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CONTENTS

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THE PROPOSED NEW ADMINISTRATIVE PROCEDURE ACT

EDWARD V. LONG*

Examining the individual sections of the proposed new Administrative Procedure Act, and contrasting them with existing sections, the author enumerates the many advantages to be gained by adoption of the present Senate bill. Senator Long then proceeds to answer each of the objections raised on the floor of the Senate immediately prior to presentation of the bill, in an effort to clarify and explain the more technical passages of the bill.

INTRODUCTION

Twenty years have passed since the enactment of the Administrative Procedure Act.[1] Federal administrative activity has increased to such an extent that today it affects almost every facet of our lives.[2] The federal agencies make more rules than the Congress passes laws, hear more cases than do the federal courts, and in many other ways affect the average citizen more directly and more often than any of our three traditional branches of Government. To cite a few examples, there are currently thirty-three federal agencies engaged in 296 consumer-protection activities;[3] most of the major industries of the nation are controlled by government agencies;[4] and the countless and sometimes confusing regulations of the Internal Revenue Service apply to every taxpayer.

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[1] Ch. 324, 60 Stat. 237 (1946), as amended (codified in scattered sections of 5 U.S.C.A. (Special Supp. 1966)).

[2] Long, *Proposed Changes in Administrative Law*, 19 SW. L.J. 203 (1965) [hereinafter cited as Long].

[3] These activities include, among others, the regulation for safety of food and drugs; the control of anticompetition practices; the establishment of reasonable rates for utilities such as the telephone, gas, and electricity; the elimination of false and misleading advertising and the correct labeling of products for the sale of goods ranging from foodstuffs to fabrics, just to name a few. See *Hearings on H.R. 7179 Before a Subcommittee of the House Committee on Government Operations*, 89th Cong., 2d Sess. 36 (1966).

[4] Transportation is regulated by the Civil Aeronautics Board, the Interstate Commerce

The rapid growth of the administrative process during the last twenty years has caused problems in the functioning of this Goliath equal in magnitude and complexity to the proliferation of the agencies. Most acute of these have been the increasing dilemma of delay and high cost coupled with a decrease in the ability of agencies to completely comply with the rigorous dictates of administrative due process and fairness. In 1953, initial steps were taken to modernize the administrative process and to remedy some of its more obvious defects.[5] Today, after years of research and discussion, another step has been taken to rectify the situation—a concrete proposal to revise and update the Administrative Procedure Act of 1946.

On March 4, 1965, Senator Dirksen of Illinois and I introduced S. 1336,[6] in the hope that this bill would provide at least an initial solution to the delay and expense plaguing citizens who must deal with and be affected by actions of administrative agencies. While we are all generally aware of the aphorism that "justice delayed is justice denied," too few of our citizens realize that the principle applies with equal force to the administrative branch of Government.[7]

Recent articles and studies show just how enervating administrative delay can be to the national economy, and just how tragically such delay can affect an individual businessman or other citizen.[8] It is the intention of this article to discuss some of the major provisions of the bill[9] as they relate to the problem of delay. In addition to a discussion of specific proposals, objections raised against various proposals will be reviewed and selected features of the bill dealing with other problems con-

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Commission, and the Federal Aviation Agency; the use of the radio spectrum is controlled by the Federal Communications Commission; and shipping is controlled by the Federal Maritime Commission.

[5] The Commission began its work in 1953 and reported to Congress in 1955. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOV'T TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURES (1955).

[6] S. 1336, 89th Cong., 1st Sess. (1965); see 111 CONG. REC. 3982 (1965) (remarks of Senator Dirksen).

[7] See S. DOC. NO. 24, 88th Cong., 1st Sess. 155 (1963); STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTIVE AND PROCEDURE, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 3 (Comm. Print 1960); Long, *supra* note 2, at 205-06.

[8] Despite the enormous growth of federal agencies after the early 1930's, the Senate had no subcommittee with direct authority over their procedures and practices until 1959, when the Senate created the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee pursuant to S. Res. 61, 86th Cong., 1st Sess. (1959).

[9] S. 1336 did not pass both houses of the 89th Congress prior to its adjournment. The same bill with some minor changes was submitted to the 90th Congress numbered S. 518. S. 518, 90th Cong., 1st Sess. (1967). Where there are differences between the two bills, it will be noted in the footnotes. Since no new hearings have yet been printed on S. 518, the hearings on S. 1336 are pertinent to an analysis of the new bill.

fronting an effective and fair administrative process will be discussed briefly.

At the outset a word of caution is advisable: The sponsors of S. 1336 do not envisage the bill and its provisions as a panacea for all the problems facing the administrative process. Those both in and out of Congress who support the bill realize that, at best, it can represent only a first step in the search for a more complete and lasting solution to the overall problems. However, without the enactment of a bill patterned on, if not identical to, S. 1336, present administrative process will eventually result in an impossible quagmire of delay and expense.

There are many interesting facets to the revised Administrative Procedure Act as passed by the Senate last year.[10] Section 3 on availability of government records, which passed both Houses as a separate bill and was signed into law on July 4, 1966,[11] is a separate topic in itself.[12] The proposed shifting of ratemaking from rulemaking to adjudication is highly significant,[13] and the attempt to encourage rulemaking by agencies is one of the most forward-looking aspects of the legislation.[14]

SECTION 4—RULEMAKING

There are two proposals in section 4 of the bill dealing with rulemaking. When an agency is petitioned by a citizen for a rulemaking proceeding or an agency initiates a rulemaking proceeding of its own, minor technical questions will arise that serve to delay consideration of the substantive issues involved. Section 4(a)[15] explicitly authorizes agencies to engage in discussions with private parties interested in submitting a proposed rule, expressing an idea, or disposing of other matters prior to the initiation of the regular rulemaking proceeding. In addition, the provision will enable the agency to avail itself of expert opinion which

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[10] 112 CONG. REC. 13100 (1966) (remarks of Senator Edward Long).

[11] Pub. L. No. 89-487, 80 Stat. 250, amending 5 U.S.C.A. § 552 (Special Supp. 1966).

[12] For a brief discussion of this legislation see text accompanying notes 51-53 *infra.*

[13] *Compare* 5 U.S.C.A. §§ 551(2), (4), (5), (6), (7) (Special Supp. 1966), *with* S. 1336, 89th Cong., 1st Sess. §§ 2(c), (d) (1965). S. 1336 included "any exception from a rule within the meaning of rule" as part of the definition of rulemaking. This portion of the definition has been dropped from S. 518.

[14] Many of these provisions to speed up the administrative process incorporate suggestions of the Administrative Conference; others have been adopted from the judicial process; and still others are novel to S. 1336.

[15] "(a) INFORMAL CONSULTATION PRIOR TO NOTICE.—Prior to notice of proposed rulemaking and either with or without public announcement, an agency may afford opportunity to interested persons to submit suggestions for rulemaking or with respect to proposed rules." S. 1336, 89th Cong., 1st Sess. § 4(a) (1965); see S. 1663, 88th Cong., 1st Sess. § 4(a) (1963). S. 518 has added a discretionary power on the part of the agency concerned also to grant such informal conferences after rulemaking.

may serve to clarify the direction the agency should take in order to reach the best decision on the issues in question.

Section 4(e) of S. 1336 requires the agencies to "maintain a rule-making docket showing the current status of all published proposals for rulemaking."[16] While such a docket's main purpose is to keep the public informed of matters presently before the agency, it should also help to reduce the number of requests for extensions of time in which to submit comments. On a number of occasions, certain agencies have issued rules that have far-reaching consequences upon substantive rights, without any advance notice or opportunity for interested parties to be heard.[17] Such action results in delay due to the necessity of the agency's having to consider petitions for rehearing, and, if a rehearing is granted, additional time is necessary so that interested parties may research and build their case. With rulemaking dockets providing a convenient and readily accessible source of information on current rulemaking proposals, the citizen will have a reasonable opportunity to express his views, and the rule itself will be better able to withstand the test of court review.[18] In addition, by providing an opportunity for interested parties to be heard, the rule issued will be clearer in purpose, more lasting in effect, as well as less confusing to those subject to its dictates. This will reduce delays which would otherwise be occasioned by constant reviews and statements concerning the meaning and scope of the rule.

SECTION 5—ADJUDICATION

In the area of agency adjudication, significant steps have been taken to reduce the time required to reach a final decision. Section 5(a)(3)[19]

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[16] S. 1336, 89th Cong., 1st Sess. § 4(e) (1965); see S. 1663, 88th Cong., 1st Sess. § 4(e) (1963).

[17] One example is the Federal Communications Commission's imposition of a "freeze" on broadcasting licenses of various categories of applicants, some of which have been in effect for years. See *Hearings on S. 1160, S. 1336, S. 1758 and S. 1879 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 459 (1965) [hereinafter cited as *1965 Hearings*].

[18] Section 4 of the bill makes ample provision for cases in which emergency rules have to be issued. S. 1336, 89th Cong., 1st Sess. § 4(d) (1965).

[19] (3) PREHEARING CONFERENCES.—Every agency shall by rule provide for prehearing conferences for use in such proceedings as the agency or the presiding officer may designate. Prehearing conferences shall provide for a discussion and, to the extent practicable, determination of the facts and issues involved in the proceeding. Such conferences shall be conducted by a presiding officer who may at any appropriate time require (A) the production and service of relevant matter upon all parties; (B) oral or written statements of the facts and issues; and (C) arguments in support thereof. At the conclusion of a prehearing conference, the presiding officer shall issue an order setting forth all action taken at the conference, amendments allowed to the pleadings and the agreements made by the parties as to any of the matters considered. The order shall limit the issues for hearing to those not disposed of by admissions or agreements and shall control the subsequent course of the proceedings, unless modified thereafter to prevent manifest injustice.

provides procedural guidelines for prehearing conferences. Such conferences are designed to dispose of preliminary or merely formal issues which, if considered at the hearing, would only add to the length of the proceeding. While many agencies already use this device,[20] an express provision standardizing the purpose and nature of prehearing conferences was deemed advisable. Those agencies holding that they lack the authority to conduct such conferences would now be expressly provided with that authority.

Section 5(a)(5)[21] provides for simplified hearing procedures for use with consent of the parties. A section 11[22] hearing examiner will not be needed to conduct such a modified hearing. This will make more personnel available to hear cases and should help expedite agency decisions.[23] The abridged procedures provided for in this section are to be used only with the consent of the parties, although agency sentiment was in favor of allowing the agency to decide when to use these abridged procedures regardless of the positions taken by the parties.[24] While the agencies' proposal would give the appearance of reducing delay by making this timesaving procedure available in more cases, it is believed that, in fact, the opposite would be the result. Section 5(a) requires that certain procedures, designed to preserve administrative due process, be followed in those instances where a statute or the Constitution requires the case "to be determined on the record after opportunity for an agency hearing." To permit an agency to designate such a case for abridged proceedings over the objections of the parties would simply subject any decision reached in such a case to later attack in the courts on the collateral issue of the agency's denial of the type of hearing that statute or due pro-

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S. 1336, 89th Cong., 1st Sess. § 5(a)(3) (1965); S. 1663, 88th Cong., 1st Sess. § 5(d) (1963).

[20] This procedural device has already been employed by various agencies such as the Interstate Commerce Commission and the Federal Power Commission.

[21] (5) MODIFIED HEARING PROCEDURE.—Every agency shall by rule provide for abridged procedures which shall be on the record and be reasonably calculated to promptly, adequately, and fairly inform the agency and the parties as to the issues, facts and arguments involved. The agency may designate hearing examiners or agency personnel of appropriate ability to conduct such abridged proceedings. The procedures shall be for use by consent of the parties in such proceedings as the agency may designate. Without delay after the conclusion of the abridged proceeding, the officer who conducted it shall make his decision based on the record and subject to the provisions of Section 8.

S. 1336, 89th Cong., 1st Sess. § 5(a)(5) (1965); S. 1663, 88th Cong., 1st Sess. § 5(c) (1963).

[22] S. 1336, 89th Cong., 1st Sess. § 11 (1965). Compare 5 U.S.C.A. §§ 3105, 7521, 5362, 3344, 1305 (Special Supp. 1966). This entire section was dropped by S. 518. However, since the wording in S. 1336 was almost exactly the same as that of the existing law, no substantive alteration resulted to the bill's overall effect.

[23] The Interstate Commerce Commission has a similar procedure and experience has shown that use of the modified hearings have expedited decisions in that agency.

[24] *1965 Hearings* 407, 471.

cess requires. The time initially saved by the use of abridged procedures would be lost in time spent reviewing the questions of the fairness of the procedure followed by the agency. While rigid adherence to traditional standards of fairness may, at first, appear to be in conflict with the goal of reducing administrative delay, the long-range result is sounder and fairer decisions unimpeachable on the grounds of procedural irregularity, and therefore less likely to be subject to remand by a reviewing court.[25]

The provision on settlement[26] has been revised to provide the agencies with the necessary discretion to deal with settlements offered only for purposes of delay. Under the new provisions, offers for settlements *must* be considered when made in advance of the proceedings—that is, in advance of the beginning of the actual hearing. After the proceeding has begun, any offer of settlement *may* be accepted at the discretion of the agency. Too often, offers of settlement are made solely for the purpose of gaining time by keeping the agency involved with a collateral issue as to the reasonableness and the effect of the proposed settlement. The new provision will stop the use of this spurious procedural device by enabling the agencies to utilize their discretion to decide when to proceed with the hearing or to stop the proceeding and consider a party's private resolution of the issues.

SECTION 6—ANCILLARY MATTERS

Section 6 deals with ancillary procedural matters not covered elsewhere in the bill. Section 6(i) explicitly provides for the agencies' right to consolidate proceedings.[27] This section will encourage the use of consolidation in appropriate situations. A current example of an involved and complex issue that may best and most quickly be solved by consolidating proceedings is the issue of the Community Antenna Television Regulations[28] now before the Federal Communications Commission.[29] There are currently 120 petitions confronting the FCC on various matters and disputes concerning the regulation, which may more readily be

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[25] This topic will be discussed in more detail. See text accompanying note 73 *infra*.

[26] (c) SETTLEMENT.—The agency shall afford all parties an opportunity, at such time in advance of the proceedings as the agency may by rule prescribe, or, in the discretion of the agency, at any time thereafter where time, the nature of the proceeding, and the public interest permit, to submit and have considered offers for the settlement or adjustment of the questions presented.
S. 1336, 89th Cong., 1st Sess. § 5(c) (1965). For the present provision see 5 U.S.C.A. § 554 (c)(1) (Special Supp. 1966).

[27] "(i) CONSOLIDATION.—Upon reasonable notice an agency may consolidate related proceedings or order joint hearings on common or related issues in different proceedings." S. 1336, 89th Cong., 1st Sess. § 6(i) (1965).

[28] 47 C.F.R. §§ 74.1001-.1083 (1966).

[29] 31 Fed. Reg. 4540 (1966).

handled by one consolidated proceeding considering all the issues involved rather than by numerous proceedings on the nuances of various issues presented by individual petitions.

Section 6(*l*)[30] provides the agencies with explicit authority to dispose of cases on "motions for summary decisions, motions to dismiss, or motions for decisions on the pleadings." Proper use of this new authority should help agencies dispose of many cases that now have to be set for more formal and time-consuming proceedings.[31]

Section 6(k)[32] provides, in effect, that agencies now have authority to issue declaratory orders in any appropriate proceeding. Under present law, the issuance of declaratory orders by agencies has been construed to be limited to adjudicatory proceedings subject to Section 5 of the Administrative Procedure Act.[33] With broader authority to issue declaratory orders in all controversies, an interested party need not risk violating or misconstruing an agency rule, order, or opinion before he is able to obtain clarification on the intent and scope of the rule, order, or opinion in question. Clarification of a rule, order, or opinion by declaratory order should save time by lessening the necessity of more involved and protracted proceedings involving the enforcement of the administrative rules, orders, or opinions.

SECTION 7—HEARINGS

Section 7(a)[34] provides that in the event a presiding officer is disqualified or becomes unavailable for any reason, another presiding officer may be assigned to continue the proceeding from the point the proceeding had reached when the original presiding officer was disqualified. Not having to start from the beginning in such a situation will save considerable time and duplication of effort. In order to insure fairness to all parties, the agency is granted discretion to order a rehearing if it can

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30 "(1) SUMMARY DECISIONS.—An agency is authorized to dispose of motions for summary decisions, motions to dismiss or motions for decision on the pleadings." S. 1336, 89th Cong., 1st Sess. § 6(*l*) (1965).

31 In this connection, § 7(b)(8), grants the same authority to the presiding officer in formal rulemaking or adjudication.

32 "(k) DECLARATORY ORDERS.—An agency shall act upon requests for declaratory orders and is authorized with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove an uncertainty. Any action taken shall constitute final agency action within the meaning of section 10." S. 1336, 89th Cong., 1st Sess. § 6(k) (1965).

33 5 U.S.C.A. § 554(e) (Special Supp. 1966). This has been partially due to the position of the section on Declaratory Orders within § 5 of the Administrative Procedure Act of 1946.

34 In any proceeding in which a presiding officer is disqualified or otherwise becomes unavailable, another presiding officer may be assigned to continue with the proceeding unless substantial prejudice to any party is shown to result therefrom. In event substantial prejudice is shown, the agency may determine the manner in which and the extent to which the proceeding shall be reheard.
S. 1336, 89th Cong., 1st Sess. § 7(a) (1965).

be shown that the factors that led to the presiding officer's disqualification would prevent a fair decision. However, the agency can make a determination as to just how much of the case must be reheard in order to eradicate the improper influence from the proceeding and still avoid the necessity of starting a proceeding all over.

Section 7(c)[35] has been revised to permit the submission of written evidence in *any* proceeding subject to the provisions of section 7, if the presiding officer so requires and if the interests of other parties are not prejudiced thereby. The present law limits the applicability of section 7(c) to "rulemaking or determining claims for money or benefits or applications for initial licenses . . . ."[36] Far greater use may be made of evidence submitted in written form in proceedings other than those enumerated in the present section of the act. For example, whether two, three, or four airlines fly between a given pair of cities is not the type of issue more readily or more definitively resolved by oral argument and cross-examination. What economic, social, or other facts that need to be developed may best and most quickly be supplied by written submissions. The same principal would hold true in many other cases, for example, when there are several applicants for a television license before the FCC. Issues like the public need for an additional channel or the financial ability of the licensee to support a station could, in most cases, readily be developed by written submissions. The case for the use of written submissions is even stronger when the proceeding before an agency is a rulemaking proceeding. Because the rules that are issued by the agencies are nearly always general in nature and application, the use of a trial-type procedure in such proceedings is not only time consuming and expensive but contrary to the traditional mode of legislative action.[37]

For the first time, procedures to govern interlocutory appeals have been provided. Section 7(e),[38] if correctly used, could reduce the number

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[35] "Any presiding officer may, where the interest of any party will not be prejudiced thereby, require the submission of all or part of the evidence in written form." S. 1336, 89th Cong., 1st Sess. § 7(c) (1965).

