applied to a court order, the 1959 amendment to section 11 of the Clayton Act makes the order final within the meaning of section 5. 73 Since it is clear that an FTC proceeding is not a criminal proceeding as that term is used in section 5, 74 an examination of section 5 should focus on whether an FTC proceeding is one which can fairly be called a "civil proceeding" within the meaning of that section.

72 "(I)t seems reasonably clear that Congress in using the term 'final judgment' in the Clayton Act had in mind the final disposition of the case, i.e., a final judgment by reason of the failure to appeal within the statutory period, or a final judgment by reason of affirmance of the appeal by the court of last resort." Twin Forts Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 369 (D. Minn. 1939). See also Leonia Amusement Corp. v. Loew's, Inc., 117 F. Supp. 747 (S.D.N.Y. 1953) (finality based upon expiration of time for appeal).
There has been some question as to whether any substantive change was made by the 1955 amendment to section 5 which changed the words "proceeding in equity" to "civil proceeding." Since the legislative history is silent on the reasons for the change, it has been held that the change was made merely to conform the language of the section to the Federal Rules of Civil Procedure. But even if the 1955 amendment did not broaden the scope of the section, the Minnesota Mining court held that an FTC proceeding could reasonably be seen to be an "equity proceeding" due to the effect of the 1959 amendment to section 11 of the Clayton Act. The court reasoned that although prior to 1959 an FTC proceeding was not a proceeding in equity, it was, nevertheless, a part of a process which involved both the FTC and the court of appeals. The FTC functioned as an investigative body similar to a master in equity and the court of appeals functioned as an enforcing agent. The action of the court of appeals constituted the proceeding in equity. When the 1959 amendment to section 11 gave the FTC capacity to issue an order which became final through the lapse of time or upon affirmance on direct appeal, the FTC proceeding, since it could result in a final order or decree, became a "civil proceeding" within the meaning of section 5.

Mr. Justice Frankfurter has said that, "the fair interpretation of a statute is often 'the art of proliferating a purpose,' . . . revealed more by demonstrable forces that produced it than by its precise phrasing."

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76 332 F.2d at 356.
78 332 F.2d at 355, 356.
81 Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951). "[I]Indeed, interpretation is the art of proliferating a purpose which is meant to cover many occasions so that it shall
Despite the possibility that Congress did not originally intend that FTC proceedings be included within section 5, a consideration of the substantial changes in the FTC since 1914,\(^\text{82}\) and the amendments to the Clayton Act, could lead to the conclusion that congressional purpose would be better effectuated by following the plausible interpretation that they are now "civil proceedings."

It has been said that Congress intended the Sherman, Clayton and Federal Trade Commission Acts to work together to provide a cumulative remedy for violations of the antitrust laws.\(^\text{83}\) Section 5, in addition to evidencing congressional recognition of the need for compensating the injured party in an antitrust action,\(^\text{84}\) indicated congressional awareness of the advantage to the public of using private self-interest as a means of enforcing these laws.\(^\text{85}\) Not the least of the benefits flowing from this cumulative remedy is the deterrent effect which it has upon potential antitrust violators.\(^\text{86}\) With this congressional policy in mind, it appears reasonable to conclude that an FTC proceeding is a civil proceeding within the meaning of section 5. To hold otherwise not only weakens the value of section 5 as a deterrent to prospective antitrust violators, defeating a portion of the cumulative remedy intended by Congress, but also severely limits the private litigant's chances for recovery in his own antitrust action. It would result in the anomaly that if a prior action were instituted by the Justice Department the private litigant would be able to reap the benefits of section 5, but if the prior


\(^\text{82}\) See Kronstein, Reporting on Corporate Activities, 38 U. DETROIT L. REV. 589, 591-92 (1961), where it is indicated that the FTC was originally organized as a reporting agency, § 5 of the Federal Trade Commission Act being included in the latter stages of the draft of the act only “to authorize the Commission to act itself, if in exceptional cases such action appeared to be necessary to correct abuses brought to light as a result of continuous observation of and reporting on industrial and corporate structure.” See generally Anderson, supra note 80, at 117; Note, 62 COLUMN. L. REV. 671 (1962) (discussion of the evolution of the FTC).


\(^\text{84}\) See New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., supra note 83, at 354; Rockefeller & Wald, supra note 59, at 255.

\(^\text{85}\) S. REP. No. 619, 84th Cong., 1st Sess. 2 (1955). Congress also realized that the bulk of private litigation under the antitrust laws followed successful federal proceedings. Id. at 3.

\(^\text{86}\) See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 378 (1955).
proceeding were before the FTC, the litigant would be excluded from these benefits, even though the same type of injunction, the same violations, and the same tests of guilt are involved in both the Justice Department action and the FTC proceeding. Moreover, the fact that, "as a general rule, the Justice Department has taken a hands-off policy with respect to violations of the Robinson-Patman Act, leaving the administration of that Act largely to the Federal Trade Commission," clearly shows that unless an FTC proceeding qualifies for section 5, a private litigant is in the same position with respect to Robinson-Patman violations as he would be if section 5 were absent from the Clayton Act. It does not seem that Congress would have intended that Robinson-Patman violators and other defendants before the FTC be thus exempted from one of the methods of enforcing the antitrust laws.

Characterizing FTC proceedings as civil proceedings for the purposes of section 5 conforms to the 1914 congressional purpose of encouraging private antitrust suits by minimizing the burdens of private litigation. If Congress is desirous of continuing to enforce the antitrust laws by means of both public and private action, the benefits of the tolling of the statute of limitations and the use of the evidence in the private action should follow both public proceedings. In the past, however, courts have shown a disposition to hold that FTC orders cannot be used as prima facie evidence under section 5(a) because they feel the language of that section which requires a final judgment or decree does not encompass the final order of a nonjudicial body. This position is supported by the language of section 11(g) of the Clayton Act which

87 See Butler, supra note 53, at 51.
89 Rockefeller & Wald, supra note 59, at 254.
90 In the words of the Minnesota Mining district court opinion:
It certainly would seem not to have been the Congressional intent to have plaintiff's rights turn on the fortuitous circumstances of which agency initiated the action. To permit a plaintiff to take advantage of facts uncovered as a result of a Department of Justice proceeding, but not as a result of a Federal Trade Commission proceeding brought under the same statute, does not seem logical.
91 See Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725, 731 (8th Cir. 1964); Ostler Candy Co. v. FTC, 106 F.2d 962, 964 (10th Cir. 1940), cert. denied, 309 U.S. 675 (1940); cases cited note 55 supra.
provides that the order of the Commission becomes final after sixty days, and not that it becomes a decree. It should be noted, however, that when it becomes final it is a final adjudication of the rights of the parties to the government proceeding and has the same res judicata effect as a court decree. In fact it has been stated that:

The Commission's cease and desist order may in many cases be as drastic as the decree of a District Court, except for the one point that the District Court's decree, unlike the Commission's order can be used as prima facie evidence in a private treble damage suit.

With a view to fulfilling the apparent congressional purpose, it would seem that the word "decree" as used in section 5(a) could be interpreted to include a final order of an administrative agency. The benefits which flow from such an interpretation, however, must be balanced against the objection that it may not be desirable to allow the unappealed order and supporting findings of fact of an administrative agency to be used as prima facie evidence in a judicial proceeding, and the fact that adoption of such a view would probably induce an increased amount of appeals from FTC orders.

Even if the order resulting from an FTC proceeding is held not to be a judgment or decree in and of itself, it is submitted that the commencement of an FTC proceeding should toll the statute of limitations under section 5(b). Since the 1959 amendment to section 11 allows appeals of an FTC order directly to the court of appeals, an FTC proceeding should be held to be a civil proceeding which will result in a decree, admissible under 5(a), if its order is affirmed by the court of appeals. The com-

98 Clayton Act §§ 11(g)-(j), added by 73 Stat. 244 (1959), 15 U.S.C. §§ 21(g)-(j) (Supp. V, 1964). With respect to a court order it has been generally accepted that if a court action results in a final determination of the issue between the parties it is a final judgment. See, e.g., Allis-Chalmers Co. v. United States, 162 Fed. 679 (7th Cir. 1908); Oklahoma City v. McMaster, 12 Okla. 570, 73 Pac. 1012 (1903). See also United States v. 15.3 Acres of Land, More or Less, 158 F. Supp. 122 (M.D. Pa. 1957).

94 United States v. Williard Tablet Co., 141 F.2d 141 (7th Cir. 1944); see Annot., 152 A.L.R. 1198 (1944).


96 See pp. 490-91 supra.

97 Clayton Act § 11(c) provides in part:
Upon such filing of the petition the court shall have jurisdiction . . . , and shall have power to make and enter a decree affirming, modifying, or setting aside the order of
mencement of the FTC proceeding would then toll the statute of limitations under 5(b) since it is part of one civil proceeding which can potentially result in a final decree admissible under 5(a). Under this interpretation a private party injured by a violation of the antitrust laws prosecuted by the FTC could await the termination of the government action without the danger that his own claim will expire in the interim. He could then estimate his chances of success by viewing the outcome of the FTC proceeding, use the decree of the court of appeals as prima facie evidence if the FTC order is appealed, and if it is not appealed, he could use the record of the FTC proceeding as an inexpensive means of discovery. He would, therefore, be accorded most of the advantages available to a party injured by a violation of the antitrust laws prosecuted by the Justice Department. Such an interpretation would also have the advantage of discouraging appeals from FTC orders, since unappealed orders would not be admissible as prima facie evidence. This result would seem to comport with both congressional purpose in the enactment of the Clayton Act and the realities of present day enforcement of antitrust legislation.


98 It is also arguable that even though an FTC proceeding is held not to qualify for § 5(a), it should be held to be a civil proceeding which tolls the statute of limitations under § 5(b). Section 5(b) does not limit the rights granted under § 5(a) of the act. See Dickinson, Inc. v. Kansas City Star Co., 173 F. Supp. 423 (E.D. Mo. 1959). By the same token, although the decree or judgment can be used as evidence only "as to all matters respecting which said judgment or decree would be an estoppel as between the parties," Clayton Act § 5(a), added by 69 Stat. 282 (1955), 15 U.S.C. § 16(a) (1958), the tolling provision applies to every right of action "based in whole or in part on any matter complained of" in the government suit. Clayton Act § 5(b), added by 69 Stat. 282 (1955), 15 U.S.C. § 16(b) (1958). Also it should be noted that the statute is suspended from the time the government suit starts, whether or not the suit is successful. Since § 5(b) requires only that there be a civil proceeding brought under the antitrust laws, and not that there be a final judgment or decree, it is conceivable that it could be found that the overall intention of Congress would be better effectuated by separating §§ 5(a) and (b), so that the victim of an antitrust violation prosecuted by the FTC could take advantage of some of the benefits of § 5. See New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 358-60 (3d Cir.), cert. granted, 85 Sup. Ct. 176 (1964). See also Butler, supra note 53, at 46-52. But see Farmington Dowel Prods. Co. v. Forster Mfg. Co., 223 F. Supp. 967, 972-74 (D. Me. 1963).

99 See text accompanying note 13 supra.


After postconviction proceedings under 28 U.S.C. § 2255 (1958) to set aside an unconstitutional judgment of conviction, Strayer, attorney for the indigent defendant, Dillon, petitioned the district court for reasonable compensation. The invitation to file such petition was extended to Strayer by the court at the time he was appointed to defend Dillon.

Ruling on the petition, the court *held*, an order of court appointing and directing an attorney to give his professional services for legal representation of an indigent defendant constitutes a "taking" of a compensable property interest for public use, entitling an attorney to just compensation under the provisions of the fifth amendment.

To reach this conclusion, the *Dillon* court reasoned that the attorney’s fees were compensable property interests, and that the appointment of counsel was a taking for public use. The court emphasized the constitutional right of a

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2 See *Armstrong v. United States*, 364 U.S. 40 (1960); *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U.S. 552 (1895); *United States v. Palmer*, 128 U.S. 262 (1888). *Armstrong* granted recovery of the value of mechanics’ liens attached to certain boats which the Government acquired as a result of default remedies of a boat building contract. By reason of the Government’s immunity to suit, the materialmen’s liens which had attached to the boats pursuant to state law were defeated. The Supreme Court, in reversing the lower court, allowed relief on the ground that there had been a taking of these liens for which just compensation was due under the fifth amendment. *Armstrong v. United States*, *supra* at 48. Both *Palmer* and *Berdan* based recovery on the implied contract theory in that both inventors had originally consented to the Army’s use of their improvements with the understanding that reasonable compensation would be made. The court in *Dillon* concluded that the appropriation and use of the patented inventions in *Palmer* and *Berdan* was in effect an appropriation and use of the time, effort and expertise of the inventors; and that although the liens in *Armstrong* were for materials, the same result would have followed had the liens been for personal services. 230 F. Supp. at 492. The court then stated that “if the work product of an inventor or a laborer claiming a lien be compensable property, so is the work product of a lawyer, and his office expenses and out-of-pocket money are such, per se." *Ibid.*

3 See *Armstrong v. United States*, 364 U.S. 40 (1960), where the destruction of the value of the mechanics’ lien by the Government accrued directly to the benefit of the Government.
court-appointed attorney to be compensated, leaving unaffected his traditional professional, ethical obligation to serve gratuitously. If the two concepts, the obligation and the right, are viewed as being mutually independent, it is not inconsistent for a court to expect an attorney to serve without regard to compensation while holding that he is entitled to such compensation as a constitutional right.

_Dillon_ overthrows seven centuries of tradition, and, appropriately based upon and "has every possible element of a fifth amendment 'taking' . . . ." _Id_. at 48. Although the Court does not attempt to stipulate these elements, it has been stated in United States v. General Motors Corp., 323 U.S. 373, 378 (1945), that:

the courts have held that the deprivation of the former owner rather than the accretion of right or interest to the sovereign constitutes the taking. Governmental action short of acquisition or occupancy has been held, if its effects are so complete as to deprive the [individual] of all or most of his interest in the subject matter, to amount to a taking.

_Cf._ United States v. Caussy, 328 U.S. 256, 266 (1946); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922). However, not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense. See United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958); United States v. Spenonbarger, 308 U.S. 256, 265-67 (1939); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870).

The _Dillon_ court was acting for the United States in ensuring that the constitutional rights of _Dillon_ were not violated. 230 F. Supp. at 489. To fulfill this duty of the sovereign to one of its citizens, _id_. at 494, it was necessary that the Government make the "acquisition of" as stated in _Armstrong_, 364 U.S. at 48, or "commandeer," as stated in _Dillon_, 230 F. Supp. at 493, the services of an attorney. Since the efforts of counsel were used to fulfill the public duty to a private citizen, it cannot be denied that the use was public.