[36] 5 U.S.C.A. § 556(d) (Special Supp. 1966).

[37] Rulemaking has consistently been considered a quasi-legislative function. The agency in promulgating a rule is functioning much like Congress or any legislative body when the latter passes a law. There are few instances, if any, where the parties affected by a law had the right or received the opportunity to argue their case orally before the lawmakers, let alone cross-examine the proposal's proponents or opponents.

[38] (e) INTERLOCUTORY APPEALS.—A presiding officer may certify to the agency, or allow the parties an interlocutory appeal on, any material question arising in the course of a proceeding, where he finds that to do so would prevent substantial prejudice to any party or would expedite the proceeding. No interlocutory appeal shall otherwise be allowed, except by order of the agency upon a showing of substantial prejudice and after a denial of such appeal by the presiding officer. The presiding officer or the agency may stay the proceeding during the pendency of the interlocutory appeal to protect the substantial rights of any party. The agency, or one or

of final appeals that come to the agency and avoid the need for rehearings. Today, procedures of interlocutory appeals vary from agency to agency. This provision will standardize the procedures, while at the same time providing sufficient flexibility to permit each agency to utilize an interlocutory appeal only when to do so will speed final agency action.

Section 7(e) also cures other defects in present agency practice with regard to interlocutory appeals, one use of which has often been for the sole purpose of diluting the hearing officers' powers. Parties have used interlocutory appeals simply to delay a final agency decision. Section 7(e) gives greater authority to the presiding officer to control the taking of an interlocutory appeal so that he may prevent the use of the appeal for purposes of delay before the actual hearing process is interrupted. When there is, however, possible prejudice to one of the parties in not allowing the appeal, the agency retains final authority to allow an appeal after the presiding officer has denied the request.[39]

SECTION 8—DECISIONS

The discussion now turns to one of the most vital and controversial sections of the bill. As revised, section 8[40] provides procedures that

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more of its members as it may designate, shall determine the question forthwith, and further proceedings shall be governed accordingly.

S. 1336, 89th Cong., 1st Sess. § 7(e) (1965). Determination of such questions has been made discretionary by S. 518 and the section now concludes: "The agency, or one or more of its members as it may designate, may determine the question or may decline to hear the question raised by the appeal, and in either event further proceedings shall be governed accordingly."

[39] Section 8 of the bill only applies to adjudication required to be conducted pursuant to § 5(a) of the bill. Appellate procedures for rulemaking proceedings are contained within the section on rulemaking. S. 1336, 89th Cong., 1st Sess. § 4(c) (1965).

[40] For convenience of reference § 8 of the bill is quoted here in its entirety.

SEC. 8. In all adjudications subject to section 5(a)—

(a) GENERAL.—The same officers who preside at the reception of evidence shall make the decision except where such officers become unavailable to the agency. In the absence of either an appeal to the agency or review by the agency within time provided by statute or by rule, such decision shall without further proceedings then become the decision of the agency. In proceedings in which the agency presides at the taking of evidence, its decision shall be the final agency action in the proceedings.

(b) SUBMITTALS AND DECISIONS.—Prior to each decision of presiding officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions and (2) supporting reasons for such proposed findings and conclusions with the opportunity, in the discretion of the presiding officer, for oral argument thereon. The record shall show the ruling upon each such finding or conclusion presented. All decisions shall become a part of the record, shall be served by the agency on the parties, and shall include (A) the opinion, and (B) the appropriate order, sanction, relief, or denial thereof.

(c) APPEAL AND REVIEW.—(1) Any party may appeal the decision of the presiding officer by serving upon the agency and the other parties, within the time prescribed by agency rule after being served with the decision, written exceptions and the reasons in support thereof which shall state specifically and concisely the manner in which (A) prejudicial error was committed in the conduct of the proceeding; (B) the findings or conclusions of material fact were clearly erroneous; (C) the conclusions of law were erroneous; (D) the decision was contrary to law or to the duly promulgated rules or decisions of the agency; or (E) there was a novel question

should have the greatest effect on speeding final agency decisions.[41] Section 8(a) affirmatively and explicitly places decisional authority in the man who hears the evidence—the presiding officer. The decision of the presiding officer is then subject to review by the agency (or an appeal board if established). Review of the presiding officer's decision is limited in scope by section 8(c)(1) so that, except as provided in section 8(c)(4), wholesale rehearing of cases by agency members is abolished. The provisions of section 8(c)(2) establish appeal boards to handle appeals in routine cases. This should substantially limit the time agency members

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brought into issue. The record for appeal shall include all matters constituting the record upon which the decision of the presiding officer was based. Any portion of the record relied upon shall be identified by detailed page references. Except for good cause shown, no exceptions by any party shall rely on any question of fact or law upon which the presiding officer had not been afforded an opportunity to pass. The appeal shall be limited to the questions raised by the exceptions.

(2) Except to the extent that the establishment of an agency appeal board is clearly unwarranted by the number of proceedings in which exceptions are filed or that agency appellate procedures have been otherwise provided by Congress, each agency shall establish by rule one or more agency appeal boards composed of agency members, hearing examiners (other than the presiding officer), or both. Proceedings before the appeal board shall be as provided by agency rule and shall include oral argument if requested by a party. In [*sic*] an appeal board has been established, exceptions shall be considered and determined by the appeal board unless a private party shall promptly file an application for a determination of the exceptions by the agency. If an application is made for review to the agency, in addition to the exceptions enumerated in subsection 8(c)(1), the private party may request the agency to reconsider its policy. If the agency denies the application, it shall be deemed to have considered and denied each exception and affirmed the decision of the presiding officer. If the agency grants the application, it shall determine the exceptions after considering the reasons therefor. In a proceeding in which there is more than one private party, and an application is filed for review by the agency, if the agency declines consideration of the application, it may refer the appeal to an appeal board. If no appeal board has been established, the exceptions shall be considered and determined by the agency after considering the reasons therefor.

(3) Except where the agency declines consideration of an application for review or where the agency denies the application for a determination of the exceptions, there shall be a ruling by the agency, or the appeal board if it decides the appeal, upon each material exception; the record shall show the ruling and the reason therefor; and the decision of the presiding officer shall be affirmed, set aside, or modified to conform with such rulings or remanded with instructions.

(4) After entry of the decision of the presiding officer or after the action of the appeal board, the agency in its discretion may, within the time prescribed by agency rule, order the case before it for review but only upon the ground that the decision or action may be contrary to law or agency policy, that the agency wishes to reconsider its policy, or that a novel question of policy has been presented. The agency shall state in such order the specific agency policy or novel question of policy involved. On such review the agency shall have all the power it would have if it were initially deciding the proceeding; provided that if the agency determines that further evidence is necessary on an issue of fact the agency shall remand the case with instructions for further proceedings before the presiding officer.

(5) The action on review or on appeal if no review is taken shall be on the record and be the final action of the agency except when the decision is remanded or set for reconsideration or rehearing.

S. 1336, 89th Cong., 1st Sess. § 8 (1965).

A second exception has been added to the first sentence of § 8(a) by S. 518 which reads: "(2) where the agency omits an officer's decision in cases which are required by statute to be decided within a specific period of time." Section 8(c)(2) has also been expanded by S. 518 to allow other agencies to file application for a determination of the exceptions in the same fashion as a private party.

[41] S. 1336, 89th Cong., 1st Sess. §§ 8(c)(2), (3) (1965).

must spend reviewing individual cases, freeing them for more important duties.

It is hoped that the procedural steps provided by the revised section 8 will upgrade the authority and therefore the quality of an examiner's decision. Better decisions at the hearing level should mean fewer appeals.[42] Freeing agency members from having to decide the vast majority of routine adjudications from which appeals are taken will allow the agency members more time to devote to policymaking determinations and promulgation.

Issuance of more defined, definite, and detailed rules should enable the hearing examiners, agency staffs, and the public affected thereby, to better understand the rules, their scope and purpose. Such understanding should, in turn, enable the examiners and staffs to more easily apply the rules to specific situations and controversies, thereby reducing the number of appeals and the lapse of time between initiation of a proceeding and the taking of final agency action. Better rules, enabling the efficient taking of final agency action, should also reduce the number of petitions for judicial review under section 10, and define more clearly the scope of review, thus facilitating completion of such cases.

Further elaboration on certain provisions of section 8 may prove helpful. In accordance with Recommendation No. 9 of the last temporary Administrative Conference, grounds for appeal are expressly established for agency review of a presiding officer's decision.[43] According to the provisions of section 8(c)(1) of the bill, exceptions not raised before the presiding officer, may not, with a few exceptions,[44] be raised on appeal. Further, the pages of the record where the alleged errors are recorded must be specified. For some reason, agency practice over the years has permitted and at times encouraged or even required wholesale certification of an unexamined record to the agency members for review.[45] This practice in effect makes the agency members rehear the entire case which of course greatly increases the time between the initiation of a proceeding and the issuance of a final decision and increases the expense of the proceeding above reasonable levels.

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[42] S. Doc. No. 24, 88th Cong., 1st Sess. 159 (1963). This position was affirmatively taken by members of the Administrative Conference in their Recommendation No. 9. *Id.* at 155.

[43] *Ibid.*

[44] S. 1336, 89th Cong., 1st Sess. § 8(c)(1) (1965).

[45] There are some administrators of the opinion that this is the only way they can properly perform their tasks as the major authority within an agency. The Federal Power Commission has long suffered from such a belief.

It is not uncommon for a record of anywhere from 2,000 to 5,000 pages to be certified with exhibits which may run from 150 to 300 pages. Obviously such a mammoth record is impossible of scrutiny.

After specific objections have been made to the decision of a presiding officer, either the agency or an appeal board will review them.[46] If appeal boards are established, the private party can initially choose to seek review before either the appeal board or the full agency. Since, according to the intent and structure of the provisions of section 8(c)(2), only the more routine adjudicatory cases are to be decided by appeal boards, it is incumbent upon those parties wishing review of a presiding officer's decision by the agency members to make a strong and forceful showing that their grievances, as set forth in their objections to the presiding officer's petition, are of such magnitude and importance in the area of regulation within the particular agency's jurisdiction and so interlaced with the public interest to warrant the full agency's consideration and review. If the party fails to make this strong showing, the decision of the presiding officer is to be affirmed, and any further review must be sought in the courts.

This procedure avoids the delay that would otherwise be occasioned by having the agency sit and review each case to determine whether the full agency or an appeal board should hear the case. Not only would such a task of assigning cases for review consume much more time, it would provide an additional ground for collateral attack on the theory that the agency had erred in making the assignment to the appeal board. In addition, under the procedures of section 8, if a party goes to the agency for review and is denied review, the decision of the presiding officer is affirmed. This would mean that the court on judicial review should be able to consider the merits of the case and not the collateral issue of whether the agency abused its discretion in assigning a case to an appeal board rather than reviewing the case itself. It should also be made clear at this juncture that the decision of the appeal board is, except as provided in section 8(c)(4), final agency action and not an interim opinion prior to agency review.

There is one exception to the intra-agency appellate review route as provided by section 8(c)(2). Where an application involving multiple private parties is filed for review by the agency and the agency declines consideration of the application, the agency may, in its discretion, refer the appeal to an appeal board. The purpose of this exception is to preclude one private party from petitioning for full agency review in the hope that the agency will deny his application and thereby preclude the other private parties from obtaining any intra-agency review, thereby

[46] Careful reading of § 8(c)(1) of the bill will show that appeal boards do not *have* to be established. On the other hand, should an agency establish appeal boards, there is no limitation on the number of such boards that may be established, which may help to reduce further the excessive backlog of agency cases.

forcing them into court if they wish any review at all. However, it should be made clear that the determination by the agency to refer the appeal to an appeal board is discretionary and that the appeal board's decision after referral, except for section 8(c)(4), is final agency action. The party cannot seek review of the appeal board's decision before the agency.

In order to provide a flexible procedure allowing the greatest possible exercise of agency expertise in the performance of its appellate functions, section 8(c)(4) allows the full agency to take a case on review after decision by either the presiding officer or the appeal board. To avoid the possibility of tier decision making, this power is limited to cases involving an identifiable policy issue of major significance to regulation within the agency's jurisdiction.[47] If the agency does decide to review a case pursuant to section 8(c)(4)'s provision, the agency will have all the power it would have were it initially deciding the case.

SECTIONS 9 AND 10—SANCTIONS, POWERS, AND JUDICIAL REVIEW

Section 9(a)[48] provides that each agency has a duty to set and complete proceedings or investigations with reasonable dispatch. This mandate was formerly limited to proceedings involving the licensing functions of various agencies.[49] However, the provision is obviously one that should be followed by all agencies in all of their functions, and the bill so provides.

A new provision in section 10(b)[50] may also be distinguished as helping to reduce delay and expense. It provides that an agency may now be sued by its official title. This provision eliminates the present delay and confusion when a private citizen seeks to sue an agency and must try to serve and join the agency's head or its members in the suit.

There are of course many other provisions in S. 1336 as it passed the Senate that could be discussed at length, but time and space will not per-

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[47] Specific guidelines are provided for the exercise of the agency's discretion under § 8(c)(4). S. 518 has renumbered these sections, but has otherwise left them unchanged.

[48] "Every agency shall have a duty, with due regard for the rights and privileges of all interested parties or adversely affected persons and with reasonable dispatch, to set and complete any investigation or proceedings required to be conducted pursuant to this Act or other proceedings required by law and to make its decision." S. 1336, 89th Cong., 1st Sess. § 9(a) (1965).

[49] Administrative Procedure Act § 9(b), 5 U.S.C.A. § 558(c) (Special Supp. 1966).

[50] "The action for judicial review may be brought against the agency by its official title." S. 1336, 89th Cong., 1st Sess. § 10(b) (1965). S. 518 has dropped the § 10(b)(2) jurisdictional requirement of "jurisdiction to protect the other substantial rights of any person in an agency proceeding," contained in S. 1336, in order to establish district court jurisdiction to review the agency action.

mit. However, before considering certain objections to the bill, there are two singularly important features included within the bill that are worthy of at least brief comment. The two provisions referred to are section 3, which deals with the public's right to government information, and sections 6(b) and (c), which deal with the individual's right to have the representative of his choice represent him before most government agencies and the right of the members of the legal and accounting professions to represent their clients before the Internal Revenue Service without having to comply with some bureaucrat's notion of what the representative must show in order to be able to prove his competence and integrity.

The first of these provisions, section 3, is more commonly referred to as the "Freedom of Information" law.[51] For many years, members of both Houses of Congress, ably assisted and encouraged by members of the press, have waged a fight to obtain a meaningful public information law.[52] At long last, the battle has been won, but not until the field was littered with the bodies of nearly every federal agency supported by tax dollars. Briefly, the salient features of section 3(a) update and clarify the list of materials required to be published in the *Federal Register* and, for the first time, provide an effective penalty if such materials are not so published.[53]

Section 3(b) has been revised to more clearly express Congress' intent that all orders, opinions, statements of policy, interpretations, and other materials affecting the public used by the agency are made available for public inspection and copying or else published and offered for sale. For the first time, agencies will be required to have available a current index of all the materials covered by the section, or suffer a penalty for noncompliance.

Section 3(c) is probably the most controversial portion of the new law and, at the same time, the most necessary and useful. Section 3(c)

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[51] Section 3 of the bill is identical to the legislation President Johnson signed into law on July 4, 1966. Pub. L. No. 89-487, 80 Stat. 250, amending 5 U.S.C.A. § 552 (Special Supp. 1966). Although the provisions of the bill will not take effect until July of 1967, the Federal Communications Commission has already expressed its intention to comply with the law as soon as possible.

[52] *1965 Hearings*; *Hearings on S. 1666 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 88th Cong., 1st Sess. (1963). Of course all those involved in efforts to pass this legislation are well acquainted with the many long and diligent years that Congressman John Moss (D.-Cal.) spent in helping to enact this final version.

[53] In addition, § 3(a)(E) offers an alternative means of publication which may help to reduce the bulk and complexity of the *Federal Register* by providing that all material, reasonably available to persons affected, shall be deemed published when incorporated by reference. Should an agency fail to publish required material, no person can be required to rely on, or be adversely affected by, such material, unless that person has actual and timely notice of its terms.

provides that all agency records not made available pursuant to section 3(a) or (b) must be made available to any person upon request. Failure to comply with this mandate subjects the offending agency to a court action for injunctive relief and to an order to produce those records withheld. Because the complainant will not have the evidence to prove the agency is wrongfully withholding its records, the burden of proof is upon the agency to show that its action is correct and in compliance with law.

Section 3(f) provides that the record of final votes of an agency must be made available for public inspection. This subsection will allow the public to know how their administrators stand on issues before the agency and still allow free debate within the agency until final action is taken.

Since many government records must be cloaked in secrecy in order to protect an overriding public interest in the efficient and effective functioning of government, section 3(e) sets forth nine specific and limited exceptions to the requirement of full disclosure as set out in section 3. Because of the great interest free men have in open and candid government, it is hoped that these exceptions will be construed as narrowly as possible by both administrator and judge. The desired construction can be achieved if the courageous spirit of free men, firm in their convictions, honest in their endeavors, and fearless in their opinions, is fostered, encouraged and practiced by all those subject to this historic law.

Sections 6(b) and (c),[54] as with section 3, have already been enacted into law and provide for the right of an attorney in good standing before the bar of the highest court of any state, possession, territory, commonwealth or the District of Columbia to practice before any federal agency (except the Patent Office) without the necessity of complying with any agency rules governing qualifications over and above those imposed by the bar of which the attorney is a member.[55] Why this law ever was needed is a mystery. However, it clearly sets out Congress' intent that all persons have a right to the representative of their choice in administrative proceedings and investigations[56] and that all attorneys (and CPA's in certain cases) have a right to practice their profession free from the arbitrary imposition of useless and meaningless standards of conduct.[57]

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[54] These sections are identical to the legislation signed into law on Nov. 8, 1965, Pub. L. No. 89-332, 79 Stat. 1281. For legislative history of the provisions of this act see *1965 Hearings*.

[55] Provision has been made for the practice of Certified Public Accountants before the Internal Revenue Service. Pub. L. No. 89-332, 79 Stat. 1281 (1965).

[56] As an example of how overzealous bureaucrats can deny a citizen his right to have counsel of his choice, see the testimony of Dan S. Bushnell, *1965 Hearings* 251, 253-54. See generally *Hearings on Invasions of Privacy (Government Agencies) Pursuant to S. Res. 39 and 190 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st & 2d Sess., pts. 1-4 (1965-1966).