The district court was empowered to direct compensation in the absence of congressional authorization or direction based on the "taking" for public use in violation of the fifth amendment. _Armstrong_ v. United States, _supra_; United States v. Finn, 127 F. Supp. 158 (S.D. Cal. 1954), _modified_, 239 F.2d 679 (9th Cir. 1956).


Three states, Indiana, Iowa and Wisconsin, followed the minority view which allowed compensation in absence of a statute, the latter two now having statutes. See generally Annot., 130 A.L.R. 1439 (1941). The ruling in Indiana recognized the attorney's duty to render gratuitous services, but said the right of the indigent to counsel carries with it the correlative right of his counsel to compensation. See Knox County Council v. State _ex rel._ McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940); Webb v. Baird, 6 Ind. 13 (1854); Blythe v. State, 4 Ind. 525 (1853). See also Dane County v. Smith, 13 Wis. 585 (1861); Carpenter v. Dane County, 9 Wis. 274 (1859). Iowa, prior to the enactment of its statute, concluded that:

If attorneys, as officers of the court, have obligations under which they must act professionally, they also have rights to which they are entitled, and which they must justly claim in common with other men in the business of life.

Hall v. Washington County, 2 Greene 473, 476 (Iowa 1850).

decisions of the Supreme Court,6 appears a legitimate response to the current expansion of the right of defendants, and more specifically, indigent defendants, to be represented by counsel.7 The inescapable corollary of this expansion is a growing demand by indigents for counsel, and this demand has cast an inequitable burden upon appointed attorneys in light of the practicalities of modern practice.8

6 Armstrong v. United States, 364 U.S. 40 (1960); United States v. Berdan Fire-Arms Mfg. Co., 156 U.S. 552 (1895); United States v. Palmer, 128 U.S. 262 (1888). The analogies drawn in the Dillon opinion, though merely analogies and as such based upon factually distinguishable cases, represent Dillon's significance fully as much as the impact of its result upon the bar.

7 See 1963 REPORT OF THE ATT'Y GEN. COMM. ON POVERTY AND ADMINISTRATION OF CRIMINAL JUSTICE 14-30. The right of the defendant to the assistance of counsel in a criminal trial was set forth in Gideon v. Wainwright, 372 U.S. 335 (1963). The constitutional right to benefit of counsel was held in Douglas v. California, 372 U.S. 353 (1963), to exist where the merits of the only appeal an indigent has of right are being decided in a criminal case. The right to counsel was sustained in Wildeblood v. United States, 106 U.S. App. D.C. 338, 273 F.2d 73 (1959), for application for leave to appeal, where there was no appeal as of right and the prosecution involved a matter of serious moral turpitude. Earlier, Johnson v. United States, 352 U.S. 565 (1957), held the aid of counsel to be of right for a defendant challenging the trial court's refusal to certify his application for an in forma pauperis appeal as made in good faith. Pretrial right of counsel recently has been recognized in Massiah v. United States, 377 U.S. 201 (1964), which held that deliberate elicitation of incriminating statements from the defendant in the absence of his attorney was a deprivation of the right to counsel. Escobedo v. Illinois, 378 U.S. 478 (1964), enlarges this area by extending a right to counsel to a defendant previous to his indictment and particularly during interrogation. See Note, The Coming of Massiah: A Demand for Absolute Right to Counsel, 52 Geo. L.J. 825 (1964). In the area of postconviction (civil) proceedings, appointment of counsel is generally held to be at the discretion of the court; however, it has been held that when a triable issue of fact exists attended by such circumstances or difficulties that a fair and meaningful hearing cannot be had without aid of counsel, compliance with the due process clause of the fifth amendment requires that counsel be appointed. Dillon v. United States, 307 F.2d 445 (9th Cir. 1962).

8 See Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess., ser. 3, at 53 (1963) [hereinafter cited as 1963 Hearings]. During these hearings the President of the Montana Bar Association made the following statement:

This system [appointing counsel without compensation] originated in the old days, when the practice of law was a relatively leisurely and much less complex occupation. In those days it may perhaps have been accounted a distinction and a privilege to serve without compensation in the great matter of upholding our system of justice and assuring fair treatment to indigent persons. But today, asking a busy lawyer, engaged in the fast-moving, infinitely complex operation known as the private practice of law, to assume the defense in these cases without compensation is tantamount to asking for a donation of perhaps many thousands of dollars out of his pocket. 1963 Hearings 24. The increased burdens on attorneys may be considered no more than a change in degree, and no right to compensation should be provided where none existed before; but it is equally logical to consider the burdens to be so completely different from those imposed on attorneys in the past as to create a difference in kind resulting in a new property interest falling within the purview of the fifth amendment.
Dillon recognized this burden, as did the Criminal Justice Act of 1964,\(^9\) passed by Congress subsequent to Dillon. The act provides for the compensation of attorneys appointed to defend the indigent in criminal proceedings.

Since the legislative history reveals no attempt to affect the issue in Dillon,\(^10\) its rationale is vital in postconviction noncriminal proceedings such as the one Strayer was engaged in on behalf of Dillon.\(^11\) Such a postconviction application of Dillon would present administrative problems, such as a deluge of similar petitions upon the already overburdened federal judiciary, as well as fiscal problems, since the compensation allowed in Dillon is princely, relative to that provided by statute.\(^12\) If there is an increase in appointment of counsel in postconviction proceedings comparable to the increase in criminal proceedings,\(^13\) granting compensation under the constitutional holding of Dillon might constitute an undue public burden.\(^14\)

Dillon may also afford separate constitutional grounds to appeal for higher

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\(^11\) Criminal Justice Act of 1964 § 2(b), 78 Stat. 552, 18 U.S.C.A. § 3006A(b) (Supp. 1964), provides for appointment of counsel as follows:

Appointment of Counsel.—In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense, and appears without counsel, the United States commissioner or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel.

Proceedings upon a 28 U.S.C. § 2255 (1958) motion were held in Heflin v. United States, 358 U.S. 415 (1959), to constitute independent civil proceedings. Such proceedings, although technically civil, might be deemed criminal in nature. Dillon v. United States, 230 F. Supp. 487, 490 n.2. Should the language of the statute be interpreted to include postconviction proceedings, such as those under § 2255, the scope of the statute as well as the resultant cost would be enlarged considerably. See 1963 Hearings 123. The pioneering nature of this legislation at the federal level, with consequent lack of experience as to cost or effect, would appear to militate against this interpretation. Ad Hoc Committee to Develop Rules, Procedures and Guidelines for an Assigned Counsel System, Report to the Chief Justice of the United States, Chairman, and the Members of the Judicial Conference of the United States Agenda D-8 (Sept., 1964).

\(^12\) Criminal Justice Act of 1964 § 2(d), 78 Stat. 553, 18 U.S.C.A. § 3006A(d) (Supp. 1964), states:

Payment for Representation.—An attorney appointed pursuant to this section, or a bar association or legal aid agency which made an attorney available for appointment, shall . . . be compensated at a rate not exceeding $15 per hour for time expended in court or before a United States commissioner, and $10 per hour for time reasonably expended out of court, and shall be reimbursed for expenses reasonably incurred . . . . For representation of a defendant before the United States commissioner and the district court, the compensation to be paid . . . shall not exceed $500 in a case in which one or more felonies are charged, and $300 in a case in which only misdemeanors are charged. In extraordinary circumstances, payment in excess of the limits stated herein may be made . . . for protracted representation . . . .

In comparison, Strayer was allowed $35 per hour and a total of $3,804.54 compensation.

\(^13\) 30 F. Supp. at 49.

\(^14\) See cases and authorities cited note 7 supra.
compensation to attorneys who are dissatisfied with remuneration under the statute. Such a constitutional claim for compensation, strengthened by possible pleas of involuntary servitude, may well present burdensome fiscal ramifications which could, in the last analysis, only be tempered by the individual attorney's dedication to his professional, ethical obligation.¹⁵

CIVIL PROCEDURE—INCOME TAX—SUMMARY JUDGMENT—GRANTING OF TAXPAYER'S MOTION FOR SUMMARY JUDGMENT, SUPPORTED BY AFFIDAVITS AND DEPOSITION ASSERTING THAT HIS TRAVEL EXPENSES WERE MADE PRIMARILY FOR BUSINESS PURPOSES, IS ERRONEOUS EVEN THOUGH THE GOVERNMENT MERELY RESTS UPON THE FACTUALLY UNSUPPORTED DENIAL IN ITS PLEADINGS. Cross v. United States, 336 F.2d 431 (2d Cir. 1964).

Taxpayer, an Assistant Professor of Romance linguistics, traveled to Europe in the summer of 1954. Although he did not pursue a formal course of study or engage in research while abroad, taxpayer did visit schools, theaters, cafes and places of amusement; he also talked to students and teachers and attended political meetings.

Taxpayer claimed the sum of 1,300 dollars as a deduction for expenses incurred in connection with his trip. The Commissioner of Internal Revenue disallowed the deduction, disagreeing with taxpayer's contention that all the expenses were ordinary and necessary for him to maintain or improve his skills as a teacher of foreign languages. In support of his suit for a refund, taxpayer submitted affidavits of several prominent educators in the field of modern languages, all to the effect that it is necessary for a teacher of foreign languages to visit countries where the languages he teaches are spoken in order for him to maintain contact with the evolution of living languages. In taking taxpayer's deposition, the Government elicited no support for its contention that the trip was in whole or in part for personal pleasure. The only affidavit submitted by the Government was that of its own counsel which merely denied taxpayer's allegations without setting forth any specific, contravening facts. Motion for summary judgment was granted in favor of taxpayer by the court below.¹ The United States Court of Appeals for the Second Circuit reversed this ruling. Held, granting of taxpayer's motion for summary judgment, supported by affidavits and deposition asserting that his travel expenses were made primarily for business purposes, is erroneous even though the Government merely rests upon the factually unsupported denial in its pleadings.²

¹ Cf. note 4 supra.
² Cross v. United States, 336 F.2d 431 (2d Cir. 1964). The probable impact on tax law of the district court case, before reversal, has been discussed. 20 J. Taxation 44 (1964).
Though the denial of summary judgment in Cross appears to contravene the express language of the 1963 amendment to Rule 56(e) of the Federal Rules of Civil Procedure and the holdings in Dyer v. MacDougall and Radio City Music Hall Corp. v. United States, careful comparison of the situation in the instant case with those authorities reconciles the result which was reached, and further analysis demonstrates that this outcome was required. It was not the purpose of the amendment to Rule 56(e) to affect the ordinary standards applicable to the summary judgment motion. Thus, the established rule that "where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate" remains vital.

In Dyer, the information was all within the knowledge of movant's witness, but the movant did not have the burden of proof; therefore, the nonmoving party could not have won its case by merely casting doubt upon the credibility of movant's witnesses, and a trial would have had to result in a directed verdict for movant. Similarly in Cross, movant had the information solely within his knowledge; however, he also had the burden of proof, since it has consistently been

3 The amendment to Rule 56(e) states:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

4 201 F.2d 265 (2d Cir. 1952), where the court held that a nonmoving party who did not attempt to raise the issue of credibility by exercising his right to cross-examination when the depositions of movant's witnesses were being taken could not afterwards defend against a motion for summary judgment on the ground that he had been deprived of the right to cross-examination at trial.

5 135 F.2d 715 (2d Cir. 1943), where the nonmoving party exercised his right to cross-examination at the discovery level but was unable to cast doubt upon the credibility of movant's witnesses, summary judgment was granted. The court stated: "It rests upon that party at least to specify some opposing evidence which it can adduce and which will change the result." Id. at 718. In Cross, in order for the Government to satisfy this language, it would seem that they would have to seek from the taxpayer, on deposition, a breakdown of the specific expenditures of his trip and to contest his alleged purpose in making the trip. The Government, however, did not pursue this line of questioning. See Brief for Appellant, p. 51a.

6 The Notes of Advisory Committee point out that the purpose was to overcome a line of cases in the Third Circuit which had impaired the utility of the summary judgment device by allowing the opposing party to defeat the motion by falling back on his pleadings. Annot., 28 U.S.C.A. at 55 (Supp. 1963) (Rule 56).

7 Id. at 56; see, e.g., Sartor v. Arkansas Gas Corp., 321 U.S. 620 (1944); United States v. United Marketing Ass'n, 291 F.2d 851 (8th Cir. 1961).

8 201 F.2d at 269. "Unless the usual rule be departed from that impeaching evidence does not constitute substantive evidence, the plaintiff in the Dyer case preferred no substantive evidence nor indicated that he could obtain any." 6 Moore, Federal Practice ¶ 56.15, at 2150 (2d ed. 1953).
held that the determination of the Commissioner of Internal Revenue carries with it a presumption of correctness. Consequently, it is not incumbent upon the Government, the nonmoving party, affirmatively to disprove the contentions of the taxpayer; it is sufficient that the Government demonstrate petitioner's failure to sustain his burden of proof. Since the Government could accomplish this result by convincing the trier of fact to disbelieve taxpayer's testimony, it cannot successfully be contended that the Government must be defeated at trial simply because it has no substantive proof with which to refute the testimony of taxpayer. "[T]he jury, even if such testimony be uncontradicted, may exercise their independent judgment."

The requirement, as established in Radio City, that the nonmovant raise the issue of the movant's credibility by utilizing the discovery devices where the movant's credibility is a controlling issue has been minimized by Arnstein v. Porter where it was stated that:

It will not do, in such a case, to say that, since the plaintiff, in the matter presented by his affidavits, has offered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true. We think Rule 56 was not designed thus to foreclose plaintiff's privilege of examining defendant at trial, especially as to matters peculiarly within defendant's knowledge.

Hence, the trial court's finding that "the Government had every opportunity to cross-examine plaintiff at his deposition" would not seem to provide a sufficient basis for granting a motion for summary judgment.

Furthermore, the affidavits of taxpayer's "experts" do not support his personal claim. They merely support a point of view which has since been recognized by a recent Revenue Ruling which would allow a deduction for expenses of the type claimed by Professor Cross, if the taxpayer can show that his primary purpose in making the trip was to maintain or improve his skills as a language teacher, and that his itinerary was calculated to achieve that purpose. The

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9 E.g., Northern Natural Gas Co. v. O'Malley, 277 F.2d 128 (8th Cir. 1960); Halle v. Commissioner, 175 F.2d 500 (2d Cir. 1949).
10 Cf. Cleveland Chiropractic College, Inc. v. Commissioner, 312 F.2d 203 (8th Cir. 1963).
12 154 F.2d 464 (2d Cir. 1946).
13 Id. at 471. See generally Note, 55 Yale L.J. 810 (1946).
14 222 F. Supp. at 161.
15 It should be noted that these affiants were foreign language teachers for whom the result in the instant case might have personal consequences at some future date. The extent to which the movant's witnesses are interested in the success of his cause is a factor to be considered in determining whether credibility has been established as an issue. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944); cf. Dewey v. Clark, 86 U.S. App. D.C. 137, 180 F.2d 766 (1950).
16 Rev. Rul. 64-176, 1964 INT. REV. BULL. No. 23, at 9, states: "If a teacher of French, while on sabbatical leave granted for the purpose of travel, journeys throughout France in order to improve his knowledge of the French language,
statements of taxpayer's "experts" indicate only the need for such trips; they do not substantiate this taxpayer's allegations regarding his intent.\(^{17}\)

In order to qualify for a business deduction under this Revenue Ruling, the taxpayer must prove that he intended to make the trip primarily to maintain or improve his skills, and to prove that such was his intent, he must meet the qualifications of both an objective and a subjective standard. The objective test imposed by the Revenue Ruling requires that a fact inference be drawn from the specific evidentiary data of the trip. Conceding the validity of taxpayer's version of the nature of his activities,\(^{18}\) a question still remains as to whether a reasonable man could only find that these "activities were of a nature calculated to result in actual or potential benefit to him in his position as a teacher,"\(^{19}\) or whether a reasonable man might find to the contrary, i.e., that his activities indicated a mere pleasure trip. If more than one inference can reasonably be drawn from the facts, an issue of fact exists, and summary judgment is not appropriate.\(^{20}\)

Assuming that taxpayer has successfully met the aforementioned objective test, the Revenue Ruling still requires inquiry into his subjective purpose: what was his personal reason for going? "[T]he necessity to find [subjective] intention as a fact still exists."\(^{21}\) Subjective intent, by its very nature, is solely within the mind of the individual; therefore, the burden on an opposing party to show by extrinsic evidence that the person's intent is other than what he alleges it to be is virtually insurmountable. Where this problem arises, the only means by which an opponent's credibility can be determined is through the observation of his demeanor.\(^{22}\) Clearly, evaluation of demeanor evidence can only be accomplished by the trier of fact; therefore, a trial is indispensable, and summary judgment must be denied.

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\(^{17}\) See Brief for Appellant, pp. 24a-34a.

\(^{18}\) In fact, "the District Court must . . . take that view of the evidence most favorable to the opponent of the moving party, giving the opponent the benefit of all favorable inferences that may reasonably be drawn." Empire Electronics Co. v. United States, 311 F.2d 175, 180 (2d Cir. 1962); see Toebelman v. Missouri-Kansas Pipe Line Co., 130 F.2d 1016, 1018 (3d Cir. 1942).

\(^{19}\) See note 16 supra.

\(^{20}\) Empire Electronics Co. v. United States, 311 F.2d 175 (2d Cir. 1962).


It cannot be concluded that the ruling in Cross indicates an attempt on the part of the Second Circuit to disregard the clearly expressed mandate of Rule 56(e). It is not disputed that ordinarily a party will not be allowed to rely on his pleadings when opposing affidavits have been submitted; however, Rule 56(e) is qualified by its final sentence which states that summary judgment will be entered only "if appropriate." Where, as in Cross, pleadings and supporting material of the movant, in and of themselves, indicate that there are fact inferences to be drawn which are dependent on the demeanor of the witnesses, summary judgment is clearly inappropriate.

As a practical matter, since the Government now knows that summary judgment will not be granted to a taxpayer seeking a deduction where his subjective intent is a controlling issue, its bargaining position is increased. The result in the instant case allows the Commissioner to deny such a deduction without presenting any facts to substantiate his contention and by so doing force the taxpayer to go through the expenses and rigors of a trial. Unless a large sum is involved, a taxpayer will be virtually forced to compromise what might well be a legitimate claim.


The defendant was charged with statutory rape under California Penal Code § 261(1). The intercourse was consensual, but the prosecutrix was seventeen years, nine months old, while the defendant was twenty-two years old. Upon trial without a jury, defendant sought to introduce evidence that he reasonably believed the girl to be over eighteen. The trial court received such evidence only to show mitigation, not exculpation. In accordance with California Penal Code § 264, the trial court ruled the offense a misdemeanor, found the de-

1 Section 261 provides in part: "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: 1. Where the female is under the age of eighteen years . . . . ."

2 Brief for Appellant, p. 43. This small age differential and the fact that defendant could not speak English, id. at 5, permitted the supreme court to restrict its ruling to the facts of this case. The court's failure to mention them underscores its intention that the ruling apply to all defendants charged with statutory rape.

3 Section 264 provides in part:

Rape is punishable by imprisonment in the state prison not less than three years, except where the offense is under subdivision 1 of Section 261 of the Penal Code, in which case the punishment shall be either by imprisonment in the county jail for not more than one year or in the state prison for not more than 50 years, and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison . . . .
fendant guilty and placed him on probation for two years. The District Court of Appeals affirmed. The conviction was unanimously reversed by the Supreme Court of California. *Held,* reasonable belief that prosecutrix was over age of consent is a defense to the crime of statutory rape.

*Hernandez* is in accord with the early common law but is a reversal of the later trend initiated in 1875 by *Regina v. Prince* which held that a mistake as to the girl's age was not a defense. *Regina v. Prince* was the law in England for but ten years; however, it was followed in American jurisdictions until *Hernandez*. These jurisdictions deny the defense of mistake of fact as to age on two grounds—that the legislature has abolished the *mens rea* require-

6 Blackstone traces the history of statutory rape from the Jews to the Romans and finally to the Saxons. He points out that by the Statute of Westminster, 1275, 3 Edw. 1, c. 13, the ravishing of damsels under the age of twelve, *with or without their consent,* was reduced to a trespass unless prosecution was begun within forty days. 4 BLACKSTONE, *Commentaries* *â€”*212. At common law a girl under the age of ten was conclusively presumed not to have consented since she was too young to understand the nature and quality of her act. People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896); State v. Burns, 82 Conn. 213, 72 Atl. 1083 (1909); Golden v. Commonwealth, 289 Ky. 379, 158 S.W.2d 967 (1942); State v. Huntsman, 204 P.2d 448 (Utah 1949). However, there was no presumption eliminating the defense of mistake of fact or modifying the *mens rea* requirement. See generally HALL, *General Principles of Criminal Law* 287 n.27, 292-93, 339-41 (1947).
7 L.R. 2 Cr. Cas. Res. 154 (1875).
8 Although this case involved the defense of a mistake as to age in the crime of abduction, Blackburn, J., joined by seven other judges, analogized abduction to statutory rape, saying:

> It seems to us that the intention of the Legislature was to punish those who had connection with young girls though with their consent, unless the girl was, in fact, old enough to give valid consent. The man who has connection with a child relying on her consent does it *at his peril* if she is below the statutable age. *Id.* at 171-72. (Emphasis added.) Bramwell, J., joined by five other judges, drew this same analogy and conclusion in his concurring opinion. *Id.* at 175-76. The statute construed by this dictum was Offences Against the Person Act, 1861, 24 & 25 Vict. c. 100, §§ 50-51. The source of this act was the Statute of Elizabeth, 1576, 18 Eliz. 1, c. 7 § 4, which restated the common law and which was later amplified by Offences Against the Person Act, 1828, 9 Geo. 4, c. 31 § 17.
9 Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69 § 5(1). However, in 1922 Parliament limited the use of this defense to cases in which the female is between the ages of thirteen and sixteen and the male is under the age of twenty-four and has not been charged with a previous like offense. Criminal Law Amendment Act, 1922, 12 & 13 Geo. 5, c. 56.
10 Generally, two elements are required for conduct to be criminal—*actus reus* and *mens rea.* Morissette v. United States, 342 U.S. 246 (1952); Regina v. Tolson, 23 Q.B.D. 168 (1889); 4 BLACKSTONE, *Commentaries* *â€”*21; PERKINS, *Criminal Law* 654 (1957). *Mens rea* is the subjective element of crime, the intent to do a forbidden or illegal act. This element is usually presumed by the mere commission of the act, but defendants may rebut this presumption.
ment in the crime,\textsuperscript{11} or that the mistake of fact cannot have been innocent\textsuperscript{12} since extra-marital intercourse is immoral if not illegal.\textsuperscript{13} Although California courts had adopted both of these grounds,\textsuperscript{14} \textit{Hernandez} rejected them, criticizing decisions which effectively "eliminate the element of intent,"\textsuperscript{15} and thereby broadened the requirement of \textit{mens rea} in statutory rape by refusing to derive criminal intent from immoral intent, and by refusing to presume conclusively that the defendant had \textit{mens rea}.

Notwithstanding eighty-nine years of judicial construction to the contrary with respect to statutory rape, the usual rule is that a statute restating a common-law crime should not be understood as having displaced the requirement of \textit{mens rea} "unless the statute displacing it is, in its express words and necessary

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One method of rebuttal is to prove that defendant made a reasonable mistake of fact and that if the facts had been as he perceived them, his act would not have been a criminal act. Thus, when a defendant is not permitted to rely upon the defense of mistake of fact, he may be convicted for the mere commission of an act which in reality was unaccompanied by \textit{mens rea}. In statutory rape there exists the anomaly that a defendant may disprove \textit{mens rea} if insane, but not if only mistaken as to the girl's age. See, e.g., \textsc{Cal. Pen. Code} \S 26; People v. Zwick, 107 Cal. App. 190, 290 Pac. 69 (1930) (forcible rape).

\textsuperscript{11} \textit{E.g.}, Simmons v. State, 151 Flia. 778, 10 So. 2d 436 (1942); Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1896); State v. Hersh, 296 S.W. 433 (Mo. 1927); State v. Gibson, 221 N.C. 252, 20 S.E.2d 51 (1942).

\textsuperscript{12} If the defendant's act is illegal—or perhaps only immoral—even under the facts as he perceived them, then his mistake was not an innocent one. \textsc{Bishop, Statutory Crimes} \S 665 (3d ed. 1901); \textsc{Hall, op. cit. supra} note 6, at 329; \textsc{Perkins, Ignorance and Mistake in Criminal Law}, 88 U. Pa. L. Rev. 35, 65 (1939).

\textsuperscript{13} \textit{E.g.}, Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1896); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1891); Regina v. Tolson, 23 Q.B.D. 168, 194 (1889). See \textsc{Bishop, op. cit. supra} note 12, \S 490; \textsc{Perkins, supra} note 12, at 63.

\textsuperscript{14} People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896); People v. Griffin, 117 Cal. 583, 49 Pac. 711 (1897).

\textsuperscript{15} 393 P.2d at 676, 39 Cal. Rptr. at 364. The court dealt with \textit{mens rea} as both a relative and absolute concept. The thrust of the decision is to reinstate \textit{mens rea} and its attendant defense, mistake of fact. 39 Cal. Rptr. at 364. On the other hand, the opinion elsewhere cites Ploscowe's argument that when the age of consent is ten "it is not illogical to refuse to give credence to the defense 'I thought she was older . . . '" but when the age is eighteen the mistake may be bona fide. \textsc{Ploscowe, Sex and the Law} 184-85 (1951), quoted by the court at 393 P.2d 678 n.3, 39 Cal. Rptr. at 364 n.3. This argument fails to recognize that any arbitrary age limit is susceptible to a reasonable mistake of fact. In Delaware, where the age limit is seven, a defendant might reasonably believe the girl to be eight, just as in California a defendant might reasonably believe a girl seventeen to be eighteen. \textsc{Del. Code Ann. tit. 11, \S 781 (Supp. 1962)}. However, the court may not have adopted Ploscowe's logic but cited to him only in order to demonstrate the even greater injustice which results when the mistake of fact defense is eliminated in cases involving girls not ten or fourteen, but eighteen years of age. The court quotes and emphasizes Ploscowe's statement: "The statute is interpreted as if it were protecting children under the age of ten." \textsc{Ploscowe, op. cit. supra} at 185, quoted at 393 P.2d at 676 n.3, 39 Cal. Rptr. at 364 n.3.
effect, plain and unequivocal.\textsuperscript{16} The California rape statute does not contain "displacing" language;\textsuperscript{17} on the contrary, section 20 requires that intent be treated as an element of any crime.\textsuperscript{18}

Public welfare offenses are an exception to this rule of statutory construction;\textsuperscript{19} in interpreting such statutes, it is held that if the legislature failed expressly to include intent as an element of the offense, intent was purposely omitted. This exception is inapplicable to statutory rape, which is not a public welfare offense but descends from common law rape.\textsuperscript{20}

Heretofore, statutory rape has been prohibited for two reasons: (1) all extra-marital intercourse is immoral;\textsuperscript{21} and (2) extra-marital intercourse with young girls is not only immoral but harmful.\textsuperscript{22} The Hernandez court pointed out that as the statutory age limits are raised, the threat of physical harm to the girl correspondingly decreases.\textsuperscript{23} But it is the immorality of such conduct which is most strikingly dealt with by the court.

\textsuperscript{16} Bishop, Statutory Crimes 233 (1873); Armitage, Statutory Offence—A Presumption of Mens Rea, 1963 Camb. L.J. 177; Endlich, Doctrine of Mens Rea, 13 Crim. Law Mag. 831 (1891); Mueller, Mens Rea and the Law Without It, 58 W. Va. L. Rev. 35 (1955). It has been contended that the "necessary effect" of the statute requires the elimination of intent. See Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 74 (1933). Admittedly more statutory rapists would be punished by eliminating the element of intent from the crime, but if the "necessary effect" of the statute required this, it would have been done long before 1875.

\textsuperscript{17} See note 1 supra.

\textsuperscript{18} Section 20 provides: "To constitute crime there must be unity of act and intent. In every crime or public offense there must be a union, or joint operation of act and intent, or criminal negligence."

\textsuperscript{19} The term "public welfare offense" was coined and defined by Professor Sayre:

[P]ublic welfare offense is used to denote the group of police offenses and criminal nuisances, punishable irrespective of the actor's state of mind, which have been developing in England and America within the past three-quarters of a century . . . .