[57] There are two other sections of the bill which also deserve mention—§ 6(h) on discov-

LEGISLATIVE HISTORY

I should like to briefly discuss some of the legislative history of the final version of the bill. Seven sets of hearings were held on the proposal to update and revise the Administrative Procedure Act of 1946.[58] In addition, the Administrative Conference recommendations were considered and a summary of these recommendations was published by the Judiciary Committee.[59] These records represent over 3,000 pages of comments, exhibits, and proposals by the people most interested and most involved in administrative process. In addition to the formal hearings conducted by the Senate, informal conferences were held with members of the American Bar Association,[60] with members of the committee staff and representatives of the various agencies participating.[61]

Bills designed to amend the procedures before administrative agencies were introduced in the 84th Congress.[62] Immediate predecessors of S. 1336 were introduced as S. 1070 in the 86th Congress;[63] S. 1887 in the 87th Congress;[64] and S. 1663 in the 88th Congress.[65] Extensive studies were made of all of the bills. S. 1663 was redrafted and then subjected to hearings both as introduced and as revised.[66]

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ery in administrative proceedings and § 9(b) on publicity issues by an agency prior to actual adjudication of the issues. See generally the series of articles in 18 AD. L. REV. 1 (1966), for a fine discussion of this most important procedural device in administrative proceedings provided by § 6(h). As to § 9(b) of the bill, the need for this section may amply be demonstrated if testimony taken before the subcommittee is any indication of current agency practice. *1965 Hearings* 251.

[58] A list of hearings held by the Senate Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, on the subject of administrative law revision is as follows:

1) Pursuant to S. Res. 61, 86th Cong., 1st Sess. (1959)
2) Pursuant to S. Res. 234, 86th Cong., 2d Sess. (1960)
3) Pursuant to S. Res. 51, 87th Cong., 1st Sess. (1961)
4) Pursuant to S. Res. 55, 88th Cong., 1st Sess. (June 1963)
5) Pursuant to S. Res. 55, 88th Cong., 1st Sess. (Oct. 1963)
6) Pursuant to S. Res. 61, 88th Cong., 2d Sess. (1964)
7) Pursuant to S. Res. 61, 89th Cong., 1st Sess. (1965)

[59] S. DOC. NO. 24, 88th Cong., 1st Sess. (1963).

[60] No record of this three-day conference in March 1964, was published. There is a transcript on file with the Subcommittee on Administrative Practice and Procedure.

[61] *Hearings on S. 1663 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 291-543 (1964).

[62] S. 2504, S. 2540, 84th Cong., 2d Sess. (1957).

[63] S. 1070, 86th Cong., 1st Sess. (1959).

[64] S. 1887, 87th Cong., 1st Sess. (1961).

[65] S. 1663, 88th Cong., 1st Sess. (1963).

[66] *Hearings on S. 1663 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. (1964). Comparative prints were also used by the Committee including: (1) A comparison of the Administrative Procedure Act of 1946 with S. 1663 as introduced. STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS. (Comm.

On June 21, 1966, various objections to the passage of S. 1336 were raised on the floor of the Senate.[67] Other objections were made by letter to the chairman of the Judiciary Committee. Most of these objections were raised in the hearings on the various proposals and considered and rejected by the committee as being hypertechnical or evidencing a lack of understanding as to the intent of the proposal in question.

OBJECTIONS TO THE BILL

In an attempt to further clarify the provisions of S. 1336 and to answer some of these eleventh-hour objections, the objection will be set forth and then the reply or clarification will be made.

SECTION 4

Objection: Sections 4(b) and 4(c)(1) of S. 1336 and the deletion of the exemptions[68] from the requirements of the rulemaking procedures of section 4 will impose on the agency the burden of giving notice to the public of the initiation of a rulemaking proceeding regarding "any matter relating to agency, management, or personnel or to public property, loans, grants, benefits or contracts" as well as give the public the right to participate in the rulemaking proceeding concerning these matters.[69]

Reply: Section 4(b) of S. 1336 provides that notice of rulemaking shall:

> (1) be published in the Federal Register, (2) give all interested persons a reasonable time in which to prepare . . . and (3) state the time, place, and manner in which any interested party may submit matter for consideration, the authority under which the rule is proposed, and either the terms or substance of the proposed rule . . . ."

Section 4(c)(1) of the bill gives the party a right to participate in the rulemaking by submitting "written data, views or arguments with an opportunity to present the same orally unless the agency determines that oral argument is inappropriate or unwarranted."

The notice provided by section 4(b) and the procedures provided by

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Print 1963). (2) A comparison of the Administrative Procedure Act of 1946 with S. 1663 as introduced, S. 1663 as revised, and S. 2335, the American Bar Association's comparison proposal. STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS. (Comm. Print 1964). (3) A comparison of the Administrative Procedure Act of 1946 and S. 1336. STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS. (Comm. Print 1965). All of the effort represented and recorded by these documents and publications helped to produce the final version of S. 1336.

[67] 112 CONG. REC. 13100 (daily ed. June 21, 1966) (remarks of Senator Magnuson).

[68] S. REP. NO. 1234, 89th Cong., 2d Sess. 27 (1966).

[69] Particular problems are created by this proposal in regard to the agencies' procurement and regulations.

4(c)(1) are not burdensome to the point of disrupting the agency's functioning. Their purpose is simply to allow adequate participation by the people who pay the bills—the taxpayers—when an agency issues a rule governing such things as the acquisition or disposal of property, the negotiation of a contract, or the qualification for a loan.

Further, objections to this proposal fail to consider the new definition of "rule," contained in section 2(c), which is limited to pronouncements of general applicability.[70] When this proposal is read in conjunction with the new definition of "rule,"[71] it becomes clear that the agencies will not have to issue notice and allow public participation when negotiating an individual contract or deciding one applicant's qualifications for a loan, grant, or other benefit.

SECTION 5

Objection: Addition of the phrase, "under the Constitution," to section 5 governing agency adjudications creates uncertainty as to what additional proceedings will be subject to the provisions of section 5.

Reply: Admittedly, this addition is not as specific as would be an enumeration of the proceedings that would be subjected to the requirements of section 5, but the phrase itself is no more vague or uncertain in its application than, for example, "due process." The language of the present law is not exact in either meaning or construction.[72] The effect of this change is to bring some procedural uniformity to those adjudications involving the rights of private individuals which are best protected by constitutional safeguards.

Objection: Section 5(a)(5) of the bill allows use of the modified procedure only in those cases where the parties consent to such procedure.

Reply: Investing all agencies with authority to *order* abridged procedures in instances in which a statute or the Constitution grants the private party a right to a hearing, could subject the decisions reached in such cases to collateral attack for lack of compliance with statutory procedures and constitutional requirements of due process.[73] Use of abridged procedures only with the consent of the parties would obviate any objections based on the grounds of unfairness. In most instances, an agency prob-

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[70] The new provisions of § 4 do not, for example, subject the individual negotiation of a contract to the requirements of notice and public participation. Only the rules governing such an action or function are subject to these requirements.

[71] S. 1336, 89th Cong., 1st Sess. § 2(c) (1965).

[72] Riss & Co. v. United States, 341 U.S. 907 (1951); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Cates v. Handerlein, 189 F.2d 369 (7th Cir.), *rev'd*, 342 U.S. 804 (1951).

[73] For a treatment of recent developments in this area see *The United States Court of Appeals for the District of Columbia Circuit: 1965-1966 Term*, 55 GEO. L.J. 72, 78 (1966). See 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 7.01 (1958).

ably could not force private parties into an abridged proceeding under present law where a statute gives the right to a hearing on issues that may best be developed by a complete adversary proceeding.

Objection: The separation-of-functions provision of section 5(a)(6) should be made applicable to agency members as well as to presiding officers.

Reply: Section 5(a)(6)(A) in part provides: "No officer who presides at the reception of evidence shall be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigating, prosecuting, or advocating functions for any agency." There is no exception from this provision of section 5(a)(6)(A) for an agency member "who presides at the reception of evidence." The rest of the provisions on this topic remain substantially the same as present law. It is the opinion of the author that this controversial issue may best be solved after further independent study similar to that concerning ex parte communications conducted by the Administrative Conference.[74]

SECTION 6

Objection: Section 6(a) of the bill grants such broad right to counsel that it will impede factfinding, casual questioning, and routine information-gathering in nonadversary contests.

Reply: The gathering of routine information would hardly prompt members of the public to retain an attorney. Beyond this stage, it is difficult to draw a line as to when an agency should be able to deny a citizen the counsel of his choice. Our Government is today guilty of overzealous conduct in performing some of its functions.[75] Arrayed against the private citizen is the mammoth complexity and power of a vast bureaucratic system having countless means of gathering information to be used against him. It is small recompense to allow a citizen to be accompanied by his attorney if he so chooses. Indeed, the right of counsel has been so advanced by recent Supreme Court decisions,[76] that this objection seems an anachronistic echo from a less-advanced form of Government.

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[74] S. DOC. NO. 24, 88th Cong., 1st Sess. 165 (1963).

[75] *Cf.* Testimony of Dan S. Bushnell, *1965 Hearings* 251; *Hearings on Invasions of Privacy (Government Agencies) Pursuant to S. Res. 39 and 190 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st & 2d Sess., pts. 3 & 4 (1965-1966). This provision of the bill is also in accord with Recommendations Nos. 15 and 25 of the Administrative Conference, S. DOC. NO. 24, 88th Cong., 1st Sess. 225 (1963).

[76] See, *e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

SECTION 8

As previously noted, section 8 is the most controversial section of S. 1336 and has therefore been subject to the most severe questioning. However, it is the opinion of the author that consideration of the objections that have been made will show that most of them are based on an erroneous construction of the provisions of the section or on a misunderstanding of their scope and purpose.

Objection: According to the provisions of section 8(c)(1), hearing examiners must issue a decision in every adjudication. Such a requirement will diminish the authority of the agency members, those most responsible for the administration of the program, and will unnecessarily delay the taking of final agency action.

Reply: Section 7(a) of the *present* law enacted in 1946 provides in part:

> There shall preside at the taking of evidence—(1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more examiners . . . .[77]

Section 8(a) of the present APA provides in part:

> When the agency did not preside at the reception of the evidence, the presiding employee . . . shall initially decide the case unless the agency requires . . . the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by the rule.[78]

Section 7(a) remains unchanged in S. 1336, and section 8(a) provides that "the same officers who preside at the reception of evidence shall make the decision . . . . In the absence of either an appeal to the agency or review by the agency . . . such decision shall without further proceedings then become the decision of the agency." Comparing present law with the bill, it appears that the agency will retain the power in any case to sit as the presiding officer. In absence of appeal or review, the decision of the presiding officer will continue to constitute final agency action.

Under present law, the agency could, on its own initiative, review *any* decision of a presiding officer whether or not any party prosecuted an appeal. Under the provisions of section 8(c)(4) of the bill, the "agency in its discretion may . . . order the case before it for review but only upon the ground that the decision or action may be contrary to law or agency

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[77] 5 U.S.C.A. § 556(b) (Special Supp. 1966).

[78] 5 U.S.C.A. § 557(b) (Special Supp. 1966).

policy, that the agency wishes to reconsider its policy, or that a novel question of policy has been presented." The agency presently can order for review any case no matter how routine or inconsequential. Now the agency may concentrate only on those cases having important policy considerations and the routine case can be disposed of by other agency authorities.

It seems clear that there has been no diminution of the agency members' powers to make a decision in any adjudication involving major policy considerations. In addition, there are no extra procedural steps that will in any way delay the taking of final agency action.

Objection: Provisions of section 8(c) add an additional decisional step in the intra-agency review of adjudications and will cause further delays in taking final agency action.

Reply: Section 8(c) requires no tier decision-making within an agency. As in other agencies that have appellate board review, appeal boards are to be used to dispose of the more routine matters the agency adjudicates. There is no right of appeal to the full agency from a decision of an appeal board.

The pertinent provisions of proposed section 8(c)(2) provide: "In [*sic*] an appeal board has been established, exceptions shall be considered and determined by the appeal board unless a private party shall promptly file an application for a determination of the exceptions by the agency." This filing for full agency review occurs prior to any action whatsoever of the appeal board. It does not authorize any appeal from the appeal board's action for there has been no action taken by that board. In only one instance may an appeal board hear an appeal after decision by the presiding officer and denial of review by the full agency: "In a proceeding in which there is more than one private party, and an application is filed for review by the agency, if the agency declines consideration of the application, it may refer the appeal to an appeal board."[79] In this case, there still is no tier decision as no action will have been taken by an appeal board prior to the full agency's decision to refer it to that board.

Under section 8(c)(4) an agency may review a decision after action by an appeal board, but this will only occur in a very limited number of cases:

> After entry of the decision of the presiding officer or after the action of the appeal board, the agency in its discretion may, within the time prescribed by agency rule, order the case before it for review but only upon the ground that the decision or action may be contrary to law or agency policy, that the agency wishes to reconsider its policy, or that a novel question of policy has been presented.

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[79] S. 1336, 89th Cong., 1st Sess. § 8(c)(2) (1965).

Under these limited conditions and because the agency members have full control over the review of adjudications involving major policy matters, there is very little chance that S. 1336 will allow any agency action to be delayed by an additional step in the agency decisional process.

Objection: Section 8(c)(1) restricts the agency's power of inquiry to a party's specific exceptions to rulings of the officer.

Reply: This provision is based upon Recommendation No. 9 of the Administrative Conference,[80] made up of some thirty-one federal administrative agencies. As long ago as 1941, the Attorney General's Committee on Administrative Procedure recommended that

> the agencies abandon the notion that no matter how unspecified or unconvincing the grounds set out for appeal [from a hearing commissioner's decision], there is yet a duty to reexamine the record minutely and reach fresh conclusions without reference to the hearing commissioner's decision. Agencies should insist upon meaningful content and exactness in the appeal from the hearing commissioner's decision and in the subsequent oral argument before the agency. Too often, at present, exceptions are blanket in character, without reference to pages in the record and without in any way narrowing the issues. They simply seek to impose upon the agency the burden of complete reexamination. Review of the hearing commissioner's decision should in general and in the absence of clear error be limited to grounds specified in the appeal.
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> If limited as the Committee recommends, the process of review should rarely involve the heavy burden now assumed by many agencies. If the appeal, the briefs, and the oral argument are prepared with the care and precision upon which the agencies should insist, even factual issues may be determined by means of reference to the papers filed by the parties and to such portions of the record as may have been specifically indicated by them.[81]

It is difficult to understand why the agencies object to this proposal or why they have changed their minds as to its beneficial effect.

Objection: Only those factual findings of a hearing examiner which are "clearly erroneous" may be reviewed on appeal within the agency.

Reply: This proposal is consistent with Recommendation No. 9 of the Administrative Conference.[82] Here again the agencies are objecting to a proposal which some of their staffs helped to design. The test seems appropriate in that the presiding officer is actually present during the

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[80] S. DOC. NO. 24, 88th Cong., 1st Sess. 155 (1963). See also S. 1734, 87th Cong., 1st Sess. (1961). Thirty-one agencies of the Government with adjudicatory and rulemaking functions participated in the Conference. Each cabinet department sent a delegate and two delegates were sent by the seven major agencies—Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Federal Trade Commission, Interstate Commerce Commission, National Labor Relations Board, and Securities and Exchange Commission.

[81] *Final Report of Attorney General's Committee on Administrative Procedure*, S. DOC. NO. 8, 87th Cong., 1st Sess. 155 (1963).

[82] S. DOC. NO. 24, 88th Cong., 1st Sess. 155 (1963).

taking of the evidence and is therefore the best officer to decide the factual issues. His findings should be upheld unless they are clearly erroneous.

Objection: Section 8(c)(2) procedures will further delay final agency action because the agency members will have to review appeal board decisions in important cases. There will be three decisions in each case instead of two.

Reply: This argument completely ignores the purpose of appeal boards. The intent is to provide a subordinate body within the agency to hear appeals in the more routine cases. Further, in the event important issues arise in a case in which a presiding officer has reached a decision and the private party does not apply for review, the agency can review the decision of the presiding officer on its own initiative. Finally, when a party seeks review, it is most unlikely that an agency would refuse to consider a case involving important policy issues, refer it to the appeal board, and then decide to hear it after the appeal board has made its decision.

Objection: Section 8(c)(2), in actuality, makes the establishment of appeal boards mandatory.

Reply: The late President Kennedy made it a point to convey to Congress and to the agencies his desire to relieve agency members "from the necessity of dealing with many matters of lesser importance and thus conserve their time for the consideration of major matters of policy and planning."[83] Accordingly, appeal boards must be established only if the number of proceedings in which exceptions are filed warrants their establishment, since their only purpose is to alleviate the routine case load of the agency members.

Objection: Section 8(c)(2) provides that a private party may apply to the agency for a determination of the exceptions filed. If the agency denies the application, the decision of the presiding officer will be considered to be affirmed.

Reply: Since a major cause of delay is the number of routine cases that agencies must handle, such a provision will prevent parties filing for review by the agency in all cases except those containing the most pressing policy issues. The provision is designed to discourage present practice of seeking agency review in all cases.

Objection: Section 8(c)(3) of the bill requires the agency to give full rulings and reasons on each material exception if it grants an application for review. The provision will prompt agencies simply to affirm the

[83] President's messages transmitting to Congress Reorganization Plans Nos. 1-5 of 1961. 1961 U.S. CODE CONG. & AD. NEWS 1351-61.

presiding officer's decision and discourage full scrutiny of each part of a decision.

Reply: The present law, enacted in 1946, provides in section 8(b):

> The record shall show the ruling upon each . . . finding, conclusion, or exception [of the presiding officer's decision] presented. All decisions . . . shall become a part of the record and include a statement of (A) findings and conclusions, as well as the reasons or basis therefor, *upon all the material issues of fact, law, or discretion presented on the record*; and (B) the appropriate rule, order, sanction, relief or denial thereof.[84]

Pertinent provisions of section 8(c)(3) of S. 1336 provide "there shall be a ruling by the agency . . . upon each material exception; the record shall show the ruling and the reason therefor . . . ." The present law requires the record to show the ruling on each exception to the presiding officer's decision, whereas the bill would limit this to a ruling on each *material* exception. The objection has less basis due to the actual limiting of the exceptions on which an agency must rule to only those which are *material.*

Objection: Section 8(c)(4) requires the agency to remand newly raised questions of fact to the examiner, which dilutes the agency members' authority.

Reply: The bill provides "*if the agency determines* that further evidence is necessary on an issue of fact the agency shall remand the case with instructions for further proceedings before the presiding officer."[85] It is within the agency's discretion to determine whether a case should be returned to the presiding officer for the taking of further evidence. If the dispute over a factual issue can be resolved by the briefs or other documents before the agency members, there need be no remand to the presiding officer. When an issue of fact needs further evidence for its development, the most expeditious method for complete and accurate development is before the officer who has heard the other evidence pertaining to the factual issues.