Sayre, supra note 16, at 56.

\textsuperscript{20} Id. at 73; Hall, op. cit. supra note 6, at 339; see note 6 supra. The instant court did not say that statutory rape was a public welfare offense, rather it intimated that public welfare offenses should not necessarily be an exception to the general rules of statutory construction: "[T]his court has moved away from the imposition of criminal sanctions in the absence of culpability where the governing statute, by implication or otherwise, expresses no legislative intent or policy to be served by imposing strict liability." 393 P.2d at 675, 39 Cal. Rptr. at 363.

\textsuperscript{21} This belief may be traced to the Bible, which forbids adultery. Exodus 20:14. The death penalty is set out in Leviticus 20:10 and Deuteronomy 22:22. Extramarital intercourse is also forbidden in Corinthians 10:8 and Thessalonians 4:3.

\textsuperscript{22} Ploscowe contends that "the exposure to sexual experience represents a real threat to the life of the child. Anyone who tampers sexually with a young child is potentially a killer and hence a dangerous individual outside prison walls." Ploscowe, op. cit. supra note 15, at 184.

\textsuperscript{23} 393 P.2d at 676 n.3, 39 Cal. Rptr. at 364 n.3. Moreover, the physical harm argument is weakened by the fact that California permits girls under eighteen and over
The theory propounded in many cases is that the intent to commit extra-marital intercourse, an immoral act, provides the criminal intent necessary for a statutory rape conviction. On the other hand, Hernandez's counsel urged:

Surely, in the face of the problems faced by our young men, society should not impose upon him [Hernandez] the burden of acting at his peril when he seeks to satisfy a normal biological urge, second only to that of self-preservation, with a female who he reasonably believes is over the age of consent.

Out of this conflict came the court's reversal of People v. Griffin and an intimation that extra-marital intercourse is amoral, or at least not immoral to any culpable degree. Moreover, the court, without distinction, compared the reasonable mistake of fact defense in statutory rape to the same defense in bigamy cases. Yet in these two cases, if the facts conformed to the defendants' reasonable beliefs, the moral implication of their conduct would be distinctly different, for a defendant accused of bigamy has sexual relations in the marital state, whereas a defendant accused of statutory rape has extra-marital intercourse—presumably an immoral act. Thus, at most, the Hernandez court fails to confirm the immorality of extra-marital intercourse; at least, it refuses to imply criminal intent from immoral conduct. In either case the decision is in accord with the views of several modern behavioral scientists, although it represents a substantial departure from traditional authority.

To disregard the immorality of extra-marital intercourse is to remove one of the fundamental reasons for proscribing statutory rape; yet societal inter-

sixteen to marry on written consent of their parents or guardians, and further permits girls under sixteen to marry upon obtaining a court order. CAL. CIV. CODE § 56.

24 E.g., People v. Griffin, 117 Cal. 583, 49 Pac. 711 (1897); cases cited note 13 supra.

25 Brief for Appellant, p. 27. Testifying before a California legislative subcommittee studying sex crimes, Dr. Alfred C. Kinsey reported that what the law regarded as sex offenses may in fact be normal conduct. "The conclusion he draws ... is that at some time or another, 95 percent of the male population commits a sex offense for which he might be prosecuted." CALIFORNIA LEGISLATURE, PRELIMINARY REPORT OF THE SUBCOMMITTEE ON SEX CRIMES 27 (1950). Dr. Kinsey told the committee that "if you pass a law which is going to make such a crime one for which they can be committed for life, if the law is effectively enforced, you can put 50 percent of the males of your population into penal institutions." Id. at 105.

26 This case, which involved an insane prosecutrix, stated:

He who engages in such enterprises is committing a moral wrong, for which there can be neither palliation or excuse. The illegal motive ... becomes a criminal intent when the facts, at whose peril he acts, are shown to exist.

117 Cal. 583, 586, 49 Pac. 711, 712 (1897).

27 The bigamy case referred to was People v. Vogel which held that a reasonable belief that "facts existed that left him [the defendant] free to remarry" was a defense to the charge of bigamy. 46 Cal. 2d 798, 801, 299 P.2d 850, 853 (1956).

28 E.g., DRUMMOND, THE SEX PARADOX (1953); FORD & BEACH, PATTERNS OF SEXUAL BEHAVIOR 197 (1952); KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 264, 389-93 (1949); MURDOCK, SOCIAL STRUCTURE 265 (1949); PLOSCOWE, SEX AND THE LAW 184-85 (1951); Murdock, A COMPARATIVE ANTHROPOLOGICAL APPROACH, 36 J. SOC. HYGIENE 133, 137 (1950); see Note, Forcible and Statutory Rape, 62 YALE L.J. 55, 71, 77 (1952).

29 See note 13 supra.
ests still require protection of young girls from physical harm\textsuperscript{30} and regulation of the abnormality, pedophilia.\textsuperscript{31} Since neither of these aspects was present in Hernandez, the court considered not the age differential of the partners,\textsuperscript{32} but their relative culpability. Instead of protecting a knowledgeable girl seventeen years and nine months old whose affair resulted in pregnancy,\textsuperscript{33} the court went beyond the usual punish-the-boy-and-protect-the-girl reasoning of many courts and dealt with statutory rape as a joint enterprise.\textsuperscript{34}

Hernandez places no overwhelming evidentiary burden on the California prosecutors. Their initial burden of proof remains the same, a prima facie case being established by proof of carnal knowledge and age. Criminal intent is presumed by the mere undertaking of the act.\textsuperscript{35} However, instead of being conclusive, this presumption may now be rebutted by defendant’s evidence of reasonable mistake of fact as to the girl’s age.

This decision raises questions as to the nature of the evidence adducible to show the reasonableness of the mistake of fact. In some jurisdictions, like California,\textsuperscript{36} evidence of the girl’s declarations as to her age has been admitted to show mitigation, and thus to help the court decide whether the offense was a felony or a misdemeanor.\textsuperscript{37} Under the Hernandez rule, these states could now admit the same evidence to show exculpation. In other jurisdictions, evidence of the girl’s declarations is inadmissible as irrelevant\textsuperscript{38} since no matter what the

\textsuperscript{30} See note 22 supra.

\textsuperscript{31} The Model Penal Code recognizes pedophilia, an adult male’s proclivity for sex relations with children, as a symptom of mental aberration. Model Penal Code § 207.4, comment (Tent. Draft No. 4, 1955).

\textsuperscript{32} The Model Penal Code returns to common-law rape—carnal intercourse with a girl under ten years of age. Model Penal Code § 213.1(1)(d) (Proposed Official Draft 1962). However, this statute is supplemented by the Corruption of Minors and Seduction statute which proscribes intercourse with girls under sixteen if the male is at least four years older than the girl. Id. § 213.3.

\textsuperscript{33} Brief for Appellant, p. 9, People v. Hernandez, 393 P.2d 673, 39 Cal. Rptr. 361 (1964).

\textsuperscript{34} Cited at length are arguments which criticize statutory rape laws on the ground that they permit females to become the victimizer, to take advantage of the naïve male, and then to prosecute him. 393 P.2d at 674-76, 39 Cal. Rptr. 361 at 362-64, citing State v. Snow, 252 S.W. 629 (Mo. 1923); Ploscowe, Sex and the Law (1951); Note, Forcible and Statutory Rape, 62 Yale L.J. 55 (1952).

\textsuperscript{35} “Whatever one voluntarily does, he of course intends to do. If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it.” Commonwealth v. Mash, 48 Mass. (7 Met.) 472, 474 (1844); People v. Gengels, 218 Mich. 632, 188 N.W. 398 (1922) (proof of the act also proves the intent to commit statutory rape).

\textsuperscript{36} CAL. PEN. CODE § 264.

\textsuperscript{37} E.g., People v. Pantages, 212 Cal. 237, 297 Pac. 890 (1931); Heath v. State, 173 Ind. 296, 90 N.E. 310 (1910); People v Marks, 146 App. Div. 11, 130 N.Y.S. 524 (1911); Law v. State, 224 P.2d 278 (Okla. 1950); Sprague v. State, 243 Wisc. 456, 10 N.W.2d 109 (1943).

\textsuperscript{38} E.g., Bryan v. State, 18 Ala. App. 199, 89 So. 894 (1921); Renfroe v. State, 84 Ark. 16, 104 S.W. 542 (1907); State v. Wade, 224 N.C. 760, 32 S.E.2d 314 (1944).
girl said or did, the defendant acted at his peril. Hernandez makes this evidence highly relevant.

There remains the evidentiary question of whether the jury may view the prosecutrix in order to determine the reasonableness of the defendant's mistake. Wigmore states that when age is in question, a person's appearance is usually relevant, and "the tribunal may properly observe the person brought before it."39 In the case of statutory rape, however, it is not the girl's actual age which is in question, but what the defendant reasonably believed her age to be. Since under Hernandez this is now a relevant issue, the better rule would be that the reasonableness of the defendant's belief may be proved by autopic preference, even though the prosecutrix chooses not to testify. A corollary question is whether the prosecutrix may be required to dress as she did on the day in question. A majority of courts now refuse to require this of the prosecutrix.40 Yet, under the Hernandez rule, the manner of dress of the prosecutrix may be highly relevant in determining whether the defendant's belief was reasonable.

Since the intent to commit statutory rape may be derived from the intent to commit fornication, states which proscribe a single act of fornication may have difficulty applying the Hernandez rule and rationale; however, ten states,41 like California, have no fornication statutes and many others proscribe fornication only if it is "continual," "open and notorious" or both.42

The Hernandez court recognized the law of statutory rape as an ethereal structure of fictions. The decision, unencumbered by the moral issues which have so long obscured the area of sex crime,43 demonstrates that harsh results of rape statutes may be avoided44 by the judiciary without resort to legislative action.45

40 E.g., Campbell v. State, 63 Tex. Cr. 595, 141 S.W. 232 (1911).
41 Delaware, Iowa, Maryland, New Mexico, New York, Oklahoma, South Dakota, Tennessee, Vermont and Washington.
42 Model Penal Code § 207.1, comment (Tent. Draft No. 4, 1955).
43 The American Law Institute states: "We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor." Model Penal Code § 207, comment (Tent. Draft No. 4, 1955).
44 Where the age of consent is low, e.g., Del. Code Ann. tit. 11, § 781 (Supp. 1962) (seven years), recognition of the defense of mistake of fact as to age may be undesirable since denying the defense may legitimately protect against harm to young girls, see note 22 supra, who cannot realistically be said to have engaged in a "joint enterprise," see text accompanying note 34 supra. Whatever the harshness which may result from excluding the defense, few jurisdictions can be expected to allow that whoever has intercourse with a girl less than seven years of age does not "act at his peril." Cf. Criminal Law Amendment Act, 1922, 12 & 13 Geo. 5, c. 56; note 15 supra.

Plaintiffs, citizens of New Jersey, brought suit for personal injuries in a federal district court against American Express, a joint stock association organized under New York law, predicating jurisdiction on diversity of citizenship. Defendant answered that it was a joint stock company, and the court after determining that 1,600 of defendant’s shareholders were citizens of New Jersey, on its own motion, dismissed for lack of jurisdiction.1 The United States Court of Appeals for the Second Circuit reversed. Held, an unincorporated joint stock association may be deemed a citizen of the state of its organization for purposes of diversity of citizenship jurisdiction.2

In so ruling, the court departed from the established jurisdictional rule with respect to unincorporated associations.8 Incorporated associations since the 1853 decision of Marshall v. Baltimore & O.R.R.4 have been considered citizens of the state of their incorporation for the purpose of diversity jurisdiction. Although the device used in Marshall to establish citizenship was a conclusive presumption that all stockholders were citizens of the state of incorporation,5 the decision nonetheless recognized that an association such as a corporation which possessed a legally sophisticated personality distinct from its members should be treated as an entity for all purposes, including that of diversity jurisdiction, and sought to preserve the privilege of entry into the federal courts for those who dealt with representatives of corporations.6

3 Unincorporated associations have never been accorded a status as jural persons for purposes of diversity jurisdiction, nor has there developed a presumption of a single citizenship of the members. This is so even when by the applicable law they have the capacity to sue and be sued in the association name. The citizenship of all the members must be looked to, and not merely that of the officers or managers.
4 57 U.S. (16 How.) 314 (1853). In Louisville, C&O.R.R. v. Letson, 43 U.S. (2 How.) 497, 555 (1844), the Court held that a corporation was both a person, albeit an artificial one, and a citizen of the state of its incorporation. Marshall rejected the fiction, but did maintain that it was a citizen of the state of incorporation. Prior to Letson, a corporation’s citizenship had been determined by the citizenship of its stockholders. Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809).
Late in the 1800's the Supreme Court in *Chapman v. Barney*\(^7\) refused to extend the *Marshall* holding to include unincorporated associations, dismissing on its own motion for lack of diversity because defendant was a joint stock company, not a corporation.\(^8\) The *Chapman* Court divided all associations into two classes, one having capacity for citizenship as an entity by reason of incorporation, the other without such capacity because unincorporated.\(^9\)

The 1933 case of *Puerto Rico v. Russell & Co.*\(^10\) has drawn into question the continued vitality of this formula.\(^11\) In that case the petitioner sued Russell & Co., a *sociedad en comandita* organized under Puerto Rican law,\(^12\) in the Insular Court of Puerto Rico. Russell & Co., all of whose shareholders were non-residents of Puerto Rico, claimed diversity of citizenship and removed to the federal district court. The district court's assertion of jurisdiction was reversed by the Supreme Court. The Court held that the *sociedad* possessed the characteristics of a corporation and was to be considered a citizen of Puerto Rico, irrespective of the citizenship of its shareholders. Noting that the treatment of a *sociedad* under the civil law differed from the treatment of an unincorporated association under the common law\(^13\) and that under "the law of its creation the *sociedad* is consistently regarded as a juridical person,"\(^14\) the Court proceeded to list the characteristics of the *sociedad* under Puerto Rican law,\(^15\) and con-

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7 129 U.S. 677 (1889).

8 But the express company cannot be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is *not* a corporation, but a joint stock company—that is, a mere partnership.

9 With respect to diversity jurisdiction *Chapman* was followed for several decades. See, e.g., Thomas v. Board of Trustees, 195 U.S. 207 (1904) (only an agency for management, not a corporation, though it possessed corporate characteristics); Great So. Fireproof Hotel Co. v. Jones, 177 U.S. 449 (1900) (limited partnership); Levering & Garrigues v. Morr, 61 F.2d 115 (2d Cir. 1932); Taylor v. Weir, 171 Fed. 636 (3d Cir. 1909); Rountree v. Adams Express Co., 165 Fed. 152 (8th Cir. 1908); Fred Macey Co. v. Macey, 135 Fed. 725 (6th Cir. 1905); Jones v. Adams Express Co., 129 Fed. 618 (C.C.E.D. Ky. 1904).

10 288 U.S. 476 (1933).


12 288 U.S. at 481.

13 The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnerships. *Chapman v. Barney* ... The tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise. Therefore to call the *sociedad en comandita* a limited partnership in the common law sense ... is to invoke a false analogy.

14 *Id.* at 480-81.

15 As listed by the Court these characteristics are that: it can contract, own property,
cluded that "we see no adequate reason for holding that the sociedad has a different status for purposes of federal jurisdiction than a corporation organized under that law."16

Russell has been interpreted to be (1) a rejection of the rigid formula of Chapman17 or (2) no authority for departure from Chapman because of the unique facts before the Russell Court.18 Its effect on prior law has been the subject of dispute in the federal courts,19 and has recently resulted in a conflict between the Second and Fourth Circuits. Mason sees Russell as a clear departure from Chapman, and as allowing courts to grant capacity for citizenship to unincorporated associations, though such a grant would have been precluded under the Chapman rule.20 Extracting from Russell a test, based on the criteria there elaborated,21 to determine whether American Express had capacity for citizenship, the Mason court listed its legal attributes under New York law22 and concluded that

these essential characteristics of a New York joint stock association such as this defendant sufficiently invest it with a legal personality apart from its individual members, so that it is just and sensible to regard it as a separate entity for purposes of diversity of citizenship jurisdiction.23

transact business, sue and be sued in its own name; its articles of association are filed as public records; it may endure beyond the life of its members; the occasional imposition of personal liability on its members for the sociedad's debts is similar to the liability imposed by some state statutes on the shareholders of a corporation. Id. at 481.

16 Id. at 482.
17 See authorities cited note 11 supra.
18 A third interpretation is possible, i.e., that Russell represents strict compliance with Chapman. It could be reasoned that the Court was compelled to examine the sociedad's characteristics, because of its hybrid nature, in order to determine the manner in which it was viewed to exist under Puerto Rican law—much as Chapman would look to the presence or absence of incorporation in order to determine legal status.
20 It is our considered judgment, however, that the Supreme Court has abandoned the artificial and mechanical rule of Chapman v. Barney in favor of a more flexible test for capacity for citizenship, a test which demands that consideration be given to whether an organization's essential characteristics sufficiently invest it, like a corporation, with a complete legal personality distinct from that of the members it represents.
21 Note 15 supra.
22 334 F.2d at 399-400.
23 Id. at 400.
R. H. Bouligny, Inc. v. United Steelworkers reached a contrary result, expressly disagreeing with Mason's interpretation of Russell. Bouligny found Russell to be poor authority for a contention that the Supreme Court has departed from Chapman because (1) in Russell jurisdiction was based on a unique procedural statute; (2) the sociedad had always been considered a jural entity under the law of its creation, the civil law; and (3) plaintiff was the Territory of Puerto Rico, not a true "citizen." Furthermore, the Bouligny court noted that although prior to the 1958 amendment to section 1332 of the Judicial Code it might have been possible to treat unincorporated associations as corporations under 1332, the amendment now makes such a position untenable. Resolution of the conflict between Mason and Bouligny would doubtless cast light upon the jurisdictional status of unincorporated associations, especially since both cases appear legitimately to find support in Russell, the case which confounds.

Two of the leading authorities and a number of courts have suggested that the Chapman approach be abandoned. One comprehensive and authoritative discussion of the problem recommends that unincorporated associations be deemed citizens of the state in which their principal place of business is located. Those favoring the change argue that labor unions and other large unincorporated associations which have been given the capacity to sue and be sued in their own name by the state of their organization, should be given the same capacity in the federal courts, so that they would not be required to circumvent the Chapman rule by way of a class action under Rule 23(a) of the Federal Rules of Civil Procedure.

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25 Id. at 163 n.3.
26 Id. at 163.
27 Id. at 162 n.1.
28 Section 1332, as amended, provides in part: "For the purposes of this section . . . a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."
29 356 F.2d at 164.
33 Authorities cited note 30 supra.
34 The difficulties encountered in such a class action are not insubstantial. Compare Calgaz v. Calhoon, 309 F.2d 248 (5th Cir. 1962), and Oskoian v. Canuel, 269 F.2d 311 (1st Cir. 1959), and Montgomery Ward & Co. v. Langer, 168 F.2d 182 (8th Cir. 1948), and Tunstall v. Brotherhood of Locomotive Firemen, 148 F.2d 403 (4th Cir. 1946).
Adoption of the Mason position would present a number of problems in light of conflicting policy considerations. Since the change would produce increased resort to the federal courts, the resultant added burden upon those courts, which Congress sought to relieve by its 1958 amendment to the Judicial Code,35 argues against the change. Whether the Court could establish a workable standard to determine which unincorporated associations should be treated as corporations for diversity purposes and whether such associations, if deemed citizens of the state under whose laws they are organized or of their principal place of business, would also be governed by the jurisdictional statutes providing dual citizenship and special venue for corporations are questions which point out the difficulties of a judicial adoption of Mason.

Despite the problems that Mason engenders, however, the inconsistent treatment of unincorporated associations—treatment as an entity for most purposes including capacity to bring suit in state courts and under federal laws,36 but not in diversity cases—should be remedied. The same considerations which moved the Supreme Court to extend diversity jurisdiction to corporations in 185337 are


37 Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314 (1853); see text accompanying note 6 supra. The Court in Marshall reasoned that since corporations had been given the capacity to act in the business world as a single person, and since corporations were held
applicable today to many unincorporated associations, especially those which approach the legal and economic status of American Express. A grant of citizenship to such associations seems justified.


Plaintiff's wife insured the life of her husband with defendant insurance company without the knowledge or consent of the plaintiff by forging his signature to application and inspection forms for the life insurance. Plaintiff's allegation that the insurance company knew of the forgery was denied by defendant. After the insurance policy was issued, plaintiff was seriously injured by arsenic poison given to him by his wife in an attempt on his life. Plaintiff sued the insurance company for failure to use due care in issuing the life insurance to his wife without his knowledge or consent. Defendant insurer demurred. Held, insurer issuing life insurance policy on life of insured with knowledge of insured's lack of consent may be liable for harm to insured caused by applicant-beneficiary.1

The instant ruling extends the tort liability of insurers, first established in Liberty Nat'l Life Ins. Co. v. Weldon, for negligent issuance of life insurance policies. Quoting language to the effect that "a person can have no insurable interest where his only right arises under a contract which he had no authority to make," the Ramey court found that the lack of consent by the insured responsible for these acts as a single person, the law should complete its grant of status and prevent these entities from being regarded as aggregates of individuals for one purpose—diversity jurisdiction—in denial of the rights of others.

38 See Brief for Appellant, pp. 19a-23a, which presents such data as the gross income ($77,408,725 in 1960) and net income ($9,006,735 in 1960) as well as a brief description of the company's overall operation.

1 244 S.C. 16, 135 S.E.2d 362 (1964).
2 It has generally been accepted that "issuance of a policy of life insurance without the consent of the insured does not give rise to a cause of action in tort against the insurer in favor of the insured." 29 Am. Jur. Insurance § 231 (1960). Holloman v. Life Ins. Co., 192 S.C. 454, 7 S.E.2d 169 (1940), decided by this court, found no liability on the part of the insurer, but was distinguished in Ramey on the ground that there was no injury to the insured, who alleged merely that issuance of the life policy without her consent exposed her to an unreasonable risk of harm.
3 267 Ala. 171, 100 So. 2d 696 (1957).
4 Moseley v. American Nat'l Ins. Co., 167 S.C. 112, 115, 166 S.E. 94, 95 (1934), quoting 2 Joyce, Insurance § 892, at 1929 (2d ed. 1917). In Moseley no contract of insurance was perfected due to the death of the prospective insured before he could receive the application.
which rendered the policy void\(^5\) may also have deprived the beneficiary of an insurable interest\(^6\) in the life of the insured. By thus finding that the interest may have terminated, the court brought *Ramey* under the policy against "wager insurance"\(^7\) and the doctrine of *Weldon*, which held an insurer liable for issuing a life insurance policy where the applicant-beneficiary, to the knowledge of the insurer, had no insurable interest in the life of the insured.

Threading through the troublesome concepts of "insurable interest"\(^8\) and "proximate cause,"\(^9\) the *Ramey* court appears to establish a "consent" test\(^10\)


\(^6\) For an insurable interest to exist "there must be a reasonable ground, founded in the relations of the parties, either pecuniary or of blood or affinity, to expect some relief or advantage from the continuance of the life of the insured . . . ." United Brethren Mut. Aid Soc'y v. McDonald, 122 Pa. 324, 330, 15 Atl. 439, 440 (1888).

\(^7\) A lack of insurable interest creates a "wager policy" which is void as against public policy since it tends to create an unreasonable risk that the beneficiary will harm the insured to collect the proceeds of the policy. Warnock v. Davis, 104 U.S. 775 (1882).

\(^8\) A wife has an extremely strong insurable interest in the life of her husband by virtue of their relationship. Crosswell v. Connecticut Indem. Ass'n, 51 S.C. 103, 28 S.E. 200 (1897). Such an interest is extinguished only when the relationship ceases to exist. See generally 44 C.J.S. *Insurance* §§ 204-05 (1945); VANCE, *Insurance* § 31 (3d ed. 1951). There is no authority for the instant court's position that it terminates by reason of the insurer's knowledge of lack of consent of the insured.

\(^9\) The instant court, following the general rule that an independent intervening criminal act which was foreseeable at the time of the negligence does not relieve the actor of liability, Lille v. Thompson, 332 U.S. 459 (1947); Harrison v. Missouri Pac. R.R., 372 U.S. 248 (1963) (per curiam); Genovay v. Fox, 50 N.J. Super. 538, 143 A.2d 229 (1958); see *Restatement, Torts* § 448, comment b (1934), by finding that the requisite foreseeability is a jury question in a husband-wife relationship, appears effectively to rule out any instances of nonforeseeability where the lack of consent is known to the insurer. Furthermore, the fact that the applicant was also the beneficiary does not appear to limit *Ramey*'s extension of foreseeability since application by a nonbeneficiary could, within the scope of the instant court's rationale, be included as foreseeable; the factor most significant in finding foreseeability is the knowledge of insured's lack of consent.

\(^10\) Consent of the insured is required in many analogous situations. It is required to enforce the policy against the insurer, even where the beneficiary has an insurable interest. Metropolitan Life Ins. Co. v. Monahan, 102 Ky. 13, 42 S.W. 924 (1897) (suit for return of premiums); Moseley v. American Nat'l Ins. Co., 167 S.C. 112, 166 S.E. 94 (1932) (suit to enforce policy). Consent of the insured must be obtained to assign a policy to one with no insurable interest. Grigsby v. Russell, 222 U.S. 149 (1911). The majority of courts allow an insured who obtains insurance on his own life to designate a beneficiary who lacks an insurable interest. Elkhart Mut. Aid Benevolent Relief Ass'n v. Houghton, 103 Ind. 286, 2 N.E. 763 (1885); Sabin v. Phinney, 134 N.Y. 423, 31 N.E. 1087 (1892); Haberfeld v. Mayer, 256 Pa. 151, 100 Atl. 587 (1917). *But cf. Mutual Aid Union v. White,*
as the basis of liability of an insurer. When, to the knowledge of the insurer,\textsuperscript{11} the insured's consent has not been obtained,\textsuperscript{12} issuance of a policy on his life which is the cause\textsuperscript{13} of harm to the insured\textsuperscript{14} can now result in liability. Frank utilization of consent as a basis of liability places a small burden on the insurer,\textsuperscript{15} provides a clear line of liability,\textsuperscript{16} and offers the insured near-ultimate protection.\textsuperscript{17}


Mogen David Wine Corporation's application for principal trademark registration\textsuperscript{1} of a decanter bottle configuration already covered by a current design

\textsuperscript{166} Ark. 467, 267 S.W. 137 (1924) (consent test not applied and policy void where taken out in name of insured merely to avoid "wager policy" rule).

\textsuperscript{11} By its broad language to the effect that "an insurance company has \textit{a duty to use reasonable care}" in the issuance of insurance policies, 244 S.C. at 25, 135 S.E.2d at 366 (emphasis added), the instant court implies that actual knowledge of lack of consent as was assumed to be present in \textit{Ramey}, may not be required to find the insurer liable. The language of tort law permits the finding of "reason to know" on the part of the insurer, and an allegation thereof may henceforth defeat a demurrer. \textit{But cf.} note \textsuperscript{15} infra.

\textsuperscript{12} Since an application for life insurance provides for the signature of the insured, the knowledge of insured's lack of consent will normally come from knowledge of a forged signature, as appears to have been the case in \textit{Ramey}.

\textsuperscript{13} \textit{Weldon} and \textit{Ramey}, in opening and broadening the avenue of liability, make difficult an assertion of lack of causation when it is the beneficiary of the policy who injures the insured, but neither case precludes it, and causation must be established by the insured as an element of the tort.

\textsuperscript{14} \textit{Cf.} Holloman v. Life Ins. Co., 192 S.C. 454, 7 S.E.2d 169 (1940).

\textsuperscript{15} To escape having the jury, historically antagonistic to insurance companies, pass on the question of whether due care was exercised in issuing the policy, it is doubtless expedient for insurers to alter their existing practice of requiring only the signature of the insured on the application. Affirmative notice to, and receipt of acknowledgment from, the insured would appear to be sufficient to take the question of due care from the jury.

\textsuperscript{16} "What will constitute an insurable interest . . . is not easy to define by a general rule." Helmetag's Adm'r v. Miller, 76 Ala. 183, 187 (1884).

\textsuperscript{17} The insured is a far more capable judge than the insurer of whether a particular beneficiary should be trusted. See generally \textit{Vance}, \textit{op. cit. supra} note 8, § 34.

patent, was refused by the trademark examiner on the basis that secondary meaning had not been established. The Trademark Trial and Appeal Board sustained the refusal, but on the different ground that to allow trademark registration during the life of the patent would effectively extend the patent monopoly, contrary to the intent of the patent law. The Court of Customs and Patent Appeals reversed the Board’s decision. Held, a bottle configuration may simultaneously be the subject of a design patent and a trademark registration; use of the subject matter of a design patent during the life of the patent may properly be considered as trademark use.