Objection: Section 9(a) allows a party to seek an injunction in any district court against any pending agency proceeding.

Reply: This section has been reworded in S. 518 in order to meet this objection. Under the present provisions, an injunction would be granted only upon a showing of irreparable injury resulting from some illegal agency action.[86] This should afford those before an agency the

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[84] 5 U.S.C.A. § 557(c) (Special Supp. 1966). (Emphasis added.)

[85] S. 1336, 89th Cong., 1st Sess. § 8(c)(4) (1965). (Emphasis added.)

[86] The new bill retains the requirement of a showing that the "agency proceeding or investigation [is] not within the jurisdiction delegated to the agency and authorized by law." S. 518, 90th Cong., 1st Sess. § 9(a) (1967).

protection of injunctive relief where necessary. At the same time, the agencies will be protected from unfounded suits.

Objection: The bill should be amended to contain a provision requiring that a policy formulation on an issue for which an organic statute contemplates an adversary hearing shall be subject to section 7 hearings and attendant safeguards, except in the case of reviewable policy formulations which codify established agency policy determined in adjudicated proceedings.

Reply: Because the Supreme Court has upheld agency action contrary to this proposal,[87] the Committee was of the opinion that, while the proposal has some merit, independent study is warranted with a view towards the development of a separate legislative proposal.

CONCLUSION

This article has attempted to outline the various proposals incorporated within S. 1336 which should make major contributions to the updating and modernizing of administrative procedure. In addition, objections to the bill have been set out and an attempt has been made to answer those which, throughout the history of this legislation, have been the most persistent and those which have been directed to the more important provisions of the bill.

Six years of constant and dedicated effort have been expended endeavoring to fashion a solution to the major problems facing the administrative process, problems that could not have been envisioned by the framers of the first Administrative Procedure Act. The responsibility for regulating the regulators falls upon Congress. This is rightly so because each member of Congress is acquainted with the volume of complaints occasioned by administrative actions. Our goal is justice for all citizens and that end can be better achieved if adequate administrative procedural safeguards are provided. S. 1336 will, as will S. 518, its successor in the 90th Congress, give Congress an opportunity to respond to some of the critics of the federal government.

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[87] FPC v. Texaco, Inc., 377 U.S. 33 (1964).

NATIONAL EMERGENCY DISPUTES LEGISLATION: ITS NEED AND ITS PROSPECTS IN THE TRANSPORTATION INDUSTRIES

WILLIAM J. CURTIN*

Noting the increasingly favorable prospects for national emergency disputes legislation, Mr. Curtin discusses the shortcomings of the existing emergency procedures under the Railway Labor Act and Labor Management Relations Act and the major proposals for change.

It is certainly true that much has been said about the evils of national-emergency labor disputes, while very little has been done about them. Indeed, seldom in recent history have so many proposals designed to deal effectively with major labor disputes been introduced in Congress and debated in all sectors of our society. Among the first bills introduced in the first session of the 90th Congress were proposals to amend the national-emergency provisions of Taft-Hartley[1] to provide for dissolution of injunctions only on settlement of disputes;[2] to amend the Railway Labor Act[3] to provide for compulsory arbitration in labor disputes involving common carriers by air;[4] to amend the National Labor Relations Act[5] to provide that nothing therein shall invalidate state laws prohibiting strikes in public utilities (including passenger transportation);[6] to establish a United States Court of Labor-Management Relations with power to finally settle labor disputes which "result in work stoppages that adversely affect the public interest of the Nation to a substantial degree";[7] and to amend Section 10 of the Railway Labor Act[8] to provide

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[1] 61 Stat. 155 (1947), 29 U.S.C. §§ 176-80 (1964).

[2] S. 21, 90th Cong., 1st Sess. (1967) (introduced by Senator Fannin (R.-Ariz.)).

[3] 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63 (1964).

[4] S. 79, 90th Cong., 1st Sess. (1967) (introduced by Senator Holland (D.-Fla.)).

[5] As amended, 61 Stat. 155 (1947), as amended, 29 U.S.C. §§ 151-68 (1964).

[6] S. 80, 90th Cong., 1st Sess. (1967) (introduced by Senator Holland (D.-Fla.)).

[7] S. 176, 90th Cong., 1st Sess. (1967) (introduced by Senator Smathers (D.-Fla.)). On the day following the introduction of S. 176, Senators Jacob Javits (R.-N.Y.) and Wayne Morse (D.-Ore.) introduced Senate Joint Resolution 9, which would require the Secretary of Labor to report to Congress on the adequacy of present laws regulating emergency labor dis-

for a "Special Board" whose determination would be binding on the disputants for up to two years.[9] This flurry of legislative activity illustrates one of the manifestations of the growing concern in both public and private sectors that our present laws are inadequate to protect the public interest in labor disputes which have an impact on large segments of the nation's population and economy.

Naturally, Congress is not alone in recognizing the problem and searching for acceptable solutions. For example, in his 1966 State of the Union Message, the President promised to submit his own proposals for dealing effectively with strikes that threaten "irreparable damage to the national interest."[10] This pledge was made in the context of a local transit strike which was crippling the nation's largest city and ushering in a year that most labor relations experts mistakenly foresaw as a relatively quiet period in terms of work stoppages.[11] Many observers expressed disappointment in the fact that the President failed to mention national-emergency labor disputes in his 1967 State of the Union Message,[12] but it is now known that he did establish a Special White House Task Force which reportedly has made recommendations to him concerning the problem.[13] On February 7, 1967, Labor Secretary Wirtz promised the Congressional Joint Economic Committee that he would send it a statement of the President's plans on whether to ask for new

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putes. S.J. Res. 9, 90th Cong., 1st Sess. (1967). Seventeen other senators joined in sponsoring the bill. On April 6, 1967, Senators Javits and Thomas Kuchel (R.-Cal.) introduced S. 1456 to amend the Taft-Hartley Act and the Railway Labor Act to authorize boards of inquiry to make public their recommendations for settlement and to broaden the coverage of the emergency procedures in general. S. 1456, 90th Cong., 1st Sess. (1967).

[8] 44 Stat. 586 (1926), 45 U.S.C. § 160 (1964).

[9] H.R. 5638, 90th Cong., 1st Sess. (1967) (introduced by Congressman Pickle (D.-Tex.)).

[10] State of the Union Message by President Lyndon B. Johnson, Jan. 12, 1966, in 2 Weekly Compilation of Presidential Documents, Jan. 17, 1966, p. 30.

[11] In 1966, there were 28 major work stoppages, each involving 10,000 or more workers. Preliminary estimates of the Bureau of Labor Statistics indicate 4,200 stoppages, involving 1.8 million workers, started in 1966, compared with 3,963 strikes affecting 1.6 million workers during 1965. Man-days of idleness during 1966 totaled 25 million, or the highest total in any year since 1959. See 64 LAB. REL. REP. 34 (1967).

[12] *E.g.*, *L.B.J.'s Forgotten Pledge*, N.Y. Times, Jan. 14, 1967, p. 66, col. 1; *Silent on Strikes*, Washington Evening Star, Jan. 14, 1967, § A, p. 10, col. 1. In a letter to the editor of the *Washington Post* Senator Paul Fannin of Arizona stated:

> As your editorial (Jan. 16) rightly mentioned, many members of Congress, myself included, are not happy that the President did not mention emergency strike legislation in his State of the Union message. It is difficult to understand the President's reluctance to work for adequate safeguards for the national interest, particularly in view of his promise last year, which he subsequently forgot . . . .

Washington Post, Jan. 19, 1967, § A, p. 20, cols. 2-3.

[13] It is reported that the task force was headed by Under Secretary of State Katzenbach and composed of five labor relations experts from universities, as well as representatives of interested departments within the federal government, including Defense, Justice, and Labor. N.Y. Times, Nov. 30, 1966, p. 10, col. 6.

national-emergency strike legislation.[14] At this writing, no indication has been given the public that Secretary Wirtz has as yet notified the Joint Committee of the President's recommendation.

The organized bar is also concerned about the problem. In 1966 the Section of Labor Relations Law of the American Bar Association, in recommending preservation without substantial change of the emergency procedures of Title II of the Labor Management Relations Act, specifically excepted the act's application to the railroad, air, and maritime industries from its resolution.[15] The resolution was followed by a motion passed by the House of Delegates authorizing ABA President Orison S. Marden to appoint a special committee to study the problem of national strikes in the transportation industries.[16] This article, therefore, will be limited in its scope to a discussion of the possible solutions to national-emergency strikes within the transportation industries.

LABOR DISPUTES OF 1966

Undoubtedly, the management-labor disputes of 1966 served as a catalyst to the above-mentioned activity. The twelve-day transit strike in New York was estimated by the city's Commerce and Industry Association to have caused a combined loss to merchants, employees, and city of 1.2 billion dollars.[17] The entire country saw this strike, which partially paralyzed the nation's largest city, settled only after an injunction was defied, union leaders were put in jail, and the 34,000 workers involved received a wage increase far in excess of the President's Council of Economic Advisers' 3.2 per cent guidepost for noninflationary wage increases.

Later in the year, the settlement resulting from the forty-three-day strike against five major airlines[18] was regarded as the death knell of the

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[14] BNA Daily Labor Report No. 27, Feb. 8, 1967, p. AA-1.

[15] ABA SECTION OF LABOR RELATIONS LAW, 1966 COMMITTEE REPORTS 315.

[16] The resolution creating the special committee said that existing federal legislation and strike-settlement procedures "have proved repeatedly to be inadequate to protect the public interest." *Proceedings of the House of Delegates: Montreal, Canada, August 8-11, 1966*, 52 A.B.A.J. 980 (1966).

President Marden appointed the following committee members: Honorable Charles S. Desmond, Chief Judge, Court of Appeals of New York (Retired), as Chairman; George E. Bodle, Los Angeles attorney; Professor Archibald Cox, Harvard Law School; William J. Curtin, Washington, D.C., attorney; Edward J. Hickey, Jr., Washington, D.C., attorney; Professor Bernard D. Meltzer, University of Chicago Law School; Gerard D. Reilly, Washington, D.C., attorney; Professor Harry H. Wellington, Yale Law School; and Professor Jerre S. Williams, University of Texas Law School.

[17] See Foegen, *A Qualified Right to Strike—in the Public Interest*, 18 LAB. L.J. 90-95 (1967).

[18] Eastern Air Lines, Inc., National Airlines, Inc., Northwest Airlines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc.

3.2 per cent guidepost.[19] After the President, pursuant to Section 10 of the Railway Labor Act,[20] had appointed an emergency board to investigate the dispute between the air carriers and the International Association of Machinists, the union notified the emergency board that reference to the wage-price guidelines was irrelevant. The union further contended that, since the members of the emergency board constituted a presidential board and were presumably bound by administration policy, the proceeding was meaningless.[21] The recommendations reached by the board and accepted by the carriers as a framework for a just and prompt settlement amounted to a 3.6 per cent average annual cost increase, thus exceeding by some margin the presidential guidelines. The recommendation, however, was rejected out of hand by the union. On July 8, sixty per cent of the nation's domestic trunkline industry was grounded by a strike. Capitol Hill was alive with congressional speeches, almost without exception critical of the union. Similarly, editorials and newspaper columns criticized the irresponsible action of the union. Most observers thought that a "national-emergency dispute" existed,[22] if for no other reason than the threat which the union's demands for settlement posed to the economic stability of the country. Although the union

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[19] The President's Council of Economic Advisers omitted a definite figure as a wage-price guidepost in its economic report for 1967. The Council's report noted that the 3.2% guideposts specifically recommended in its 1966 report had been treated by the press and public "as firm, though voluntary, rules, and those who [failed] . . . to adhere to them as 'violators'." 1967 PRESIDENT ANN. ECONOMIC REP. 121 (transmitted to Congress January 1967). While the Council's 1967 report sought to emphasize that guideposts were "guides, not rules" and were presented as a "basis for discussion," it did not retreat from its basic position that wage rates generally should increase at the same rate as the increase in "output per man-hour." *Id.* at 120-23.

[20] 44 Stat. 586 (1926), 45 U.S.C. § 160 (1964).

[21] In a telegram to the President, dated April 19, 1966, P. S. Siemiller, the President of the IAM stated:

> We are advised that the National Mediation Board and the Department of Labor have recommended that you through Executive Order create an Emergency Board to hear the dispute . . . . In our opinion the appointment of such Board would be a total waste of time at the taxpayers' expense. We respectfully request that you reject the recommendation for the creation of an Emergency Board in the dispute.

1 Transcript of Proceedings of Nat'l Mediation Bd., Emergency Bd. No. 166, pp. 50-51 (May 6, 1966).

[22] Secretary of Labor Willard Wirtz, testifying before the House Interstate and Foreign Commerce Committee on S.J. Res. 186, stated:

> Now, that leads to the final area of identification, which involves an attempt to at least estimate or describe to you in general terms the economic effect of this strike. That is very hard to do. It is hard because the impact here is not in terms of, if I may use that phrase, the vitals of the economy as a whole with respect to which there is comparatively minor impact.
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> It affects rather a certain number of businesses and a certain number of areas, and affects them quite sharply . . . . There is a very serious inconvenience to a very great many people and there is economic injury to many businesses and to many workers especially in certain parts of the country, and there is also a very serious issue of national economic stability involved . . . .

Hearings on S.J. Res. 186 Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess. 7, 11 (1966).

represented only 35,400 employees, the negotiations and strike had become from the point of view of the nation's economists "highly visible." That is, the nation was watching to see whether, and by how much, the administration's economic policy would be violated.

While the parties were exposed to congressional hearing, the public spotlight, first-rate mediation, and occasional negotiations, the White House continued intensive behind-the-scenes efforts to bring about a noninflationary settlement. Those efforts resulted in the so-called White House settlement which, on a guidelines basis, would have cost the carriers an average annual increase of 4.7 per cent. Nevertheless, the President advised a relieved nation that the settlement was generally within the framework of the presidential emergency board's recommendations and that it was noninflationary. Despite the public's desire for an end to the strike and the strong recommendation of the IAM leadership, the rank and file on July 31, apparently sensing a chance for a second bite of the apple, rejected the pact by a margin of 2½ to 1, with a surprisingly high percentage of the membership voting.[23]

The strike was finally settled on August 19, but not before the Senate, on August 4, had passed a resolution which empowered the Executive to prevent a strike or lockout for a period up to 180 days,[24] and the House Interstate and Foreign Commerce Committee, on August 12, reported out a bill virtually identical to the Senate resolution.[25] After a marathon negotiating session which ended early in the morning of August 16, the parties agreed to a settlement which meant a 4.8 per cent average annual increase, or, if the computation assumed the maximum impact of the cost-of-living provision, about a 5 per cent average annual increase. The settlement was ratified by the union membership on August 19, by a margin of 2½ to 1.

THE PROSPECTS FOR LEGISLATIVE ACTION IN 1967

If history serves as a guide in this area, it leads to the conclusion that

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[23] The pact was rejected 17,251 to 6,587. Approximately 70% of the eligible voters participated. N.Y. Times, Aug. 1, 1966, p. 1, col. 8.

[24] S.J. Res. 186, 89th Cong., 2d Sess. (1966). During an initial thirty-day period the President was authorized to appoint a Special Airline Dispute Board which was to provide mediation services—no change could be made by the parties except by agreement during sixty days of such mediation. This period could be extended for an additional ninety days. Any agreement reached by the parties would provide that the wage-settlement provisions be retroactive to January 1, 1966. If no agreement had been reached thirty days prior to the expiration of the final period for mediation, the board was to make a final report with recommendations to the President which he then was to transmit to the Congress, along with a full and complete report of the dispute and his recommendations regarding terms or procedures which would assist in the final settlement of the dispute.

[25] *Ibid.*

the legislative and executive activity prompted by the labor disputes of 1966 and noted at the outset of this article will subside as the passage of time dims recollections of the inconveniences and upheavals caused by the strikes of 1966. Past experience indicates that strikes which adversely affect large segments of our populace lead to a clamor for regulation which will effectively end work stoppages once they become injurious and a substantial inconvenience to the general public. The greater the public inconvenience, the greater the resultant demand for governmental action. After labor peace has finally been wrung from the disputants, the demand for action diminishes.

There is, however, good cause to believe that this cyclic effect may be broken in 1967. The work stoppages of 1966 are still relatively fresh in the public mind and the number and scope of labor agreements which are up for negotiation in 1967 bodes ill for labor peace.[26] In addition to the large number of negotiations, the mood of the parties and the stated position of the Government makes the picture even more grim. The President has stated in a message to Congress that 1967 should be a year of wage-price restraint.[27] On the other hand, spokesmen for organized labor have gone on record to the effect that they intend to seek wage increases amounting to at least 5 per cent during the next calendar year.[28] Secretary of Labor Wirtz earlier this year repeated remarks of other federal labor officials that 1967 would be a hard-bargaining year for both labor and management. He expects labor to exert "very strong bargaining pressures because real wages [did not go] up much" in 1966 due to the 3.5 per cent rise in the cost of living.[29] The Secretary also fears that industrial unrest will be accelerated by the recent tendency, demonstrated so effectively in the airlines strike, of union members to reject initial settlements reached by their leaders in the hope of obtaining

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[26] In 1967, major labor negotiations and wage "reopeners" will cover more than four million workers, about forty-five per cent more than in 1966, according to Labor Department figures. Contract talks will be held in the following major industries: Trucking, automobiles, railroads, rubber, copper, meatpacking, and farm machinery. Wall Street Journal, Feb. 9, 1967, p. 1, col. 3.

[27] On January 25, 1967, President Johnson urged that both business and labor exercise the "utmost restraint and responsibility" in their wage and price decisions. Stressing that price stability constitutes a major problem in the year ahead, the President warned that attempts by labor to recoup in wages all of the rise in living costs and the failure on the part of business to absorb rising labor costs when possible or to reduce prices when labor costs decline "would have only one result: a wage-price spiral which is in the interest of neither." BNA Daily Labor Report No. 18, Jan. 26, 1967, p. A-1.

[28] Walter P. Reuther of the United Auto Workers, reacting quickly to the President's report to Congress on wage-price restraint, declared that the UAW does not intend to permit any tampering in 1967 by the corporations or any one else with the union's cost-of-living escalator clauses and will not tolerate any weakening of these contract provisions. *Ibid.*

[29] BNA Daily Labor Report No. 27, Feb. 8, 1967, p. AA-1.

more benefits.[30] Furthermore, management may be expected to take a tougher stand against wage demands because unit labor costs in manufacturing rose 2.3 per cent in the last four months of 1966.[31] Management is also wary of signs of a slowdown in the rate of economic growth in the coming year.

If 1967 does prove to be a year in which strike activity increases over last year or in which strikes attracting national attention are settled by agreements that give inflation more than a gentle nudge, we may expect to see enactment of proposals which seek to amend our present statutory regulation of national-emergency disputes. At the present time there is much dissatisfaction with the past results obtained under the procedures provided by Title II of the Labor Management Relations Act and Section 10 of the Railway Labor Act. Any further breakdown in the processes of collective bargaining in 1967 can only stimulate the demand for modification of our present statutory machinery for dealing with crippling national-emergency disputes.[32]

CURRENT EMERGENCY PROCEDURES UNDER LMRA AND RLA

LABOR MANAGEMENT RELATIONS ACT

The procedures governing national-emergency disputes under the Labor Management Relations Act are set forth in sections 206-10.[33] These sections provide that if the President finds that an actual or threatened strike will "imperil the national health or safety," he may appoint a board of inquiry.[34] Although recommendations are proscribed, the board is directed to make a written report to the President containing the facts and circumstances of the dispute. After receiving the report, if he finds that a strike or lockout will threaten the national health or safety, the President may direct the Attorney General to petition an appropriate district court for an injunction.[35] The court, if it finds that such a threat-

30 See BNA Daily Labor Report No. 5, Jan. 9, 1967, p. A-10.

31 See BNA Daily Labor Report No. 8, Jan. 12, 1967, p. B-1.

32 Just before this article went to press, Congress granted the President's urgent request for an emergency bill to postpone the threat of a nationwide railroad strike for twenty days. Pub. L. No. 10, 90th Cong., 1st Sess. (April 12, 1967). At about the same time, settlement was reached in the dispute arising out of contract negotiations in the trucking industry. No Taft-Hartley injunction was issued, but such action was probably imminent since Trucking Employers, Inc., representing approximately sixty per cent of management in the industry, had, in response to selective strikes by the International Brotherhood of Teamsters, ordered a defensive shutdown the effects of which were just beginning to be felt when settlement was reached. Washington Post, April 12, 1967, § A, p. 1, col. 8.

33 61 Stat. 155 (1947), 29 U.S.C. §§ 176-80 (1964).

34 61 Stat. 155 (1947), 29 U.S.C. § 176 (1964).

35 61 Stat. 155 (1947), 29 U.S.C. § 178 (1964).

ened or actual strike or lockout "affects an entire industry or substantial part thereof" engaged in interstate commerce or "in the production of goods for commerce" and will imperil the national health or safety, may then grant an injunction of eighty days' duration.[36] During this period the parties are to continue to bargain with the assistance of the Federal Mediation and Conciliation Service.[37] If a dispute remains unsettled, a reconvened board of inquiry must submit a final report sixty days after the issuance of the injunction, setting forth the current status of the dispute, the parties' efforts at settlement, and "the employer's last offer of settlement."[38] Within the next fifteen days the National Labor Relations Board is directed to take a vote among the employees to determine whether they wish to accept their employer's last offer. The board must then certify the results of the election to the Attorney General, the injunction to expire on the eightieth day in any event.[39] Thereafter, the President is to submit a full report of the proceedings to Congress, "together with such recommendations as he may see fit to make."[40]

RAILWAY LABOR ACT

Under Section 10 of the Railway Labor Act when a dispute between a carrier and its employees has not been adjusted under normal procedures and would, in the judgment of the National Mediation Board, threaten "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the Mediation Board is directed to notify the President.[41] The President, upon such notification, may appoint an emergency board. The creation of such a board carries with it a waiting period during which the status quo must be maintained by the parties until thirty days after the Board makes its report to the President.[42] The emergency board may and usually does make specific recommendations as to the terms of settlement of the dispute in its report to the President.[43] Under the terms of the act, the board is required to report to the President within thirty days after it is created.[44] As a practical matter, this period is often extended by Executive order. Nevertheless, at the expiration of the thirty-day

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[36] 61 Stat. 156 (1947), 29 U.S.C. § 180 (1964).
[37] 61 Stat. 155 (1947), 29 U.S.C. § 179 (1964).
[38] *Ibid.*
[39] 61 Stat. 156 (1947), 29 U.S.C. § 180 (1964).
[40] *Ibid.*
[41] 44 Stat. 586 (1926), 45 U.S.C. § 160 (1964).
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*

period following the board's report, the parties are free to take any action that they deem appropriate if no agreement has been reached.[45]

CRITICISM OF PRESENT LAW

Considerable controversy has surrounded the national-emergency disputes provisions of the Taft-Hartley Act and the Railway Labor Act in recent years. Numerous studies and opinions have been published concerning the procedural and substantive weaknesses of these statutes and most have recommended major modifications.[46] There is no doubt that current statutory procedures are inadequate to handle emergency labor disputes, but not all of the blame can be attributed to inherent weaknesses in the statutory procedures, for all areas of labor-management relations are subject to rapid and fundamental change. Thus, while strikes were just as numerous and damaging to the public interest fifteen or twenty years ago, there are two differences today—one economic and the other political.

First, yesterday's issues related primarily to the improvement of wages, hours, and other conditions of employment; today, consideration focuses on manpower utilization, job security, and coalition bargaining, which are less understood by the public than wage demands, but are certainly as important to the parties. Second, public tolerance for major strikes is diminishing. Perhaps this changing attitude on the part of many Americans is a function of the increasing complexity of strike issues for which the public has less understanding and sympathy; or perhaps a more interdependent economy spreads the effect of certain strikes to larger numbers of the public. Clearly, the public interest has demanded that a new framework of rules be established to protect the public welfare and, as discussed above, there are indications that the executive and legislative branches of the Government agree. However, in order that a discussion of alternatives be more meaningful, it is necessary to summarize the major criticisms of existing procedures.

LABOR MANAGEMENT RELATIONS ACT

The Taft-Hartley Act is not a model of clarity or completeness of legislative expression, but its major weaknesses result from the interplay of political forces which have rendered some provisions meaningless. One Taft-Hartley device for dealing with national-emergency disputes

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[45] *Ibid.*

[46] See, *e.g.*, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY (1966); Kaufman, *Emergency Boards Under the Railway Labor Act*, 9 LAB. L.J. 910 (1958); Wisehart, *The Airlines' Recent Experience Under the RLA*, 25 LAW & CONTEMP. PROB. 22 (1960).

which has served a doubtful function is the board of inquiry. It is generally felt that the decision to enjoin a labor dispute is a political determination which is made prior to appointment of the board of inquiry.[47] Theoretically, the purpose of the board is to make an accurate and objective appraisal of the implications of the threatened strike on the national health and safety. In reality, however, the board's appointment merely serves notice on the disputing parties that an injunction is imminent. The board then is relegated to a role of insignificance and its deliberations have no substantial effect on the decision of government intervention. Furthermore, section 203 of the act[48] authorizes the Federal Mediation and Conciliation Service (FMCS) to enter a dispute and offer its mediation services long before a board of inquiry is appointed. During the FMCS effort to mediate the dispute, there is the best opportunity to make findings of fact informally and report the position of the parties. Accordingly, there is no necessity for an independent board to assume this duty.[49] Another reason for the board of inquiry's inefficacy is the express prohibition against the inclusion of recommendations in its report to the President.[50] Without this power the board's function is

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[47] See, *e.g.*, Aaron, *Observations on the United States Experience*, 14 LAB. L.J. 746 (1963). The author states: "The convening of the statutory board of inquiry is an empty pretense. This action is taken only after the President's advisers have persuaded him that an 80-day injunction must be obtained. The board's report is usually perfunctory, consisting of a series of conclusions almost entirely unsupported by evidence." *Id.* at 748.

A recent case illustrates the perfunctory role played by the board of inquiry with respect to the decision to seek injunctive relief. The International Brotherhood of Electrical Workers began a strike at West Coast shipyards on November 4, 1966, but the President waited until March 2, 1967 to appoint a board of inquiry. And then within a week, the board completed its investigation and issued a report stating that it did not appear that a voluntary solution was forthcoming. N.Y. Times, March 10, 1967, p. 64, col. 1. The next day the affidavits were drawn, a petition was filed, and the injunction was issued. N.Y. Times, March 11, 1967, p. 58, col. 1. These circumstances certainly lend support to the contention that the decision to invoke the Taft-Hartley injunction was made prior to the board's appointment and that the report served no substantial purpose.

The Justice Department, at the direction of the White House, has petitioned for injunctions in twenty-seven labor disputes since the enactment of the act in 1947. In each of these cases the district court has agreed with the administration that a national emergency existed and, accordingly, terminated the strikes by injunctive orders.

[48] 61 Stat. 153 (1947), 29 U.S.C. § 173(b) (1964).

[49] In the first annual report of the Federal Mediation and Conciliation Service, the Director stated:

> The Congress imposed no special statutory duties upon the Service in the national emergency provisions of the Act (secs. 206-210) other than to assist the parties in reaching a settlement in national emergency disputes (sec. 209(a)). However, the experience of the Service with the background of such disputes, the issues involved and the positions of the parties thereon, and its knowledge of facts required by other agencies of Government called upon to perform functions prescribed by the national emergency provisions, have made it necessary for the Service to play a more active role in the administration of those provisions than appears to be required by the language of the act."

1948 FMCS ANN. REP. 40.

[50] 61 Stat. 155 (1947), 29 U.S.C. § 176 (1964). The President's message to Congress,

limited to factfinding which, as a practical matter, has already been performed by others.

Section 206 of Taft-Hartley states that after the board of inquiry files its report with the Chief Executive, "The President shall file a copy of such report with the Service [FMCS] and shall make its contents available to the public."[51] By implication, therefore, the board should have a dual role. It should make appropriate findings of fact with respect to the specific issues of the dispute, and through its report exert public pressure for a voluntary settlement. In practice, however, the board reports have not served the latter purpose. There is little doubt that major labor disputes are subject to extensive publicity and, recently, public intolerance. It is questionable, however, that the report of the board of inquiry should be credited with affecting public opinion importantly. A national-emergency labor dispute is a major news event, but the principal news stories from the Government are generated by the activities of the Secretary of Labor and the Chief Executive. Publicity with respect to the board of inquiry's report is sparse because the report is recognized as insignificant and is, therefore, not a "newsworthy" item.

A second major criticism of the Taft-Hartley emergency procedures is directed at the failure to define or establish guidelines for the determination of a "national emergency." Neither the statute nor historical experience elicits a consensus on when a dispute imperils the national health and safety. Furthermore, there does not appear to be accord as to what criteria should be used for a determination of the question. The result is that as the line between emergency and inconvenience becomes more difficult to draw, the key factor becomes public resentment against strikes in certain industries, regardless of their effect on national health or safety. In a major labor dispute evidence may be introduced which indicates a minimal impact of the strike activity on the nation's welfare, but given public support, the President has invariably invoked the injunction procedure to terminate the strike activity.[52]

In the 1961 maritime dispute, for example, most of the American flag fleet had been on strike for seventeen days when the Government petitioned for an injunction;[53] the court found that a national emergency

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dated December 3, 1945, recommended that the boards of inquiry in any eventual legislation be invested with power to make reports containing findings of facts and recommendations for settlement. 91 CONG. REC. 11289, 11333 (1945) (message of President Truman). The final product, however, delegated to the board of inquiry the power only to make findings of fact and to report the position of the parties.

[51] 61 Stat. 155 (1947), 29 U.S.C. § 176 (1964).

[52] See text accompanying note 89 *infra*.

[53] United States v. National Maritime Union, 196 F. Supp. 374 (S.D.N.Y. 1961).

within the intent of the statutory provision existed.[54] And in support of this finding, the court stated that the strike would disrupt operations under the Mutual Security Act, that it would have a critical impact upon Hawaii, that it would have a serious adverse effect upon the Government's Food for Peace program, that it would have an adverse effect upon the nation's supply of petroleum products, and that it would have an adverse effect upon the nation's economy.[55] The court, however, failed to consider the fact that American-flag ships carried only eight per cent of total United States foreign trade, while the remaining ninety-two per cent was carried on foreign-flag bottoms, which continued to operate throughout the strike period.[56]

Compare this dispute with the impact of the 1966 airline-International Association of Machinists dispute, during which the administration took the position that no emergency existed.[57] Over 70 American cities were deprived of all trunkline air services while 230 cities lost more than 70 per cent of such services.[58] In total, the strike deprived the country of 61 per cent of trunkline services. A result was that industries which rely on air cargo to supply their markets, such as electronic and scientific equipment, banking, medical supplies, and growing, were severely damaged.[59] This comparison is not designed to intimate that the administration's position in the airline dispute was erroneous and that a national emergency did exist; rather, it illustrates the inconsistencies in the application of the term "national emergency" as the trigger for governmental intervention.

The failure to satisfactorily define a national emergency is not the only deficiency with respect to the injunctive procedures of the act. In addition to finding a threat to national health and safety, a district court must also find that the strike or lockout affects an entire industry or substantial part thereof.[60] This second criterion has recently become the subject of judicial interpretation.

In December 1966, a Steelworkers Union strike against Union Carbide's operations in Kokomo, Indiana, was terminated by a Taft-Hartley injunction. The plant produced metal alloy which was purchased and used by military-aircraft-engine manufacturers, who were not directly involved in the dispute. It was argued by the Justice Department that,

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[54] *Id.* at 379.

[55] *Id.* at 382-83.

[56] BALL, GOVERNMENT-SUBSIDIZED UNION MONOPOLY 38 (1966).

[57] *Hearings on S.J. Res. 186 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 5 (1966) (statement of Secretary of Labor Willard Wirtz).

[58] *Id.* at 167 (statement of William J. Curtin, chief spokesman for the airlines).

[59] *Id.* at 169.

[60] 61 Stat. 155 (1947), 29 U.S.C. § 178(a)(i) (1964).

if the strike were permitted to continue, production in the helicopter-engine industry would be decreased by twenty-five per cent and, in view of the Vietnam situation, would thereby endanger the national safety. The national-emergency provisions, it was contended, are not restricted to ending work stoppages in an industry in which the striking employees are immediately engaged. The district court granted the injunction and held that the production of the alloy by this one plant affected a substantial part of the military aircraft engine industry, thereby satisfying the statutory requirements. The decision was affirmed by a court of appeals[61] and the Supreme Court denied certiorari.[62]

Another recent judicial interpretation of the Taft-Hartley provisions occurred in March 1967, when President Johnson announced that the Government would seek an injunction in the West Coast shipyard strike. The Defense Department reported that the strike was interfering with critical work on ships needed for Vietnam. To counter the Government's allegation that operations of the shipyards were essential to military effort, the union offered evidence to show that most of the struck ship construction concerned "hulls of ships not due to be completed for another three or four years."[63] Senator Warren G. Magnuson (D.-Wash.) added that the shipbuilding strike was hurting the West Coast area but that the impact was not great enough to warrant government intervention.[64] Nevertheless, on March 10, 1967, the district court granted the injunction.[65]

The decisions in these two cases indicate that there has been a recent change of policy on the part of the executive branch concerning the appropriate use of the existing emergency procedures. But whether the change is solely a function of the Vietnam conflict or reflects a permanent change of attitude with respect to the size of a labor dispute required for injunctive action is not yet clear.

A final procedure of the Taft-Hartley Act which has come under considerable criticism is the employer's last-offer vote.[66] This vote, it is charged, is expensive, clumsy, and self-defeating.[67] Apparently it is the

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[61] United Steelworkers v. United States, 64 L.R.R.M. 2150 (D.C. Cir. 1966).

[62] United Steelworkers v. United States, 385 U.S. 1036 (1967).

[63] *Testing Taft-Hartley Anew*, Business Week, March 11, 1967, p. 86.

[64] *Ibid.*

[65] United States v. Albina Eng'r & Mach. Works, Inc., Civ. No. 46684, D.N.D. Col., March 10, 1967.

[66] 61 Stat. 155 (1947), 29 U.S.C. § 179(b) (1964).

[67] Present procedures require a vote among the strikers on the employer's last offer before the Taft-Hartley injunction is dissolved. This vote seldom, if ever, serves a constructive purpose. Votes that have been held run overwhelmingly against the employer's last offer. This is to be expected since union members will almost always

product of some congressional opinion that if allowed to express their preferences by secret ballot, the rank and file will repudiate the union leadership and refuse to be party to an unreasonable strike.[68] In practice, the vote only serves to solidify the disputing employees behind their union's position, tending to make the union negotiators less flexible at the bargaining table, and thus hampers rather than assists the collective-bargaining process. Commentators generally agree that this voting procedure should be eliminated.[69]

RAILWAY LABOR ACT

The 1962-1963 work-rules dispute in the rail industry, which required special legislation to impose a settlement, followed by the 1966 airlines dispute, underscored the general loss of respect for the emergency procedures of Section 10 of the Railway Labor Act.[70] After its passage in 1926, the Railway Labor Act became known as the "model law" but in recent years the machinery of the act appears to have encouraged both sides to delay serious efforts toward bargaining. The problem may be one of overuse.[71] Since its inception the President has appointed an emergency board approximately 170 times.[72] As a consequence, the periods of delay dictated by the emergency provisions of the statute often have been incorporated into the procedures and stratagems of collective bargaining.

In important negotiations, if the National Mediation Board fails to work out a settlement and a threat of strike exists, an emergency board is appointed. This board may seek a settlement during the first thirty-day period. After the board's recommended settlement is filed with the President, another thirty days pass during which time a strike is forbidden. Since the parties expect this procedure to be used in virtually every important case, serious bargaining does not begin many times until the emergency board has reported to the President. The practical result is that there is no "emergency" procedure.

The report of the most recent emergency board succinctly illustrates

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back their leaders in a play of bargaining strategy . . . . We therefore recommend that the vote procedure be eliminated as a required statutory step.
THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 103 (1961).

[68] *Ibid.*

[69] *Ibid.*

[70] 44 Stat. 586 (1926), 45 U.S.C. § 160 (1964).

[71] "Under the Railway Labor Act . . . the appointment of an 'emergency board,' when a strike or lock out is threatened, has become an almost automatic part of the process of settling the terms of contracts. Neither of these procedures is working. Both should be changed sharply." THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 105 (1961).