The instant case represents the first judicial consideration of the registrability on the Principal Register of a container covered by a current design patent. With the issue presented in this precise posture, the court was faced with the necessity of either erasing entirely or drawing more distinctly the line traditionally assumed to exist between patents and trademarks. By reversing the seemingly settled administrative view that the existence of a current design patent was a bar to trademark registration, the court chose to erase, grounding its decision upon its finding that trademark rights exist for reasons distinct from and independent of patent rights.

In answering the Board’s principal argument that registration of a patented article as a trademark would extend the patent monopoly, the court found, and based its decision upon, a distinction between patent and trademark rights, stating:

2 Des. Pat. No. 158,213, issued Apr. 18, 1950, for a term of fourteen years.
5 In re Mogen David Wine Corp., 51 C.C.P.A. (Patents) 1260, 328 F.2d 925, 140 U.S.P.Q. 575 (1964). The case was remanded for determination of the factual issue regarding the establishment of secondary meaning for the bottle.
6 When the question was first considered administratively, it was held (1) that a container could not be registered on the Principal Register and (2) that the existence of a current design patent was a bar to trademark registration. Ex parte Minnesota Mining & Mfg. Co., 92 U.S.P.Q. 74 (Ex. in Chief 1952). The first holding was overruled with the registration on the Principal Register of an unpatented bottle. Ex parte Haig & Haig Ltd., 118 U.S.P.Q. 229 (Comm’r Pat. 1958); see In re McIlhenny Co., 47 C.C.P.A. (Patents) 985, 278 F.2d 953, 126 U.S.P.Q. 138 (1960) (holding adopted, registration refused on other grounds). The second holding was partially overruled with Supplemental Registration of a patented bottle. In re Pepsi-Cola Co., 120 U.S.P.Q. 468 (T.T. & A. Bd. 1959). A bottle which was the subject of an expired design patent had previously been registered on the Supplemental Register. Ex parte Caron Corp., 100 U.S.P.Q. 356 (Comm’r Pat. 1954). Unlike the Principal Register, the Supplemental Register carries no presumption of trademark validity, and expressly provides for the registration of packages. See generally 7 PATENT AND TRADEMARK JOURNAL OF RESEARCH AND EDUCATION 474 (1963).
8 The court found support for its distinction in 1 CALLMAN, UNFAIR COMPETITION AND
The underlying purpose and the essence of patent rights are separate and distinct from those appertaining to trademarks. No right accruing from the one is dependent upon or conditioned by any right concomitant to the other. The longevity of the exclusivity of one is limited by law while the other may be extended in perpetuity.9

The Board's adoption of the view10 that use in trade under the protection of the patent monopoly could not properly be considered as trademark use was likewise rejected by the court.11

In rationalizing its decision, the court decided without discussing an issue often discussed in patent cases but never decided, viz. upon what theory is a patent granted? The court seemingly adopted the theory that a patent monopoly is a creature of the sovereign,12 granted to any inventor who meets the conditions prescribed by the sovereign and that the public may copy when the term of the patent comes to an end, with certain exceptions. However, the right to copy is not derived in any way from the patent law; it is a right which inheres in the public under general law. . . . No new right is born.13

Under the court's theory, trademark rights are apparently an "exception" to the public's otherwise unlimited right to copy.

Trademarks § 16.3, at 252 (2d ed. 1950); 1 Nims, Unfair Competition and Trademarks § 139, at 390 (4th ed. 1947). However, Callman cited no cases to support the assertion relied upon that "after the life of the (design) patent, protection may be granted against unfair competition on the ground of secondary meaning." Callman, op. cit. supra § 16.3, at 256.


10 Previously expressed in Ex parte Caron Corp., 100 U.S.P.Q. 356, 360 (Comm'r Pat. 1954).

11 Some cases have held that the public must acquiesce in the use of a mark before it can be claimed as a trademark. See, e.g., Upjohn Co. v. Wm. S. Merrell Chemical Co., 269 Fed. 209 (6th Cir. 1920); Merriam Co. v. Saalfield, 198 Fed. 369, 374 (6th Cir. 1912); National Lock Washer Co. v. Hobbs Mfg. Co., 210 Fed. 516, 518 (D. Mass. 1914). The court in Mogen David stated that to hold this "would be tantamount to writing an exception into the statute excluding consideration of use during the life of a design patent." 51 C.C.P.A. (Patents) at 1265, 328 F.2d at 931, 140 U.S.P.Q. at 580. The court also distinguished its previous refusal of trademark registration of an essentially functional design, In re The Delister Concentrator Co., 48 C.C.P.A. (Patents) 952, 289 F.2d 496, 129 U.S.P.Q. 314 (1961), pointing out that here the design was ornamental and nonfunctional. The court thus rejected the Solicitor's argument that the ornamentation of the bottle functioned to make the container serve as a decanter for table use and, being functional, should not be monopolized as a trademark.

12 See generally 1 Robinson, Patents §§ 1-10 (1890).

If one accepts this view of the nature of a patent, or even the theory that a patent is in the nature of a contract in which the patentee only discloses his invention to the public as consideration for the grant of the monopoly, the court's determination that the existence of a patent should in no way affect trademark rights is tenable. Since the inventor has fulfilled all that is required of him by disclosure, there would seem no reason why he could not obtain additional protection from other sources, e.g., trademark laws.

In contrast with these theories are the views that a patent is in the nature of a contract, or is a creature of the sovereign, but, in either case, the consideration or condition upon which the patent is granted is the dedication of the invention to the public upon the expiration of the patent. This view finds early support in the Supreme Court's Singer Mfg. Co. v. June Mfg. Co. decision where the Court decided that the right of the public to make the thing covered by the patent upon the expiration of the monopoly is the condition upon which the patent is granted. In Singer the Court held that not only the machine, but even the manufacturer's name became public property upon expiration of the patent. The Court's philosophy was aptly summarized by Mr. Chief Justice Stone in a later case:

By the force of the patent laws not only is the invention of the patent dedicated to the public upon its expiration, but the public thereby becomes entitled to share in the good will which the patentee has built up in the patented article or product through the enjoyment of his patent monopoly. Hence we have held that the patentee may not exclude the public from participating in that good will or secure, to any extent, a continuation of his monopoly by resorting to trademark law.

The public's right to copy an unpatented article even to nonfunctional ornamentation was reaffirmed by the Supreme Court just three days before Mogen David when the Court held invalid state laws prohibiting copying of articles not subject to patent or copyright protection. Even more recently the Court has held that

14 The contract theory wherein the consideration is the inventor's disclosure of his invention, the public being vested with no future right to the free use of the invention, is supported by some commentators. See Arnold, A Philosophy on the Protections Afforded by Patent, Trademark, Copyright and Unfair Competition Law; The Sources and Nature of Product Simulation Law, 54 TRADEMARK REP. 413 (1964); Smith, "In Vino (Mogen David Brand) Veritas?," 54 TRADEMARK REP. 581 (1964). Walker seems to have recently adopted this view. 1 Walker, Patents § 6, at 45 (Deller 2d ed. 1964), quoting Fried. Krupp Aktien-Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 594 (3d Cir. 1911), cert. denied, 223 U.S. 728 (1912) (dictum). This view did not appear in an earlier edition of the same treatise, 1 Walker, Patents § 14 (Lotsch ed. 1929), and is without recent judicial support.


any attempted reservation or continuation in the patentee or those claiming under him of the patent monopoly, after the patent expires, whatever the legal device employed, runs counter to the policy and the purpose of the patent laws.18

The Supreme Court's view and that of the Court of Customs and Patent Appeals in Mogen David seem patently antithetical. However adroitly one handles the legal distinctions between patents and trademarks, the fact remains that under Mogen David a manufacturer may obtain a patent monopoly and use its protection to obtain and perpetuate the less comprehensive trademark monopoly.

When the decision is viewed from the point of view of its overall practical effect, the transparency of the court's reasoning becomes manifest. While it has been urged that others could use the decanter wine bottle for bottling a host of other products,19 if, as Mogen David claims, the public has come to associate the bottle with Mogen David's products, this association could conceivably extend to grape juice in the same bottle, or apple juice, or even pancake syrup. As a better example, few products could be sold in a "Pepsi" bottle which would not be associated with the Pepsi-Cola Company, thus deceiving the public as to the origin of the contents of the bottle. Under the rationale of Mogen David, an inventor could, by virtue of the patent monopoly, perpetuate a monopoly on virtually the entire commercial potential of the bottle, which could even approach the extent of the original patent monopoly. In such a case, with only a limited or even illusory right to use the bottle in commerce passing to the public upon expiration of the patent, the public receives little for its grant to the inventor of a fourteen-year monopoly.

Mogen David would seem, in practical effect at least, to permit an establishment of a perpetual monopoly on a manufacture through the use of the patent laws which the Constitution forbids,20 and which Congress never intended.21 It is submitted, therefore, that the doctrine of Mogen David will be short lived.22 On the other hand, if this doctrine is accepted, manufacturers will find patent protection a decided advantage in establishing their containers as a trademark.


Decedent applied for two flight insurance policies which were to be in force solely for his round trip to Venezuela. His wife paid the premiums, was named beneficiary and was given possession of the two policies. The policies provided for payment of certain amounts to the insured for specifically enumerated injuries, and in the event of the insured's death the principal amounts were to be paid to the designated beneficiary. The insured retained the right to change the beneficiary and to assign the policy without the consent of the originally designated beneficiary, subject to the usual conditions of notice to, and written confirmation by, the insurer. Decedent was subsequently killed in an airplane crash while en route to Venezuela. His widow filed proof of claim and was paid 125,000 dollars, which was not included by the executors in decedent's gross estate for federal estate tax purposes. The Commissioner assessed a deficiency on the ground that the insurance payments were includible, as proceeds of "policies on the life of the decedent," under section 2042(2) of the Internal Revenue Code of 1954.\(^\text{1}\) The assessment was sustained by the Tax Court;\(^\text{2}\) the United States Court of Appeals for the Third Circuit reversed. Held, flight insurance proceeds are not includible in the gross estate of the decedent-insured under section 2042(2) of the Internal Revenue Code of 1954.\(^\text{3}\)

The instant court, here considering for the first time whether flight insurance is includible under section 2042(2),\(^\text{4}\) based its decision on the nature of flight insurance as accident insurance with death benefits. Disagreeing with the long-determinative\(^\text{5}\) 1929 Board of Tax Appeals decision of Leopold Ackerman,\(^\text{6}\)

\(^\text{1}\) The value of the gross estate shall include the value of all property—

\(\cdots\cdots\)

\(^\text{2}\) Receivable by other beneficiaries.—to the extent of the amount receivable by... beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person.

\(^\text{3}\) Estate of Marshal L. Noel, 39 T.C. 466 (1962).


\(^\text{5}\) Id. at 951.


\(^\text{6}\) 15 B.T.A. 635 (1929).
which established the presumption under a predecessor of section 2042(2)\(^7\) that accident insurance with death benefits was includible,\(^8\) its taxability hinging upon whether the requisite tests of ownership had been met, the \textit{Noel} court differentiated accident from life insurance\(^9\) and found that Congress intended to include only the latter as “insurance under policies on the life of the decedent.”\(^10\)

Citing \textit{Oglesby-Barnitz Bank & Trust Co. v. Clark},\(^11\) the court differentiated accident from life policies on the basis of the contingency which determines the insurer’s liability: the contingency insured against in life policies—death—is inevitable; the contingency in accident policies is evitable.\(^12\) Utilizing this distinction, the court continued by turning to legislative intent, noting that the original estate tax statute,\(^13\) which omitted a specific reference to life insurance proceeds, permitted avoidance of the tax by making such proceeds payable to designated beneficiaries rather than to the insured's estate. Congress enacted legislation correcting this deficiency, making such policies includible under the

\(^7\) Revenue Act of 1924, ch. 234, § 302(g), 43 Stat. 304.

\(^8\) Citing Logan v. Fidelity & Cas. Co., 146 Mo. 114, 124, 47 S.W. 948, 950-51 (1898), which recognized that both accident policies with death benefits and life policies are contingent upon loss of life, \textit{Ackerman} found the two types of policies indistinguishable. 15 B.T.A. at 637.

\(^9\) 332 F.2d at 952-53.

\(^10\) \textit{Id.} at 953-54.

\(^11\) 112 Ohio App. 31, 175 N.E.2d 98 (1959), which stated: [1]n a policy of life insurance, death is the contingency insured against; and if it be the result of an accident, the accident is but an incidental factor; while in an accidental death policy, the accident is the thing insured against, and the death is but one of the incidents which creates liability.

\(^12\) As a further differentiation, the \textit{Noel} court observed that life insurance has several economic and investment features absent in an accident policy. Life policies build up a cash surrender value against which loans may be secured, the insurer immediately assuming absolute risk of loss, and the insured acquiring an immediate property interest. 332 F.2d at 952-53; see Bowles v. Mutual Beneficial Health & Acc. Ass'n, 99 F.2d 44 (4th Cir. 1938); Fidelity & Cas. Co. v. Dorough, 107 Fed. 389 (5th Cir. 1901); Ticktin v. Fidelity & Cas. Co., 87 Fed. 543 (C.C.W.D. Mo. 1898); Baumann v. Preferred Acc. Ins. Co., 225 N.Y. 480, 122 N.E. 628 (1919). Accident policies have no surrender value, and the insured has “nothing more than an inchoate and defeasible right.” 332 F.2d at 953. The court concluded that “an accident policy which provides for the payment of the principal sum in the event of the insured’s accidental death is not thereby converted into a life policy; such a feature does not alter the essential nature of the insurance.” \textit{Ibid.} The Treasury Department is apparently willing to accept limited distinctions between life insurance and accident insurance with death benefits with respect to income tax. See Proposed Treas. Reg. § 1.79-1(b)(1)(ii) (b), 29 Fed. Reg. 10516-17 (1964).

statute. In light of the legislative history and the salient distinctions between accident and life policies, the court reasoned that since flight insurance lacks the certainty desirable in estate planning, it is not the type purchased to escape estate taxation, and thus it falls outside the intent of Congress expressed in enacting the predecessor of section 2042(2).