[72] The last emergency board under the Railway Labor Act was Emergency Board No. 169, created on January 28, 1967, by Exec. Order No. 11324, 32 Fed. Reg. 1075 (1967).

the problem concerning the progress made by the parties through the process of free collective bargaining prior to the board's appointment. The panel stated:

> As the case developed it became apparent that no real bargaining had actually taken place between the parties before their appearance before the Board. We believe this is generally the case in proceedings before Emergency Boards. In this regard, Boards appointed under the Railway Labor Act face a different situation from those appointed under the Taft-Hartley Act; under the latter, bargaining has taken place and the parties come to the public tribunal only with the hard core of their dispute. In transportation cases, experience shows that the parties begin to negotiate only after an Emergency Board has been appointed, and often only after a report has been submitted to the President. We believe that continuation of this practice will defeat other attempts to improve labor relations in the railroad industry.[73]

ALTERNATIVES TO PRESENT PROCEDURES

To be accomplished, any change in these procedures will have to minimize the objections of all parties concerned—management, labor, Congress, administration, and public. The search for an acceptable plan, or plans, will be most difficult.[74] There are two competing aspects of public policy involved which must be reconciled. Almost everyone agrees in the abstract that it is in the public interest to preserve free collective bargaining with its attendant right to strike or lockout in order to pressure acceptance of one's bargaining position. In opposition, however, is the growing feeling that the public interest demands that labor disputes which deprive large segments of society of necessary goods and services are to be avoided at almost any cost. Thus one writer has said:

> While strikes may be viewed as the price society must necessarily pay for the privilege of decentralizing decision-making in economic matters to the people who have to live under these decisions, it is also possible that at least some strikes are an *unnecessary* price which the public is paying for less efficient and less responsible negotiation than

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[73] REPORT TO PRESIDENT BY EMERGENCY BOARD NO. 169, at 5 (March 13, 1967). The panel, consisting of David Ginsburg, Chairman, Washington, D.C., attorney, Frank J. Dugan, Professor of Law, Georgetown University Law Center, and John W. McConnell, President of the University of New Hampshire, recommended that the Railway Labor Act be amended to help expedite the settlement of disputes in the transportation industry.

[74] Following settlement of the forty-three day airline strike, the chief government mediator, Assistant Secretary of Labor James Reynolds, was interviewed with respect to his outlook for future legislation. His response was:

> I think one of the things that I've learned is that there is no sense of accomplishment in lifting the hand of a groggy winner in a thing like this when you know the groggy loser has been the public, and somehow or other, these strikes that have such an impact on the public comfort and the public interest will have to be shortened or will have to be avoided and still preserve the institution of free collective bargaining. Now, that's quite a trick, but I think we can do it.

Interview With Assistant Secretary of Labor Reynolds, in Washington, D.C., Sunday, Sept. 4, 1966 (WTTG-TV 10:30 p.m.).

> it has reason to expect from the parties. It may be the price the public is being asked to pay for a willful exercise of private power which, rather then being sanctified as pure democracy, should be called to account for its disregard for the rights of others. While we wish to preserve the system of private decision-making, it does not follow that the private decision-makers should feel at liberty to trample heedlessly on the reasonable expectations of the society of which they are an integral part.[75]

Our highly mobile society is so dependent upon its transportation systems that work stoppages in these industries immediately create adverse effects upon segments of society not parties to the dispute. It is because of the extensive secondary effects of transportation work stoppages that special concern has been directed to modification of our present methods of dealing with such labor disputes.

COMPULSORY ARBITRATION

One suggested alternative to the present approach is to compel the parties in the transportation industries to submit to arbitration when they are unable or unwilling to resolve their differences through collective bargaining. Experience with compulsory arbitration in this country has been limited. It was employed during both World Wars, a few states experimented with it during the turbulent labor periods that followed those wars, and in 1963 special federal legislation imposed compulsory arbitration in the long-smoldering work-rules dispute in the railroad industry.[76]

Traditionally, labor and management have been opposed to the idea of compulsory arbitration. Some of the reasons for this may be illustrated by looking to the record of the proceedings before the House Merchant Marine and Fisheries Committee in 1963. At that time, the Committee conducted hearings on proposed legislation designed to alleviate the complex labor problems of the maritime industry,[77] which included a provision for compulsory arbitration.[78] Every labor leader who appeared before the Committee opposed the compulsory-arbitration provisions. Joseph Curran, President of the National Maritime Union,[79] felt they would destroy free collective bargaining in the industry and inevitably lead to the destruction of other features of our American way of life. He likened the procedures to the Russian method of settling labor

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[75] CHAMBERLAIN, THE LABOR SECTOR 633-34 (1965).

[76] Act of Aug. 28, 1963, Pub. L. No. 88-108, 77 Stat. 132.

[77] *Hearings on H.R. 1897, 2004, 2331 Before House Committee on Merchant Marine and Fisheries*, 88th Cong., 1st Sess (1963) [hereinafter cited as *Maritime Hearings*].

[78] H.R. 1897, 2004, 2331, 88th Cong., 1st Sess. (1963).

[79] Mr. Curran is also a vice president of the AFL-CIO. *Maritime Hearings* 307.

disputes. Harry Bridges, controversial leader of the International Longshoremens Warehousemens Union, declined to associate himself with those who thought the proposal was un-American; rather, he opposed the proposal because it would take away the right to strike and destroy collective bargaining.[80] Mr. Bridges candidly stated that in his opinion the respective positions of individual members of either labor or management on compulsory arbitration are a function of their own ability to win a strike;[81] those who support compulsory arbitration are unable to sustain their position at the bargaining table.

While it is true that management generally is opposed to the idea of compulsory arbitration, the majority of employers in the transportation industries favor some form of compulsory arbitration to settle labor disputes. At the 1963 hearings of the House Merchant Marine and Fisheries Committee, J. Max Harrison, representing the American Maritime Association, appeared and noted his organization's specific opposition to the compulsory-arbitration provisions of the proposed bill.[82] However, Ralph E. Casey, President of the American Merchant Marine Institute, testified that the dry-cargo companies he represented were in favor of the proposed compulsory-arbitration provisions, while many of the tanker companies he represented were opposed to them.[83] The late Paul St. Sure, President of Pacific Marine Association, also took a strong stand in favor of settling disputes in the maritime industry by compulsory arbitration.[84]

Employers in the railroad industry readily accepted Secretary Wirtz's suggestion in August 1963 that the parties submit their work-rules dispute to binding arbitration. Similarly, the five airline carriers involved in the 1966 labor dispute with the International Association of Machinists were willing to submit to a binding arbitration settlement. The Transportation Association of America, which is composed of shippers, transport investors, and carriers in the transportation industries, has since 1961 made it a matter of policy that binding arbitration should be employed when disputes have not been settled through the normal processes of collective bargaining and threaten the paramount public interest in uninterrupted transportation service. During the airlines strike of 1966, the Association passed a resolution which said in part: "The Railway Labor Act should be amended to provide for final and binding adjudica-

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[80] *Id.* at 570.

[81] *Id.* at 574.

[82] *Maritime Hearings* 259.

[83] *Id.* at 1239.

[84] *Id.* at 225.

tion by a Presidential Board, of disputes involving rates of pay, rules and working conditions . . . ."[85]

While management lawyers on the American Bar Association Section of Labor Relations Law's Ad Hoc Committee to Study National Emergency Disputes were opposed to compulsory arbitration generally, they favored final settlement of strikes or threatened strikes in the railroad, airline, and merchant marine industries by the Interstate Commerce Commission, Civil Aeronautics Board, and Federal Maritime Commission, respectively. The management members explained that they saw no inconsistency in their position because of the unique character of the railroad and air transportation industries as public utilities under the jurisdiction of the Railway Labor Act.[86]

Speculation is that the President's special committee to study national-emergency disputes[87] recommended against imposition of compulsory arbitration in any broad manner. This and all other indications at this time lead to the conclusion that if the idea of compulsory arbitration gains any acceptance, it will be on an *ad hoc* basis, probably in the area of the transportation industries or as part of an arsenal of weapons granted to the President to be used when all else has failed. Thus, unless public opinion becomes so strong that a radical departure from our present system is demanded, compulsory arbitration will probably not be employed except through specific legislation in isolated cases which create a grave threat to the national interest, such as the railroad-work-dispute legislation of 1963.

THE ARSENAL OF WEAPONS APPROACH

An alternative to existing legislation more widely accepted than compulsory arbitration is the so-called "arsenal of weapons" approach. One of the first proponents of this approach was an independent study group commissioned by the Committee for Economic Development to examine the public interest in national labor policy.[88] Although the group's report discusses a number of current problems in the labor relations field, its most lasting contribution has been its suggestions for amendments to

[85] Resolution of Transportation Association of America, Aug. 10, 1966.

[86] ABA SECTION OF LABOR RELATIONS LAW, 1966 COMMITTEE REPORTS 339-43.

[87] See note 13 *supra*.

[88] The panel consisted of: Clark Kerr (Chairman), former President, University of California; Douglass V. Brown, Professor of Industrial Management, Massachusetts Institute of Technology; David L. Cole, Attorney and Arbitrator; John T. Dunlop, Professor of Economics, Harvard University; William Y. Elliott, Professor of Government, Harvard University; Albert Rees, Professor of Economics, University of Chicago; Robert M. Solow, Professor of Economics, Massachusetts Institute of Technology; Philip Taft, Professor of Economics, Brown University; George W. Taylor, Professor of Labor Relations, Wharton School of Finance and Commerce, University of Pennsylvania. THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 4 (1961).

the existing emergency-disputes provisions of the Taft-Hartley Act and the Railway Labor Act.

The group concluded that strike activity is a necessary part of free collective bargaining and an important element in the decision-making process in the private sector. It cautioned, however, that the strike should be treated as a weapon of last resort and be used only in a manner consistent with the interests of society. For when the strike weapon is used in a manner damaging to the public interest, it becomes necessary to arm the Government to protect that interest.

Real national emergencies, the group found, have been rare. At the time the report was published, the Taft-Hartley Act had been invoked only nineteen times and in the group's opinion the existence of a genuine emergency was at least doubtful in several of those cases. They recommended that emergency procedures be freed from political pressures[89] and limited to the existence of a serious threat to the national interest.

The basic premise of the arsenal-of-weapons approach is that each dispute is unique and therefore it is necessary to equip the President with a variety of possible courses of action he may employ to meet any given emergency. In addition, a variety of available responses imposes a degree of uncertainty in the minds of the parties to a dispute that may spur them to settle it themselves rather than run the risk of being forced to accept a settlement procedure they do not desire.

The plan suggested by the group includes: (1) imparting greater vigor to the mediation process in contract discussions in industries which are potentially the source of national emergencies; (2) encouraging the principals to maintain a continuing process of discussion during the term of each current contract for the purpose of defining the most serious problem areas; (3) encouraging a more extensive and systematic use of a fact-finding procedure both before and during negotiations; (4) giving the President power to appoint a board of experts ten days prior to the date announced for a strike which might cause a national emergency, the board to step up the mediation process and provide the President with information that would help him determine his future course of action; (5) giving the President the option to require partial or full operation of an industry while a board of expert public representatives (or a tripartite board) works on the case and prepares its recommendations for future action; (6) giving the President power to direct that the report of this

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[89] The President is always subjected to heavy political pressures to move into an important labor dispute. These pressures he must resist, though to do so often calls for great political skill and courage. To do otherwise invites frequent use of whatever procedures are devised; and in turn, frequent use undermines the process of collective bargaining that must ultimately produce the settlement.
Id. at 96.

board include recommendations for settlement; (7) affording the President the option of whether and when to release these recommendations; (8) prohibiting the parties from conducting a strike or a lockout for a period of eighty days and preventing unilateral changes in working conditions while these procedures are being employed; and (9) leaving the President free throughout the entire period to recommend additional legislative remedies and devices to Congress. While the specific weapons recommended by the group may be criticized, the importance of the recommendation is the underlying concept of adding flexibility to the approach that Government may take with respect to work stoppages that threaten the national interest.

INDUSTRIAL PEACE COMMISSION

Another alternative, recently suggested by Professor Leland Hazard,[90] is that Congress establish an Industrial Peace Commission as a permanent agency of the federal government. As suggested, the Commission would "save collective bargaining and the right to strike and give effective voice to the public interest in collective bargaining."[91] Mr. Hazard would have the law establishing the Commission reaffirm all of the aspects of the present federal labor laws, but in addition Congress would include other declarations of national policy in the public interest such as "stable currency and stable prices; globally balanced balance of payments; need for uninterrupted flow of goods and services; both for civilian well-being and for national defense; and implementation of American foreign policy by whatever constitutional commitments the President or Congress might make."[92] In operation, the Commission would be called in by either party to a collective-bargaining agreement or by the President, to define issues, find facts, and recommend a settlement that would come within the framework of the defined national policies. The Commission would, subject to limitations imposed by its own rules, hear all interested parties including—employers, unions, governmental agencies, consumer organizations, taxpayers' associations, and financial institutions. After the hearing stage, which would be limited in time and during which any strike or lockout would be prohibited, a recommendation for settlement would be made by the agency. From that point, the procedure for acceptance or rejection of the settlement would be much the same as under the present title II provisions of Taft-Hartley. The great virtue of the plan according to the author would be that if strikes

[90] Hazard, *Strikes and People*, Atlantic, Dec., 1966, p. 116. Mr. Hazard is a professor of industrial administration at the Carnegie Institute of Technology.

[91] *Id.* at 117.

[92] *Ibid.*

did occur, it would only be after the entire controversy had been subjected to scrutiny in the public interest with attendant publicity. Clearly, this proposal recognizes the right of the public to sit as a third party at the bargaining table.

COMMON TERMINATION DATES FOR COLLECTIVE-BARGAINING CONTRACTS WITHIN AN INDUSTRY

Another suggested alternative to the present pattern of collective bargaining in this country would be to require common termination dates for all collective-bargaining agreements within a given industry. The problems that can arise when different union contracts expire individually was illustrated by the recent situation confronting National Airlines. National was one of the five airlines which were struck by the International Association of Machinists in the summer of 1966. Before National could catch its breath from the forty-three-day shutdown, it was met with fresh demands from the Air Line Pilots' Association. After National avoided a strike deadline set by this union for December 15, 1966, it was immediately faced with negotiations for a new contract with the Air Line Employees Union. The employees represented by this union voted ten to one to authorize a strike at the carrier's three-dozen locations. Fortunately, this proposed strike was averted in March 1967 when last ditch negotiating ended in settlement.

An equally fragmented bargaining process exists in the railroad industry. Five labor organizations represent practically all the major railroads' operating employees,[93] conducting negotiations on a national scale but bargaining separately.[94] Generally, eleven standard railway labor organizations, which include a majority of the nonoperating employees, join together for a uniform national wage and rules negotiation.[95] The other nonoperating employees, such as yardmasters and train dispatchers, process their demands separately.

As an illustration of an extreme case, the Baltimore and Ohio Railroad must bargain with five marine unions and seventeen rail unions,

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[93] In addition to these five operating unions there were 25 nonoperating unions and 15 maritime unions representing some rail employees as of February 1964. Shils, *Industrial Unrest in the Nation's Rail Industry*, 15 LAB. L.J. 81, 84-85 (1964).

[94] The Report of the Presidential Railroad Commission states:

> On the side of labor, there is equal need for review and reorganization. The existence of five separate operating labor organizations has been a source of a number of serious problems. It has complicated negotiations materially; it has delayed the systematic review of wage differentials and relationships and it has diluted responsibilities and made more difficult the adoption of forward looking policies. The time has come to create by merger one engine service and one train service labor organization.

PRESIDENTIAL RAILROAD COMM'N REPORT 184 n.1 (1962).

[95] 1964 NAT'L MEDIATION BD. ANN. REP. 10.

some of which represent more than one classification of employee.[96] Complete chaos is averted by a historical bargaining pattern in which the representatives of management and labor agree to conduct collective bargaining negotiations of periodic wage and rules demands on a complex industrywide basis.[97] Occasionally, a national settlement will establish a pattern for the entire railroad industry and most of the unions not party to the negotiations will follow the precedent. However, in the event the original demands of the unions differ widely or seek a substantial departure from existing employment conditions, the possible result is hundreds of serious disputes developing at the same time or closely following one another on the various railroads of the country.[98]

The maritime industry also suffers from the same type of fragmentation, except it has the additional element of intense interunion rivalry which has led each union to press for economic gains surpassing those of its rivals. The result for the employers is an endless circle of union demands and rising labor costs. These factors have caused an extremely high incidence of strikes and work stoppages over the past twenty-five years. The average employer must bargain with four to five different unions representing the licensed and unlicensed personnel of a single ship. A strike by one of the unions can shut down a particular ship, a particular company, or the entire industry.[99]

ELIMINATION OF PRESENT RATIFICATION PROCEDURES

Every year since 1961 the National Mediation Board's Annual Report has recommended that the present procedures by which union members vote to ratify or reject the tentative collective-bargaining agreements reached by their representatives be modified. The problem presented by these procedures was well illustrated in the airlines strike of 1966 when the agreement reached between the union's representatives

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[96] Shils, *supra* note 93, at 87.

[97] *Ibid.*

[98] 1964 NAT'L MEDIATION BD. ANN. REP. 10.

[99] Perhaps one of the most descriptive statements of maritime labor relations appeared in the report of the 1961 Presidential Board of Inquiry:

> The long history of labor negotiations and settlements in this industry expiring on nonuniform dates, with union rivals jockeying for position, with scores of nonuniform agreements between the management and labor units, with recurring necessities of 'catching up' inequities between the different craft unions, and with drastic splits between associations themselves—all of these have resulted in an almost chaotic form of collective bargaining and labor-management relationships.
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> Many attempts have been made in the past, and even while our Board was in session, to form coalitions for bargaining purposes. Differences in interest, in goals and in basic economics, between types of ships and geographic areas of operation, present serious obstacles to pattern bargaining which is characteristic of so many important American industries.

REPORT OF PRESIDENTIAL BOARD OF INQUIRY, 1961 MARITIME STRIKE 4 (July 2, 1961).

and the five carriers was submitted to the membership. The members voted not to ratify, the parties returned to the bargaining table, and sixty per cent of the nation's trunk airlines remained idle.

Unfortunately this is not an isolated instance. A national settlement may ignore local issues which make its announcement illusory. In September 1964, Walter Reuther and the big-three auto makers entered into an agreement that the union leader described as the best contract the United Auto Workers had ever negotiated. The rank and file at General Motors did not agree; they stayed on strike for six weeks following this initial agreement. A continuation of this process will inevitably lead employers to hold back their best offer in the realization that the initial agreement will not be the final one.

CONCLUSION

The modes of transportation are an identifiable and separate part of industry. Their semipublic nature has long been recognized by a variety of special governmental regulations relating to safety, financial, and service functions. More recently, it has become increasingly clear that labor relations in these industries also presents special problems deserving of the public interest and attention. Laws which regulate the collective-bargaining procedure in industry generally do not seem to work as well in the transportation industries. The Railway Labor Act of 1926 was an early recognition of the need for special regulation. Coverage of the airlines industry by the same law in the mid-1930's was a further indication. The maritime industry has proved to be the best example of inadequacies of the emergency provisions of Taft-Hartley.