Noel's attempt to define "insurance under policies on the life of the decedent," and its inquiry into legislative intent parallel the approach of Ackerman. Both Noel and Ackerman utilized insurance law terminology in differentiating accident from life policies, and both looked to legislative intent, but Noel's inquiry into legislative intent was not limited to the statutory language alone, as was Ackerman's, rather it extended to the specific reasoning of the drafters of the relevant provision.

Noel's analysis of section 2042(2) draws into question the includibility of double indemnity agreements and term insurance within that section. The court's reasoning would seemingly apply to proceeds payable under a double indemnity rider which, although integrally connected with life insurance, are payable solely upon the occurrence of an evitable event—the accident. On the other hand, with respect to term insurance, where the insurer contracts to pay the principal amount only if the insured dies before the expiration of a specified number of years, the instant case would not apply. Although payment is con-
tangible on the evitable event of death within a specified term, nevertheless, the
tingentity insured against is death, whereas Noel is limited to insurance
policies in which the contingency is other than death.¹⁹

Even in the face of the Commissioner's contentions that the Noel decision
will mean a significant loss of revenue to the Government²⁰ and that it contra-
venes congressional policies which "seek to bring into the gross estate all items
of value owned by the decedent, or over which the decedent exercised control
during his life,"²¹ the instant ruling, on the specific question before the court,
appears appropriate; the legislative intent of section 2042(2) as assessed by
Noel leaves no other conclusion.²² Nonetheless, that assessment fails to consider
the current extensive use of flight insurance and accident policies with death
benefits, and perhaps will fall because it could be reasoned that Congress would
have included such insurance, had it been prevalent in 1918, within the scope
of section 2042(2), and that it has not done so more recently because of tax-
payers' obeisance to Ackerman.

¹⁹ True term contracts, however, have no loan or cash value. 1 Appelman, op. cit. supra
note 11, § 3, at 10. In this respect they are similar to accident policies.
²⁰ Over seven million policies like those in the instant cases are issued each year. Under
these and other policies, casualty insurance companies paid about $7,000,000 for loss
of life from airplane accidents in 1963. Under all forms of accident insurance, death
payments on account of accidental death totalled approximately $73,000,000 in 1962.
Petition for Certiorari, p. 6.

²¹ Ibid. Once it is concluded that the policy in a particular case is of the type covered
by § 2042(2), the problem of control becomes material. The Tax Court in the instant
case found that decedent had the requisite incidents of ownership in the flight policies, and
that his inability to exercise them was immaterial. 39 T.C. at 472. The court of appeals
agreed. 332 F.2d at 951 (dictum). These rulings appear appropriate since legal inability
to exercise retained powers over property transferred in trust is immaterial under §§ 2036
and 2038. Round v. Commissioner, 332 F.2d 590 (1st Cir. 1964); Hurd v. Commissioner,
160 F.2d 610 (1st Cir. 1947); Estate of Charles S. Inman, 18 T.C. 552 (1952), rev'd on other
grounds, 203 F.2d 679 (2d Cir. 1953); Estate of Virginia H. West, 9 T.C. 736 (1947),
aff'd sub nom., St. Louis Union Trust Co. v. Commissioner, 173 F.2d 505 (8th Cir. 1949);
Rev. Rul. 61-123, 1961-2 CUM. BULL. 151. One method for the taxpayer to avoid the problem
of control in a Noel-type policy would be to have the incidents of ownership clauses
of the policy stricken.

²² It should be noted, however, that Congress, in 1918, considered the enactment of the
predecessor of § 2042(1), governing policies payable to the executor, as unnecessary since
such policies were already covered by the generic gross estate provision. Lowndes &
22 (1918). The taxation of policies payable to the executor seemingly would not distin-
guish between accident and life policies. It is arguable that Congress intended that § 2042(2)
reach all types of policies in the same manner, provided that payment is made for death.
Such an argument is fortified by the fact that §§ 2042(1) and 2042(2) are combined under
a common section heading, each using the phrase, "policies on the life of the decedent."
BOOK REVIEWS


This book is an account of the life and thoughts of a native Mississippi liberal. The style is simple and clear; the content is candid and perceptive and profoundly disturbing.

Frank Smith's family lived in the area of Greenwood in the Mississippi Delta region, where the principal industry was and still is cotton farming and the Negroes outnumber the whites. The author states that the Mississippi Delta of his childhood, in the 1920's and 1930's, was little changed from the mid-nineteenth century. The members of his family on both sides had been Mississippians for generations, earning their livelihoods as small farmers, small merchants and clerks. In 1926, when the author was eight years old, his father, a cotton farmer and deputy sheriff, was murdered by a Negro on a country road as he stopped to offer the Negro a lift.

Frank Smith's Mississippian unorthodoxy may have had its origins in his ten years. The Greenwood library subscribed to The New Republic and The Nation; as a high school boy, he read every issue. He used his earnings from a paper route to join the Book-of-the-Month Club and The Literary Guild.

Prior to World War II, he attended a junior college in Mississippi and later "Ole Miss," and also did some newspaper work and free-lance writing. After military service, he was elected to the State Senate, and in 1950 to the United States House of Representatives. His quick political success was partially attributable to the fact that his father's family had been well known and respected in the Delta region for several generations. He remained in office until his defeat in the Democratic primary in 1962. It seems that two factors contributed to this defeat—the merger of his congressional district with another, and opposition to his views as a "moderate" and Kennedy supporter. Frank Smith was active in support of Kennedy prior to Kennedy's nomination and during the presidential campaign. This was not conducive to political longevity in Mississippi. Upon Smith's defeat in 1962, Kennedy appointed him to his present position as a Director of the Tennessee Valley Authority.

Frank Smith says that Mississippi is obsessed with race. The individual white Mississippian and the Mississippi public authorities at all levels have, since Reconstruction days, systematically subjugated the Negro

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politically, economically and socially; slavery was replaced by caste. The principal topic of white Mississippian conversation is now, and has been for a century, the Negro. In the past ten years, the race issue has rami-
ified; the United Nations, relations with the Soviet Union, foreign aid, domestic economic legislation, all have racial significance. In Mississippi politics now there is only one issue—race; the Mississippi newspapers deal almost exclusively with one subject—race. The current extreme racial virulence dates back to the 1954 school integration decision. Frank Smith’s account indicates that the representation of the Negro condition in Mississippi by the northern press and other media is understated.

How did a man of Frank Smith’s conviction and conscience construct a successful political career in Mississippi? Frank Smith never voted for any civil rights legislation of any kind. His public posture was that of a segregationist. But he refused to inflame racial feeling for political gain; in this he was unusual, if not unique, in Mississippi politics in recent years. He also frequently supported so-called liberal domestic economic legislation and internationalist legislation, which have become targets of the radical racist and right-wing politician and press of Missis-
sippi. His reputation as a Kennedy supporter and a “moderate” on the race issue was in substantial part the reason for his political defeat in 1962 at the hands of an exponent of the “Mississippi Way of Life” and all that the phrase connotes. Smith makes it clear that he never preached gradualism or equality on the hustings, but it seems that he was sus-
ppected of these sins. As he points out again and again in the book, it is impossible to reason on the race issue in Mississippi unless one is pre-
pared to be vilified, ostracized and threatened. The author confirms Professor James Silver’s thesis set forth in his work, *Mississippi: The Closed Society*, that the State has become intellectually shackled.

One question with which the author does not come to grips is why this hate and fear of the Negro by the white Mississippian exists. Does the white Mississippian believe that the Negro is latently a rampaging savage, violent and lustful? Does he fear Negro revenge for generations of slavery and subjugation? Is he fearful of his capacity to compete success-
fully with the Negro? Is the subjugation of the Negro simply a means of providing cheap labor, Negro and white? The author does not direct himself to this question, other than to indicate that the white Mississip-
ian fears widespread miscegenation, and that the standard Mississippian interpretation of Christianity does not include the Negro among the children of God. The author also points out that the caste system has brought about economic retardation and generally cheap labor. The
author does not attempt an analysis of the phenomenon of extraordinary racial hatred in his state. I am sure that this perceptive and articulate man could give us as good an account of the southern white psyche as anyone, and I wish that he had.

How does Frank Smith view the future of Mississippi's race relations? Does he suggest any solution? He sees federal power increasingly being brought to bear to enforce constitutionally-protected rights such as voting and school integration. This book was written before enactment of the Civil Rights Act of 1964, but the author anticipated that federal power would be employed to end other forms of institutionalized segregation and discrimination. Smith places heavy emphasis upon economic discrimination. He sees the abolition of this as central to the emancipation of the Negro and the economic emancipation of Mississippi. The author recognizes the huge economic waste inherent in the subjugation of the Negro; to his credit, however, he never offers this as the basic reason for reform. Frank Smith's fundamental decency and Christianity would never allow this as justification for what is essentially a moral position. Frank Smith is not at all sanguine concerning the emergence of white leadership to advance the cause of racial justice and equality in Mississippi. He does not predict violence as the Negro presses his claims with federal support, nor does he predict white accommodation. If leadership is forthcoming, it will not be from public officials, the church or the bar; if it should come, he sees it emerging from the landed class, the planters. They are the least subject to economic and social pressures; they also have a traditional self-image, if not a tradition, of noblesse oblige.

Smith recognizes that the opening up of opportunity to the Negro will not automatically produce skilled and industrious Negroes qualified to exploit these opportunities; traits fostered by generations of slavery, persecution and hopelessness will not disappear suddenly. Smith does not, however, go into the problems of Negro self-development and civil rights leadership. I feel they deserve brief mention here to round out this discussion. The capacity of the Negro to exploit opportunity, whether in Mississippi or New York, will not be developed in the voting booth, in the Congress or in street demonstrations. The inculcation of standards of industry and learning may well be the most difficult part of the Negro revolution in this country. The time may be fast arriving when responsible Negro leadership must talk about internal discipline rather than external reform. This will not be easy. It is not clear that the leadership will be equal to this task.

It would be remarkable if organizations or individuals with purposes
broader than Negro civil rights as such should not join in a movement with the potential and dynamism of the present Negro movement. There are twenty million human beings and potentially ten per cent of the voting population vitally concerned with this movement. Since this review is appearing in a legal journal, it is of interest to note that the National Lawyers Guild contributed very substantial legal assistance to civil rights workers in Mississippi in the summer of 1964, probably more than any of the other organizations which sponsored legal assistance. There was virtually no such assistance from the Mississippi Bar. It is recognized that lawyers form a substantial part of the intellectual leadership of the civil rights movement.

It would be most interesting to know what Frank Smith thinks about the activities of the Mississippi Freedom Party and the Council of Federated Organizations (COFO). In addition to obtaining political rights for Negroes, the professed aim of the Freedom Party is to try to weld a political union of the Negro and the poor white in Mississippi. COFO has encouraged the presence and assistance of northern white and Negro students in Mississippi. Without detracting in the slightest from the courage and conviction of these people, it seems appropriate to question whether this activity is conducive to the emergence of moderate white leadership in the State which is the key to a peaceful transition.

PAUL G. HASKELL*


The advent of the Great Depression in 1929 and the passage of the most protectionist tariff in United States history in 1930 may have been unrelated. The Smoot-Hawley Tariff Act1 was the last total tariff revision undertaken by the Congress. Up to that time, the United States tariff had been periodically revised, upward or downward, usually with each change in Administration. The two great political parties were historically divided on the tariff question; the great and bitter tariff controversies that raged during the last half of the nineteenth century and the early decades of the twentieth century were between the Republi-

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can Party, which bore the stamp of the high-tariff party, and the Democratic Party, which advocated a low-tariff policy.

As Thoreau said in his essay *On the Duty of Civil Disobedience*,

Trade and commerce, if they were not made of India-rubber, would never manage to bounce over the obstacles which legislators are constantly putting in their way; and if one were to judge these men wholly by the effects of their actions and not partly by their intentions, they would deserve to be classed and punished with those mischievous persons who put obstructions on railroads.

The legislators of the important trading nations of the world had done such a thorough job that when the Democrats came to power in 1932 the bounce had been taken out of international commerce. The chaotic conditions of world trade required brave emergency measures on an international scale, and the new Democratic Administration was equal to the challenge. It came forward with a plan, fathered by the late Secretary of State Cordell Hull, to seek the recovery of world trade through trade agreements with foreign countries for the mutual reduction of duties and other trade barriers. The resulting legislation in June 1934,\(^2\) granted the President authority to enter into tariff-reducing agreements for a period of three years and to implement these agreements without further recourse to Congress. By periodic extensions of this authority, United States tariff-making has since been accomplished essentially by international agreement.

As the trade agreements program progressed, it drew more and more bipartisan support in the Congress. The tariff was no longer a major political issue and received relatively little mention in political campaigns. This is not to say that protectionist sentiment has disappeared; there remains a hard core of protectionists made up of members of both the great Parties. But the international relations aspects of the tariff have come more and more to be recognized; and by the time of the Kennedy Administration, the trade agreements program had come to be considered as a cornerstone of United States foreign economic policy.

When the Kennedy Administration took office, the President's trade agreements authority had been extended eleven times; trade agreements with most of the important (and numerous unimportant) countries had been concluded, and the Smoot-Hawley tariff had been considerably scaled down. By far the greatest number of United States tariff cuts had been negotiated under the General Agreement on Tariffs and Trade

(GATT), a multilateral agreement negotiated at Geneva in 1947 and supplemented by subsequent "rounds" of negotiations. One of the first projects of the Kennedy Administration was to develop a program for the extension of the trade agreements authority scheduled to expire in June 1962. The Trade Expansion Act of 1962 was the congressional response to President Kennedy’s request for a new trade agreements authority that would provide a "new American trade initiative . . . to meet the challenges and opportunities of a rapidly changing world economy."

The rapid and phenomenal growth of the European Economic Community (Common Market) was listed by the President as one of the principal challenges that needed to be met by a bold new United States trade agreements authority.

Professor Metzger's long and active experience in and out of Government in both the legal and economic aspects of international trade eminently qualifies him to write a book analyzing the provisions of the Trade Expansion Act of 1962 (in the development of which he played an important role) and the prospects for the implementation of the act. His book provides not only a highly competent and much needed discussion of the subject, but also an invaluable appendix containing the 1962 act together with Executive orders and pertinent regulations that provide a complete guide to the administrative machinery for implementing the act.

The author analyzes the "escape clause" provisions and the related "adjustment assistance" provisions of the Trade Expansion Act at considerable length, and no reviewer of this book could be as interested in this particular aspect of the act as this one. The term "escape clause" refers to provisions of trade agreements that permit a contracting party to "escape" from certain obligations under specified conditions. In United States tariff and trade parlance the term has come to refer almost exclusively to the clause in the GATT and other trade agreements to which the United States is a party which permits a contracting party to withdraw a tariff concession if the concession gives rise to such increased imports as to cause or threaten serious injury to an industry of that con-

tracting party. Originally by Executive order, and subsequently by statute, the United States adopted a domestic procedure by which the Tariff Commission would determine the facts in a given case and report its findings to the President who would decide whether the findings warranted the invocation of the escape clause.

In presenting to the Congress his proposals for new trade agreements legislation, President Kennedy recommended the continuation of the escape clause feature (though as modified in important respects), but pointed out that where considerations of national policy made it desirable to deny escape-clause relief to an injured industry, there were no alternative relief measures available. He accordingly proposed the inclusion in the new legislation of "an additional alternative called trade adjustment assistance" which "will permit the executive branch to make extensive use of its facilities, programs, and resources to provide special assistance to farmers, firms and their employees in making the economic readjustments necessitated by the imports resulting from tariff concessions."8

Professor Metzger compares the escape-clause provisions of the 1962 act with those of the previous law, and points out that under the 1962 act industries are bound to have greater difficulty in meeting the criteria for escape-clause relief than under the previous law. This is primarily due to the strengthening of the causation factors in relating increased imports of a concession item to the trade agreement concession and increased imports to serious injury to an industry. Under the previous law, if increased imports of a concession item were found to be due "in whole or in part" to the duty reflecting the concession, and the increased imports were found to have "contributed substantially"9 toward causing or threatening serious injury to the industry concerned, the conditions for a recommendation to the President for escape action were met. In the administration of the old provisions, the Tariff Commission presumed increased imports to be due at least in part to the duty reflecting the concession if there were in fact increased imports of a concession item and the increased imports contributed substantially to the serious injury.

The 1962 act leaves no room for such a presumption. Under its provisions an affirmative determination by the Tariff Commission in an escape-clause case is justified only if the Commission finds that increased imports were due in whole or in part to the duty reflecting the concession.

imports are due "in major part" to a trade agreement concession,\textsuperscript{11} and that the increased imports have been "the major factor" in causing or threatening serious injury to the domestic industry concerned.\textsuperscript{12} In providing for adjustment assistance for firms (loans, technical aid, etc.) and workers (money allowances, retraining, etc.) seriously injured or rendered jobless by increased imports following a concession, Congress specified precisely the same causal tests as those provided in industry escape-clause cases. Thus, in the case of a petition of a firm or a group of workers for adjustment assistance, an affirmative finding by the Tariff Commission would be justified only if it found that increased imports are due "in major part" to a trade agreement concession, and that such increased imports are the major cause of serious injury to the firm, or unemployment of the workers of a firm, as the case may be.\textsuperscript{13}

There is no reason, in principle, why the same causal tests should not be applied in all these cases, and Professor Metzger has no complaint on this score. Neither does he have any quarrel with the strengthening of the escape-clause causal requirements. However, he berates the Tariff Commission for setting out in one of its reports in a workers' adjustment-assistance case that the identical causation requirement in industry escape-clause cases and firm or workers' adjustment cases "allows no room for any different interpretation or application of the criteria,"\textsuperscript{14} regardless of whether the case be an industry escape-clause case or a firm or workers' adjustment-assistance case.

The good Professor attacks this position of the Tariff Commission as "gratuitous . . . and therefore quite unwise," charging that it "ignores the very purpose Congress expressed by tightening the escape clause and adding adjustment assistance."\textsuperscript{15} He heatedly argues that although the Tariff Commission should indeed apply the same standards in all these cases, it should nevertheless apply them "somewhat less stringently"\textsuperscript{16} in adjustment-assistance cases for firms and workers. Professor Metzger's rationale for this point of view runs like this: that the Tariff Commission has six months within which to make a determination in an industry escape-clause case, but only sixty days to make a determination in an adjustment-assistance case for a firm or group of workers; that the Com-

\textsuperscript{14} METZGER, TRADE AGREEMENTS AND THE KENNEDY ROUND 63 (1964).
\textsuperscript{15} Ibid.
\textsuperscript{16} Id. at 61.
mission cannot be expected to obtain the same "quality" of evidence in sixty days as it might in six months; that the reason for the inclusion of the adjustment-assistance provisions was to minimize tariff relief as the remedy for domestic industries injured by increased imports caused by trade agreement concessions; that minimized use of tariff relief was to be counterbalanced by use of the newly created adjustment-assistance measures that did not involve tariff action; that if the newly made, more stringent escape-clause standards were to be applied just as rigorously to adjustment-assistance cases, there would in fact be no counterbalancing; that when Congress assigns the task of applying a statute to an administrative agency, it expects the agency to adopt "flexible" methods of accomplishing the purposes of the enactment, to read the statute in terms of its purpose and not merely its literal words. "If in fact this position is maintained and applied," the Professor warns,

it could well result in either one of two consequences, both of which would be very unfortunate. The Commission might well find that, under pressure, it had to relax its application of the causation standards of both the escape clause and adjustment assistance, which would ignore the foreign relations reasons for the tightening of the escape clause. On the other hand, if it did not do so, the Commission might well be disappointing bitterly the expectations of workers, their trade unions, and business enterprises who supported the escape clause tightening, in fact the entire statute, because they wished to cooperate in the achievement of increased international trade, in the belief that where it reasonably appeared that domestic firms or workers had become import-impacted they would secure the modest adjustment assistance provided by the Act. In that event, substantial and justifiable pressure would be put upon the Congress to amend the Act to make crystal clear to the Tariff Commission the purpose which it had expressed.\(^{17}\)

It is not clear what kind of "pressure" Professor Metzger had in mind that might cause the Tariff Commission to relax its application of the causation standards of both the escape-clause and the adjustment-assistance provisions and thus "ignore the foreign relations reasons for the tightening of the escape clause." And it would hardly seem proper for the Commission to apply the statutory standards "somewhat less stringently" in adjustment-assistance cases to avoid disappointing the expectations of workers, their trade unions and business enterprises who supported the tightening of the escape clause, unless, of course, this could be done consistently with the law.

Surely Professor Metzger is not urging the Tariff Commission to interpret the word "major" one way in an industry escape clause and dif-

\(^{17}\) Id. at 63.
ferently in a firm or worker adjustment-assistance case. Perhaps he means by his "somewhat less stringently" approach that the Commission should be satisfied with somewhat less proof in applying the causal requirements in an adjustment-assistance case than it must require in an escape-clause case. This would suggest resort to a presumption of major causation in adjustment-assistance cases where the evidence of causation is somewhat less than would be required to establish major causation in an escape clause. If this be the Professor's meaning, it is a strange proposition of law. If it was indeed the "purpose" of Congress in including the adjustment-assistance provisions in the act to minimize resort to tariff relief for import-impacted industries, such purpose addresses itself to the President whom the Congress provided with alternatives of a nontariff nature. Even then, if in the case of an affirmative finding in an industry escape-clause case the President were to choose the nontariff alternatives, Congress required that he report to it his reasons for not taking tariff action and provided for mandatory tariff relief upon adoption of a concurrent resolution.

What Professor Metzger appears to be advocating is that the Tariff Commission adopt a hard attitude in escape-clause cases and a soft one in adjustment-assistance cases. If it were to do so for the reasons stated by Professor Metzger, Congress would hardly wait for "pressure" to get it to "amend the Act to make crystal clear to the Tariff Commission" who the legislators and who the administrators are.

The last two chapters of the book are devoted to an appraisal of the Trade Expansion Act, of foreign and domestic threats to the success of the Kennedy Round of tariff negotiations, and of the prospects for a successful outcome of the negotiations.

After describing the extraordinary grant of powers for continuing the program of reducing artificial barriers to increased trade among nations which the Trade Expansion Act of 1962 represents, Professor Metzger poses the question whether, having with great resolution succeeded in obtaining the means with which to launch a "new American trade initiative," the Administration will as resolutely employ these means to achieve the purpose for which they were secured. He ruefully compares the vigor and clarity of President Kennedy's January 1962 message to Congress requesting the new trade legislation with his strongly protectionist flavored response, just four months after enactment of the act, to a question from the press regarding pressures on him to impose restrictions on imports of wool textiles.18 Quoting a Washington Post com-

ment on the way Administrations have of "using glowing rhetoric about free trade and then retreating in concrete instances into the foxholes of protectionism," Professor Metzger sadly observes that "to ask for surcease from hypocrisy in this world is equivalent to waiting for the pot of gold plus rainbow to fall in one's lap."

Hope, however, "springs eternal," and the author sees encouraging signs in the initiation of domestic procedures under the Trade Expansion Act which promise the broadest possible tariff negotiation base. His hopes, dimmed by the tragic death of President Kennedy, brighten at the record of President Johnson's advocacy of the Trade Agreements Program when he served in the legislative branch, and this, the author is confident, assures that President Johnson will continue to exert the influence of the United States toward achieving the success of the Kennedy Round.

President Johnson's position on expanding world trade is set forth in a White House release of October 25, 1964, wherein he refers to the Trade Expansion Act of 1962 as "one of the great legislative monuments to President Kennedy's leadership," and declares that "this Administration is fully committed to its vigorous implementation." Alas, however, it is evident that the glow of the rhetoric will continue to be dulled by retreats "into the foxholes of protectionism." The President goes on to say, "Special import difficulties confronting particular sections of our economy may at times require remedial action," and cites the action taken to meet the problems of meat producers (import quotas on beef), and of cotton textiles and apparel manufacturers (import quotas), and the work that is proceeding on arrangements among the woolen textile-producing nations "which would be in the mutual interests of all" (undoubtedly import quotas).

Good will on the part of the United States alone, the author declares, is not enough. What about the other nations taking part in this great bargaining contest—especially the Common Market countries (France, West Germany, Italy, Belgium, the Netherlands, and Luxembourg)? The Trade Expansion Act of 1962 (which was aimed particularly at the Common Market external tariff wall) had hardly been signed into law before threatening clouds began to gather in the European sector. The remarkable success of the Common Market encouraged nationalistic tendencies, and de Gaulle's quest for leadership of an "independent" Europe fanned the flame of this new European nationalism. What of

20 Metzger, op. cit. supra note 14, at 96 n.3.
President Kennedy's Grand Design for a great Atlantic Community based upon the principle of interdependence, with the United States and Western Europe as equal partners, for which the Kennedy Round had been expected to provide one of the great adhesive forces? The "disparate" rates issue\(^{21}\) raised by the French flared to menacing proportions, and rising Common Market agricultural protectionism could sound the death-knell for any meaningful Kennedy Round.

The rejection of Britain's bid for membership in the Common Market having rendered impotent the hard-won authority to reduce to zero the tariffs on certain categories of products, the only hope for a "successful" Kennedy Round lies, in Professor Metzger's view, in the extent to which the fifty per cent rate-reducing authority of the Trade Expansion Act can be used to achieve: (1) a substantial lowering of the common external tariff of the Common Market; (2) conditions under which Commonwealth, United Kingdom, and countries of the European Free Trade Association (Great Britain, Sweden, Norway, Denmark, Austria, Switzerland, and Portugal) could maintain an important share of the former markets for their products; (3) for Japan the ability to continue to engage in competitive exports to Europe and the United States; and (4) the opportunity for non-African less-developed countries to continue to export a substantial share of their tropical products to Europe.\(^ {22}\) Following an erudite analysis of the problems involved in attempting to lower barriers to "outsiders" by a community of nations banded together for the purpose of creating a wider, but nevertheless limited, customs territory, and considering the Principles and Procedures for the negotiation of the Kennedy Round adopted by the GATT Ministerial Conference in May 1963, Professor Metzger concludes that a twenty-five per cent tariff reduction "across-the-board" on industrial products would need to be termed a success.

As for meaningful negotiations on agricultural products, the author holds out little hope. While the battle over the "agricultural" issue is temporarily quiescent, Professor Metzger fears the battle may be lost by the United States and other "outsiders" who may be forced "to choose between a negotiation which contains meaningful tariff concessions on industrial products with very little assurance concerning long-run access of agricultural products, and no tariff deal at all."\(^ {23}\) That the United States is recognizing this as its choice is evidenced by recent pronouncements indicating, fortunately, that this country is not picking up its marbles.

\(^{21}\) See id. at 107, 110.
\(^{22}\) Id. at 103-04.
\(^{23}\) Id. at 111.
What are the chances of a “successful” negotiation (in Professor Metzger’s terms) on even the industrial products? This, says the author, depends primarily upon the attitude of President de Gaulle. While not discounting a de Gaulle veto, Professor Metzger concludes that the French leader will in the end agree.

The meager terms in which the author defines a “successful” Kennedy Round do not leave him disconsolate. A twenty-five per cent across-the-board reduction in duties on industrial products, and “temporarily less dissatisfying access on agricultural products that the current Common Market portends,”24 would not be “epochal,” he concedes, but it would be useful. Steel-hardened regional trading groups would have been avoided and some fluidity in trading patterns would have been maintained. The Grand Design or Atlantic Community would remain a possibility. While conflicts of interest would not be erased, balance of payments problems would not be solved, and other hoped-for objectives would not be attained, there would still have been another step forward toward ridding the world of artificial barriers against international trade. This, concludes Professor Metzger, would make it all worth while.

Sympathetic observers of the progress of the Kennedy Round negotiations cannot but share Professor Metzger’s anxiety. The full promise of the Trade Expansion Act of 1962 was destroyed by the rejection of Britain’s bid for membership in the Common Market. New threats to even the limited “success” envisioned by Professor Metzger arise even now; witness the recent British surcharge on imports. But in the last analysis, and in spite of all obstacles, the extent of the success of the Kennedy Round depends in decisive measure upon the quality of leadership which the United States exercises. It was determined United States leadership that inspired the initial assault on world trade barriers in 1934; and determined United States leadership was at the forefront of the subsequent attacks on these barriers. Professor Metzger cogently sums it up when he says:

There can be no doubt that the difficulties of accomplishing continual increases in international trade are both substantial and by no means solely of our own making, as recent events in Europe have made clear. Nevertheless, the United States, as the most powerful economic and military unit in the world today and for some time to come, perforce will have a good deal to say about whether these difficulties in the path of expanding trade will be overcome. If the voice with which we spoke in 1962 is regained, the 1962 Trade Expansion Act has a chance of living up to its promise.25

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24 Id. at 118.
25 Id. at 96.
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BOOKS RECEIVED