There are a number of reasons that the transportation industries present special problems with respect to achievement of peaceful contract settlements which are not injurious to the public interest. This article has concentrated upon one aspect only—the inadequacy of present emergency dispute provisions. The difficulties in the transportation field have been so frequently manifested that there is a growing public opinion which supports legislative reform. Whatever the causes of the problems, the reasons for this developing public judgment seem clear. Strikes in transportation most consistently involve the public, both as to its convenience and as to its economic welfare. It is because such strikes attract so much public attention, and because recent declarations of national economic policy include guidelines for terms of settlement designed to protect the national interest, that public opinion has become concerned with not only whether the strikes can be terminated or prevented, but also whether the cost of the settlement will be injurious to the national goal of preventing inflation.

The multiplicity of unions representing employees in the various modes of the transportation industry, the very nature of the industries themselves, and other factors have led to a dangerous disregard of the national economic policy in contract settlements. Since such industries are both highly regulated and highly visible, the cost of such settlements attracts wide notice and disproportionately influences the cost of contract settlements in other industries. There is little question but that the 5 per cent settlement extracted from five airline carriers by the Machinists Union in mid-1966 effectively rejected the presidential guideposts of 3.2 per cent as a restraint upon labor contract settlements since that time. Yet, only 35,000 employees were represented by the union in that dispute. Moreover, later settlements by other carriers with other unions in that industry substantially exceeded 5 per cent. In 1967, the President's Council of Economic Advisors abandoned, at least temporarily, the 3.2 per cent Guidelines. In March, a Presidential Emergency Board recommended a 5 per cent settlement in the railroad industry. The trucking industry was faced with demands from the Teamsters Union which reportedly approached a cost of 12 per cent and it is feared that the settlement may exceed 5 per cent. Strikes in either instance would probably not insure less costly settlements unless they induce effective and prompt legislation.

It has been the purpose of this article to survey the views of spokesmen for the various modes of transportation as to the need for legislative reform, as well as to review the variety of proposals which have been discussed in recent years. The public's representatives appear to recognize these needs as indicated by the observable activity in the legislative and executive branches of the federal government. Thus, it is recognized that both the cost of strikes and the cost of settlements in the transportation industries constitute a problem of national moment. While the public's representatives appear to recognize the need for legislative reform, the appropriate combination of circumstances to support enactment of effective laws may not be present until another major strike occurs. Molders of public opinion and representatives of the legal profession continue to show an awareness of the problem. All concerned admit to the inadequacy of present statutory procedures. Recently, presidential emergency boards have taken to commenting upon the futility of existing laws and procedures. Industry spokesmen admit to the awesome imbalance at the bargaining table and most agree that radical statutory changes are demanded.

Present procedures for coping with national-emergency disputes under the Taft-Hartley and Railway Labor Acts are rightfully subject to criticism for several reasons. The board of inquiry appointed by the

President under Taft-Hartley is of dubious value since the President and his advisors have already made the political decision that a national emergency exists when he appoints the board. The board may not make recommendations and normally its factfinding duties have already been carried out by the other agencies of the federal government. Moreover, nowhere in the statute is the term "national emergency" carefully defined. The provisions have been invoked more in terms of historical precedent than any discernible application of objective standards.

The emergency procedures of the Railway Labor Act have been invoked so often that the parties have come to expect this form of solution to almost every dispute. In actual practice, no "emergency" procedure now exists since the parties have come to expect the appointment of an emergency board. Usually, it is not until the emergency board has come into being that the parties engage in meaningful bargaining.

While compulsory arbitration has been suggested as a solution that might eliminate most national emergencies, labor leaders and most nontransportation employer groups oppose this solution. In the transportation industries many employers actively seek compulsory arbitration, and it is in these industries that this form of settlement would most likely be legislated. At present, however, the prospect of enactment of general compulsory arbitration legislation is slight and it may be expected that the practice of legislating at the last minute to avoid work stoppages in individual crises will continue.

It is much more probable that if present emergency dispute provisions are permanently amended, the alternative chosen will be some form of an arsenal-of-weapons approach. The flexibility provided by such an arrangement allows the Executive to meet each individual problem in a manner best suited to enhance settlement of the dispute. The very uncertainty of the approach the Executive may adopt to meet the problem may encourage the parties to resolve their differences without running the risk of an imposed procedure for settlement. Support for the arsenal approach far outstrips that for any other suggested solution.

A more recent proposal would establish an Industrial Peace Commission as a permanent agency of the federal government. The main thrust of this proposal is that the government would, on a permanent basis, take an active role in protecting the public interest in labor disputes. The procedures suggested would also keep the public fully apprised of the issues involved and the positions of the parties.

Other suggested alternatives to our present methods and practices for dealing with national-emergency disputes are directed toward reducing the frequency with which these disputes arise. Greater use of coalition bargaining in which all unions which represent the employees of

large employers or employer groups bargain together at one time, and common expiration dates for all the collective-bargaining argreements that the large employer enters into or within an industry would reduce the number of crises endangering the public interest. The pyramiding of local disputes which in the past has wrecked the harmony finally reached on a national level would be ameliorated by requiring continuous study and negotiation on a local level by representatives afforded sufficient power to make binding the agreements reached. The present system of giving union representatives power to negotiate subject to ratification of the rank and file has in certain instances been abused and continuation of this practice might well lead to a requirement that representatives be given power to enter into binding agreements without further reference to the membership.

Thus it is clear that there is a need for modification of our present laws dealing with national-emergency disputes in the transportation industries. However, prospects for passage of legislation which would modify present procedures probably hinge on the occurrence of one more crippling labor dispute in the near future.

PRIMARY JURISDICTION TO DECIDE ANTITRUST JURISDICTION: A PRACTICAL APPROACH TO THE ALLOCATION OF FUNCTIONS

LIONEL KESTENBAUM*

In this article, Mr. Kestenbaum explores the tangled jurisdiction of courts and agencies in antitrust litigation. Approving the practical approach of Jewel Tea, he advocates that the allocation of jurisdiction between court and agency be based on such considerations as the relevance of regulatory aspects to the ultimate issues, the degree of expertise required, and the nature and origin of the antitrust immunity asserted.

A reference to "regulatory agencies and the antitrust laws" will evoke a broad range of problems. The range begins with fundamental judgments of economic and political policy: In what areas should competition and a free market be supplanted by regulatory control over entry, prices, and other terms of service or sale? More narrowly, when a regulatory system is established, how is it to be "reconciled" or "accommodated" with antitrust law and policy? From the standpoint of the particular regulatory agency, to what extent should it be concerned with competition? And when it is so concerned, to what extent are antitrust principles and precedents relevant? Turning to the courts, what is the impact of the regulatory law upon the preexisting judicial sphere of antitrust influence? Are the antitrust prohibitions, and the jurisdiction of the courts to enforce them, untouched, supplemented, or supplanted by regulation? And is the answer a sweeping conclusion from the statutes, or does it discriminate between different practices or depend upon specific regulatory action?

These questions have sometimes been characterized, to my mind inaccurately, as issues of "primary jurisdiction." For the substantive problem of antitrust immunity has to be carefully distinguished from the problem of allocating between court and agency the function of deciding the substantive issue, which is all that fits strictly under the "primary jurisdiction" rubric. The material for drawing such distinction is now at hand in two recent cases: *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*[1] and *Carnation Co. v. Pacific Westbound Conference*,[2] in which the

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[1] 381 U.S. 676 (1965).

[2] 383 U.S. 213 (1966).

Supreme Court, apparently for the first time, has articulated a practical approach towards allocating the function of determining the substantive issue.

Less than two years ago, an eminent antitrust practitioner characterized the subject of primary jurisdiction and the antitrust laws as one enveloped in obscurity.[3] Since the cases previously decided confirmed that gloomy observation, confusion was compounded by the sanguine comment of a leading administrative law treatise that "few aspects of administrative law have been so systematically and satisfactorily developed."[4] The *Jewel Tea* and *Carnation* cases provide an apt occasion to seek to understand the obscurity and to see how far it has been dispelled.

THE ROLE OF PRIMARY JURISDICTION IN THE ANTITRUST CONTEXT

One basic point should be made at the outset about the doctrine of primary jurisdiction—it is in essence a method by which a court allocates between itself and an agency the initial power, hence often the principal power, to decide a particular issue material to the court case. This function can be exemplified by the doctrine's customary context in the regulatory law. For example, in the famous *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*,[5] cited as the harbinger of primary jurisdiction, there was no dispute about the substantive issue to be decided and the test to be applied; the ultimate issue was the reasonableness of railroad rates under the common-law principles incorporated in the Interstate Commerce Act.[6] The question was simply whether a court or the Interstate Commerce Commission should decide it. The Supreme Court held that the ICC "alone is vested with power originally to entertain proceedings for the alteration of an established schedule" when the claim is that "the rates fixed therein are unreasonable."[7] As Mr. Justice Harlan explained in a more recent case, this was an allocation to the agency of the law-making power over that issue because of its special competence, leaving to the courts a reviewing function only.[8]

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[3] Cox, "The Federal Regulatory Agencies and the Antitrust Laws," Transcript of Proceedings of the Federal Hearing Examiners' Second Annual Seminar, §§ 28-30, at 162 (1964).

[4] 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 19.01 (1958).

[5] 204 U.S. 426 (1907).

[6] Ch. 104, § 22, 24 Stat. 387 (1887), as amended, 49 U.S.C. § 22 (1964).

[7] 204 U.S. at 448.

[8] United States v. Western Pac. R.R., 352 U.S. 59, 65 (1956). Professor Davis' unwarranted optimism, see text accompanying note 4 *supra*, is undoubtedly connected with his unwillingness to accept the teaching of *Western Pacific*. He asserts that "the doctrine of primary jurisdiction does not necessarily allocate power between court and agencies" because it governs only the locus of *initial* decision, not the final decision. 3 DAVIS, ADMINISTRATIVE LAW

In the antitrust field, in contrast, the principal jurisdictional question is not simply who decides a single issue under a common standard. Rather, it is the fixing of a line of demarcation between the spheres of two different legal rules: The standard of antitrust legality and the standard of the regulatory law.[9] The two different standards are administered by two quite distinct institutions. There is no question that, if antitrust statutes govern, the court will adjudicate the case; if the regulatory statute applies, the agency will adjudicate the issue, subject to judicial review. In this context, the issues of legality are not common to antitrust court and agency. The issue of common concern is the determination which law applies, or, to put it another way, whether the power of the courts to entertain antitrust suits has been supplanted or limited by regulatory authority. What is at stake in terms of the primary jurisdiction doctrine is that the resolution of the question of which law applies be properly allocated between the two tribunals, so that the location of the interface between the antitrust and regulatory statutes be decided in the most efficient, orderly, and equitable manner. Less a matter of substantive law than of judicial administration, procedure, and esthetics, it is yet of compelling importance to court, agency, and litigants.

Much of the writing and talking in this area concerns the location of the boundary between antitrust jurisdiction and antitrust immunity in specific cases under specific statutes. While this will be touched on below,[10] it is a misnomer to include it as part of the doctrine of primary jurisdiction. Wherever the line falls between the antitrust and regulatory laws, its fixing is a threshhold question which is of common concern to the court and agency. For purposes of this article, it is the allocation between the court and the agency of the initial disposition of that threshold question which calls for application of primary jurisdiction principles.

TREATISE § 19.01 (1958). There are two misconceptions here. First, the limited scope of judicial review is important. Calling upon the agency to make the initial decision in effect gives it the principal "lawmaking power" over questions of fact and inferential judgment. Second, there is a difference between a proceeding commenced before an agency, which is subject to review, and a reference to an agency under the primary jurisdiction doctrine. The former necessarily includes all relevant issues, including legal, statutory, and constitutional matters on which the courts do not defer to the agency. But primary jurisdiction requires a court to stop a pending judicial proceeding and refer it to the agency, which should not be done except with respect to so-called administrative questions on which the agency view is significant, if not decisive. Professor Davis is overimpressed with the vague and misleading language in Far East Conference v. United States, 342 U.S. 570 (1952); see text accompanying notes 66-72 *infra*.

[9] Competition may be one factor considered in the regulatory judgment but the ultimate test—the "public interest"—is quite different.

[10] See text accompanying notes 38-51 *infra*.

THE PRACTICAL APPROACH OF JEWEL TEA

The most important of the recent cases is *Jewel Tea*, in which Mr. Justice White articulated factors relevant to allocation of the function of resolving a claim of antitrust immunity.[11] *Jewel Tea* was a private antitrust suit by a supermarket chain against a labor union challenging the lawfulness of a provision in their collective-bargaining agreement which limited the operating hours of the plaintiff's meat departments. The union asserted that its conduct was within the labor exemption from the antitrust laws[12] and argued preliminarily that the court should refer to the National Labor Relations Board the issue whether the operating-hours provision was one of the "terms or conditions of employment,"[13] important to the applicability of the labor exemption.

Mr. Justice White's response laid stress upon the practicalities. He recognized that the Board has "special expertise" in resolving the stated issue. But this expertise is not exclusive; in various contexts, "courts are themselves not without experience in classifying bargaining subjects as terms or conditions of employment."[14] Further, the Justice pointed out that at the time the lower court denied reference to the Board, the issue within the agency's expertise appeared at best subsidiary. This was sufficient ground for affirmance since "the doctrine of primary jurisdiction is not a doctrine of futility"; and parties should not be burdened with an administrative proceeding to obtain an agency decision unrelated to "a controlling legal issue" dispositive of the case.[15] The opinion's commonsense approach is epitomized by this appraisal of the lower court's ruling in the context of the situation in which it was rendered, the Court being unmoved by subsequent litigation which had belatedly highlighted the possible administrative issue. Underlining the element of practical discretion is another point cited as favoring judicial disposition—the ab-

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[11] 381 U.S. at 684-88. Although Mr. Justice White's majority opinion was joined explicitly by only two other Justices, his was the only opinion which discussed the claim of primary jurisdiction and gave reasons for rejecting it. We are justified in taking these to be the Court's reasons since such rejection was the predicate for reaching the merits, which the other opinions did.

[12] Clayton Act § 6, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964).

[13] The quoted language is part of the definition of "labor dispute" in the Norris-LaGuardia Act § 13(c), 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1964). That act withdraws jurisdiction from the federal courts to issue injunctions "in any case involving or growing out of a labor dispute" except under severely limited conditions. 47 Stat. 71 (1932), 29 U.S.C. § 107 (1964). Similar terminology, "the terms and conditions of employment," is used to define the subjects of collective bargaining in § 8(d) of the National Labor Relations Act, reenacted by 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

[14] 381 U.S. at 685-86.

[15] *Id.* at 686.

sence of an effective, convenient, and certain procedure before the Board for obtaining the requested determination.[16]

The *Jewel Tea* criteria for allocating the decision of antitrust immunity are, thus, the court's ability to proceed on its own, and the need, utility, and availability of agency decision. That these sensible tests are not commonplace, and this article not idle, is shown by contrasting the opinion of Mr. Justice Brennan in *United States v. Philadelphia Nat'l Bank*,[17] decided in 1963, just two years before *Jewel Tea.*

Philadelphia Bank was an antitrust case in which the Government challenged the lawfulness of a bank merger under Section 7 of the Clayton Act;[18] and the Court, before reaching the merits, discussed the claim that the Bank Merger Act of 1960[19] had exempted from the antitrust laws a merger approved by the Comptroller of the Currency. Reviewing the Bank Merger Act and its legislative history, the Court found no express or implied repeal of the antitrust laws.[20] Mr. Justice Brennan then turned to the doctrine of primary jurisdiction which, it was said in traditional terms, requires judicial abstention and preliminary resort to a regulatory agency to protect the integrity of a regulatory scheme.[21] The opinion described the effect of primary jurisdiction as not ousting but only postponing, the court's jurisdiction, although it sometimes results in "channel[ing] judicial enforcement of antitrust policy into appellate review of the agency's decision."[22] The Justice stated that the rejection of any repeal of the antitrust laws argued against the use of primary jurisdiction[23] and pointed out that even if that doctrine were applicable, it was satisfied because "the agency proceeding was completed before the antitrust action was commenced."[24]

The logic of *Philadelphia Bank*'s brief discussion of primary jurisdiction crumbles at any point tested. First, once the Court had ruled that antitrust jurisdiction survived the regulatory enactment, it had disposed of the merits of reconciling the two laws. Why did it then proceed to discuss primary jurisdiction? There was no issue left of law or fact on

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[16] *Id.* at 687-88.

[17] 374 U.S. 321 (1963).

[18] 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964).

[19] Pub. L. No. 86-463, 74 Stat. 129 (amended by 80 Stat. 7 (1966), 12 U.S.C.A. § 1828 (Supp. 1966)).

[20] 374 U.S. at 350-52.

[21] *Id.* at 353.

[22] *Id.* at 353-54.

[23] Mr. Justice Brennan's treatment of primary jurisdiction as a lesser version of antitrust repeal or supersession was foreshadowed in his dissent in Pan American World Airways, Inc. v. United States, 371 U.S. 296, 331-33 (1963). A tendency towards this approach was also indicated in Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1062 (1964).

[24] 374 U.S. at 353.

which the Court could conceivably have deferred to, or referred for, an agency opinion. Primary jurisdiction, as we have since been told, is not a doctrine of futility. Conversely, if the Court had found an implied repeal, which would have limited the judicial role to "appellate review of the agency's decision,"[25] this would have meant that the antitrust jurisdiction had not been merely "postponed," but rather supplanted by the regulatory law. Under the antitrust standard, the question was whether a merger was likely to have substantial anticompetitive effects. Under the regulatory statute, in contrast, the agency would decide whether the transaction, even if anticompetitive, was in the public interest. The Court's function in reviewing the latter decision would not be at all like deciding the antitrust case because, aside from the constraints upon judicial review, the substantive standard is different. Mr. Justice Brennan failed to distinguish the antitrust and regulatory universes of discourse, and he failed to identify the limited role of the doctrine of primary jurisdiction in fixing the boundary between them.

The murky character of the *Philadelphia Bank* opinion on this point is underscored by its reliance on the fact that the proceedings before the Comptroller of the Currency had already been completed.[26] What were those proceedings? The Comptroller had appraised the merger, taking into consideration its competitive effects, and approved it under the test of the Bank Merger Act as being "in the public interest."[27] What im-

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[25] *Id.* at 354.

[26] The Comptroller's unwritten opinion, as summarized in his annual report to Congress, is outlined by Mr. Justice Brennan. *Id.* at 333.

[27] Bank Merger Act of 1960, Pub. L. No. 86-463, 74 Stat. 129. The conventional public interest of this provision has been recently replaced by the Bank Merger Act of 1966, 80 Stat. 7, 12 U.S.C.A. § 1828 (Supp. 1966). As now amended, § 18(c) provides that the Comptroller or other responsible agency may approve any proposed bank merger "whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade" only if he further finds "that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effects of the transaction in meeting the convenience and needs of the community to be served"; the agency may not approve any merger "which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States."

The bizarre aspect of the 1966 act is that it directs the district courts to use the "identical" standards that the agencies use in appraising the validity of bank mergers under § 7 of the Clayton Act, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964), and § 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964); in doing so, the courts are not reviewing the agency's ruling but are determining "de novo the issues presented" (and the agency is authorized to intervene in court, presumably to defend the merger). Bank Merger Act of 1966, §§ 18(c)(7)(A), (B), (D), 80 Stat. 8, 12 U.S.C.A. § 1828 (Supp. 1966). The Supreme Court has recently construed this statute, and upheld the independent authority of the district courts to adjudicate the validity of the bank mergers under the antitrust laws, as modified by the defense or justification of "convenience and needs" provided by the 1966 act. United States v. First City Nat'l Bank, 35 U.S.L. WEEK 4303 (U.S. March 28, 1967).

For purposes of this article, it is significant to note that, by authorizing both court and agency to apply the same standard separately, the Bank Merger Act runs counter to the usual

pact did that have on the Supreme Court's adjudication of the antitrust claim? None whatever. The issue decided by the agency was irrelevant to the standards of the Clayton Act. To be sure, the Comptroller had *not* expressed any opinion about the legal effect of his approval; specifically, he had not decided whether his approval resulted in immunity from the antitrust laws. It is clear that primary jurisdiction principles would be pertinent in allocating the power to decide that question. But on this critical point, only the barest hint may be gleaned from the *Philadelphia Bank* opinion. All we can say is that the Supreme Court did not indicate any interest in getting the Comptroller's view. We are left with the unelaborated implication that issues of antitrust immunity hinging upon construction of regulatory statutes may properly be decided without the agencies' direct participation.

The absence of any stated rationale for this implication, and the remainder of the *Philadelphia Bank* discussion, show that it is not too obvious to stress the value of the practical criteria set out by Mr. Justice White in *Jewel Tea.* At the least, an agency should not be asked to decide issues in this context unless they are material to the question of antitrust immunity and unless the agency can contribute something substantial to their resolution.

PRIMARY JURISDICTION APPLIED TO ANTITRUST IMMUNITY AS A STATUTORY ISSUE

Let us test this discussion against the experience of the cases. In a suit charging antitrust violations, the possible application of primary jurisdiction principles arises when the defendant asserts immunity from the antitrust laws and seeks either dismissal or a stay and reference to the regulatory agency whose law provides the alleged immunity. There are two responses to this defense which can be framed strictly in terms of statutory interpretation. The defense can be sustained, and the antitrust claim held barred, because the antitrust laws have been entirely displaced by another statutory scheme; or the defense can be rejected on the ground that the antitrust claim is unaffected by the regulatory statute or by anything which might have been done or might be done under it. The answer in favor of the defense is illustrated by *Jewel Tea*, by the 1963 decision in *Pan American World Airways, Inc. v. United States*,[28] upholding the Civil Aeronautics Board's exclusive jurisdiction over air-

reasons for establishing regulatory agencies—and the usual technique of allocating to the agency the function of deciding certain issues. In the present context, I think we may regard the Bank Merger Act of 1966 as a political sport, not reflecting any deliberate radical reassessment by Congress of the relation of administrative and judicial functions.

[28] 371 U.S. 296 (1963).

line-route matters, and by the earlier decision in *United States Nav. Co. v. Cunard S.S. Co.*[29] The negative answer, rejecting regulatory preemption and sustaining antitrust jurisdiction, is illustrated by the *Philadelphia Bank* case, *United States v. Radio Corp. of America*,[30] and *United States v. Borden Co.*[31]

Strikingly, in both categories of cases, the Court showed no hesitancy about reaching its conclusion on antitrust immunity without calling upon the views of the relevant agency. With the benefit of hindsight and *Jewel Tea*, we may supply as the elided major premise, that "courts are themselves not without experience" in resolving such questions.[32] Even within the regulatory universe, the doctrine of primary jurisdiction dictates reference to the agency only in response to a palpable need for "expert and specialized knowledge" or "administrative uniformity" but not otherwise.[33] Statutory construction is preeminently a judicial job. And construction of the antitrust laws, whose generality is said to have a near-constitutional dimension,[34] receives especial attention from the federal courts. In that sense, as Mr. Justice Douglas indicated a few years ago, the antitrust laws are within *the courts'* "primary jurisdiction."[35] Further, a number of antitrust exemptions are defined by statute, without involvement of any administrative body,[36] thus confirming the judiciary's role in drawing the jurisdictional line. Finally, even when a regulatory agency exists, its expertise, real or *ex officio*, can be said to be limited to administrative questions and not to extend to determining the ultimate reach of its authority, particularly when impinging upon the courts' antitrust jurisdiction.

The argument, since it is imaginary, should not be imagined as one-sided. Weighing against the above contentions is the fact that a claim of antitrust immunity involves chiefly the interpretation of the regulatory statute asserted as the basis for immunity—not of the antitrust laws.

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[29] 284 U.S. 474 (1932). The Court retreated from *Cunard* in subsequent cases. See note 55 *infra*.

[30] 358 U.S. 334 (1959).

[31] 308 U.S. 188 (1939). California v. FPC, 369 U.S. 482 (1962), is a rare example of the issue of antitrust jurisdiction being decided on appeal from the regulatory agency, rather than in an antitrust case in the court. The reason it was decided in this fashion was that the agency failed to stay its proceeding pending determination of the antitrust case.

[32] Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 686 (1965).

[33] United States v. Western Pac. R.R., 352 U.S. 59, 64-66, 69 (1956); see, *e.g.*, Great No. Ry. v. Merchants Elevator Co., 259 U.S. 285 (1922); Atlantic Coast Line R.R. v. Riss & Co., 267 F.2d 657 (D.C. Cir. 1958); Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1043-47 (1964).

[34] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

[35] California v. FPC, 369 U.S. 482, 490 (1962).

[36] *E.g.*, Clayton Act § 6, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964) (labor and agricultural organizations). See also note 13 *supra*.

Acknowledging the court's complete responsibility when no agency exists and its ultimate control in all cases, why ignore the views of an expert body when available? In other contexts, it is often said that an agency's view of its own statute is entitled to considerable weight,[37] even though the question of interpretation is ultimately for the courts. So here, it may be said that the agency's exposition of the objectives of the regulatory scheme, and of the needs which have become apparent in its administration, is relevant to their compatibility with antitrust rules, as well as to the existence and scope of antitrust immunity.

There is, of course, no trace of such dialogue in any case except *Jewel Tea.* That decision suggests that there may yet be cases calling for reference to a regulatory agency of issues of antitrust jurisdiction hinging upon interpretation of regulatory statutes. It is surely significant, however, that none has yet appeared before the Supreme Court. The uniform decisions are a silent tribute to the force of the arguments favoring the courts' retention of the decisive role by retention of jurisdiction. On the statutory issue of antitrust jurisdiction or immunity, the probability of enlightenment from an agency opinion is usually not high enough to warrant the burden of an administrative proceeding; any agency interest can ordinarily be adequately expressed by means of *amicus* presentations in court.

If we digress for a moment to look for a motif in the Supreme Court cases dealing with statutory issues of antitrust immunity, we are reminded of nothing so much as that most reliable general proposition that "general propositions do not decide concrete cases."[38] Thus, it is often said with great confidence that the Court looks for an explicit statutory provision of immunity from the antitrust laws, and the rule is, indeed, that such immunity will not be implied except when the Court thinks it ought to be. Three years ago the Court acknowledged that the statutory duty of a stock exchange to prevent fraud and to discipline offending members would inevitably result in a concerted refusal of exchange members to do business with offenders, which would otherwise be a boycott violating the Sherman Act.[39] The result was a holding that it would be a defense, to a charge of a violation of Section I of the Sherman Act[40] by a concerted refusal to deal, that such acts fell within the scope and purposes of self-

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[37] Power Reactor Dev. Co. v. International Union of Elec. Workers, 367 U.S. 396, 408 (1961); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

[38] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[39] Silver v. New York Stock Exch., 373 U.S. 341, 347 (1963).

[40] 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

regulation under the Securities and Exchange Act,[41] despite the absence of a statutory provision on the point.[42]

Another oft-cited maxim is that implied antitrust immunity will be afforded only to the narrowest extent necessary. On that theory, the power of an agency to enjoin restrictive trade practices should not supersede the overlapping jurisdiction of courts to grant injunctive remedies in antitrust cases. It was so held with regard to the Secretary of Agriculture's power over cooperatives;[43] and yet, the contrary was later held with regard to the Civil Aeronautics Board's power over airline routes, apparently on the theory that defining restrictive practices inevitably involved regulatory judgment.[44] Similarly, confining antitrust immunity to the narrowest scope possible underlies the recent *Carnation* case, which held that ocean-freight shippers injured by a shipping conference's illegal rate-fixing may choose between seeking damages from an antitrust court or reparations from the Federal Maritime Commission.[45] Yet the Court had held, long before, that railroad shippers did not have such an option because the Interstate Commerce Commission's authority to award reparations superseded the shipper's antitrust remedy of treble damages for a similar conspiracy among railroads.[46] Further, when the regulatory statute provides only injunctive *or* damage relief, several cases have held that the corresponding antitrust remedy alone is superseded, while the other remains available.[47] But there is at least one decision to show that the absence of regulatory remedy will sometimes be found to embody a congressional intent that no relief should be afforded under any law.[48]

Perhaps these cases may be rationalized and harmonized upon close comparative analysis of the range and comprehensiveness of the powers

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41 48 Stat. 881 (1934), as amended, 15 U.S.C. §§ 78a-u (1964).

42 373 U.S. at 364. In *Silver*, the particular act of the exchange was held subject to the antitrust laws because not shown to be within purposes of the Securities and Exchange Act, the Court relying upon the inadequacy of the procedures used by the exchange to make its determination. *Id.* at 365-66.

43 United States v. Borden Co., 308 U.S. 188 (1939).

44 Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963).

45 Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 216-18 (1966).

46 Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922). Without citing *Keogh*, one footnote in *Carnation* distinguished an important element in the earlier opinion's reasoning. *Compare* Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 219 n.3 (1966), *with* Keogh v. Chicago & N.W. Ry., 260 U.S. 156, 163 (1922).

47 *E.g.*, Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (antitrust injunctive remedy remains); Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 609 (2d Cir. 1964), *cert. dismissed*, 380 U.S. 248 (1965) (antitrust damage remedy survives); S.S.W., Inc. v. Air Transp. Ass'n, 89 U.S. App. D.C. 273, 191 F.2d 658 (1951), *cert. denied*, 343 U.S. 955 (1952) (antitrust damage remedy survives).

48 Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922); *cf.* T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959).

vested in the respective agencies, but the opinions themselves suggest that any overall rationalization is not worth the effort. The Court's basic tendency is to focus on each regulatory system, its distinct history and objectives, even its efficacy, as well as on the potential impact of overlapping antitrust jurisdiction. The Court expends little effort to show that a present result jibes with prior cases arising under other statutes, and the inevitable and excusable sleight of hand with the few rules of construction is surely not the key to the result. In short, the theme of a recent decision on a procedural point—"federal agencies are not fungibles"[49]—animates this antitrust context.

It is highly important, I believe, that the Court's approach to the merits of antitrust immunity appear pragmatic, not dogmatic. This should help divorce the vital and conflicting interests in the substantive outcome of the immunity issue from what can be a common interest in proper allocation of the power to decide it. Among many of the commentators, the tendency has been to merge these matters in the apparent belief that they are inextricable. Thus, court reference to an administrative agency has been condemned as denigrating competition, being an "abdication of judicial responsibility . . . over basic issues of national economic policy,"[50] and defended as needed "to assure that the substantive exemptions from the antitrust laws created by Congress or required by the logic and structure of the regulatory scheme are not destroyed through bypassing the forum chiefly concerned with the regulation of the industry in question."[51] It is possible, I submit, to lay aside preconceptions of result and to consider separately the allocation of the function to de-

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[49] International Union, United Auto. Workers v. Scofield, 382 U.S. 205, 210 (1965). This case dealt with intervention in the court review proceedings, but justification for applying the principle in the present context can be established by reading the opinions cited in notes 43-48 *supra*. To take as an example the *Carnation* and *Keogh* cases, one might contrast them by pointing out that the ICC, since it can set aside unreasonable rates and prescribe lawful rates, has much broader power over railroad rates than has the FMC over ocean-freight rates. Interstate Commerce Act, ch. 104 §§ 13, 15, 24 Stat. 383 (1887), as amended, 49 U.S.C. §§ 13, 15 (1964). The FMC, on the other hand, was limited until 1961 to preventing discrimination and other abuses and regulating joint action through shipping conferences. Shipping Act of 1916, ch. 451, §§ 14-17, 39 Stat. 733, as amended, 46 U.S.C. §§ 812-16 (1964). Even now, when the FMC can set aside ocean-freight rates which are "so unreasonably high or low as to be detrimental to the commerce of the United States," it has no power to prescribe such rates. Act of Oct. 3, 1961, 75 Stat. 764, as amended, 46 U.S.C. § 818 (1964). Moreover, the maritime regulatory scheme had been widely criticized for its ineffectiveness. See *Report on the Ocean Freight Industry of the Antitrust Subcommittee of the House Judiciary Committee*, H.R. REP. NO. 1419, 87th Cong., 2d Sess. (1962). In the circumstances, it is noteworthy that the Supreme Court in *Carnation* did not draw any comparison between agencies, statutes, and industries, and ignored the prior precedent in the railroad industry.

[50] Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 438, 464-71 (1954); see Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1060-61 (1964).

[51] Von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929, 932 (1954).

cide the scope of antitrust jurisdiction or immunity on neutral grounds of efficiency, convenience, and fairness.

IMMUNIZATION BY PRIOR AGENCY ACTION

So much for the resolution of the existence and scope of an antitrust immunity when it presents a statutory question. Quite a different picture is presented when the regulatory statute explicitly provides an antitrust immunity flowing from agency action—like approval of a transaction or practice—and the question is whether the agency has taken such an action. When the issue thus is the scope of a prior agency order, devotees of primary jurisdiction find themselves in quite familiar territory.

Carnation Co. v. Pacific Westbound Conference,[52] the second of the recent Supreme Court decisions, is pertinent on this point. In that case, the plaintiff sought treble damages based on an increase in shipping rates by the Pacific Westbound Conference which assertedly violated the antitrust laws. The Conference had been approved by the Maritime Commission, in an order resulting in antitrust immunity, so that its members could lawfully agree on rates.[53] The plaintiff alleged that the Conference went beyond the scope of such approval and transgressed Section 1 of the Sherman Act[54] by agreeing upon rates with persons outside their organizations, members of another conference. The Court recognized that the issue presented, whether certain "activities constituted the implementation of unapproved agreements," could properly be referred to the agency for "initial" determination to avoid "the danger of . . . a conflict" between the two tribunals.[55] The Court's test for reference to an agency

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[52] 383 U.S. 213 (1966).

[53] This procedure was authorized by the Shipping Act of 1916, ch. 451, § 15, 39 Stat. 733, as amended, 46 U.S.C. § 814 (1964).

[54] 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

[55] 383 U.S. at 220. The quoted language is set forth in the Court's gloss on two prior cases dealing with antitrust suits in the ocean-freight industry, Far East Conference v. United States, 342 U.S. 570 (1952), and United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474 (1932). While indicating the Court's present convictions, the gloss is a somewhat surprising presentation of those earlier cases. In particular, the *Cunard* case cannot be accurately described as involving the scope of a prior approved agreement, for there was apparently no approved agreement in existence to which defendant was a party. See United States Nav. Co. v. Cunard S.S. Co., 50 F.2d 83, 85, 89 (2d Cir. 1931). On its face, indeed, *Cunard* appeared to decide that the Shipping Act "supersedes the antitrust laws" to the extent that the antitrust allegations "constitute" or are "interrelated" with conduct amounting to violations of the Shipping Act. 284 U.S. at 485. From that position the Court retreated in three steps: Far East Conference v. United States, *supra*; Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958); and Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966).

As to *Far East*, the Court's gloss is accurate. The defendant conference had been approved by the agency and the issue was whether the assailed dual-rate plan was or could be within such approval. However, the rationale of *Far East* is presented in *Cunard* in a way not discernible in that decision itself. See text accompanying notes 73-75 *infra*.

of issues requiring construction of the latter's orders was whether the activity challenged in the antitrust case was "arguably lawful" under the regulatory law;[56] no reference was required if the activity was "clearly unlawful" under that law.[57] The Court ruled against reference in *Carnation* because the agency had already construed its order and had found the alleged conduct to be beyond it.[58]

The *Carnation* approach, like that of *Jewel Tea*, affirms the desirability of referring for agency determination such issues related to antitrust jurisdiction—but only such—as can be illuminated by the administrative proceeding. An agency is particularly expert in interpreting its own orders, and the primary jurisdiction doctrine would therefore lead an antitrust court to refer to it a decision upon the scope of such orders when critical to antitrust immunity. But just as no reference need be made when the agency has already decided the issue, as in *Carnation*, so also there may be other occasions when reference will be rejected because it can confidently be concluded that the agency's contribution to an understanding of its prior order would not be necessary or particularly useful. This is consistent with traditional primary jurisdiction principles. To hark back to the archetype, the ICC is the expert in construing rail tariffs but the courts have found many occasions when its specialized competence was not needed, the characteristic shibboleth being that the issue is one "solely of law."[59]

Nor is this exception a rarity in the antitrust field. Without any reference for agency determinations, courts have found either that challenged action was within a prior agency order, and hence immune from antitrust suit,[60] or that the action was plainly outside an agency order.[61] As the Second Circuit has remarked, the answer may be "no more difficult than the score of yesterday's ball game"; in those circumstances,

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[56] 383 U.S. at 222.

[57] *Id.* at 221. The Court stated that if "clearly unlawful" under the regulatory law, the challenged conduct could be subjected to antitrust sanctions which did not conflict with future administrative actions. See notes 73-85 *infra* and accompanying text.

[58] 383 U.S. at 223. Since the Court further held that the antitrust damage remedy was not superseded by the reparations remedy of the Shipping Act, it reversed the dismissal of the antitrust case. Because review of the agency order was pending in a court of appeals, the Court directed that the antitrust case be held in the district court pending the outcome of the review proceedings.

[59] See, *e.g.*, United States v. Western Pac. R.R., 352 U.S. 59, 65-66, 69 (1956); Great No. Ry. v. Merchants Elevator Co., 259 U.S. 285, 294-96 (1922).

[60] *E.g.*, McManus v. Lake Cent. Airlines, Inc., 327 F.2d 212 (2d Cir.), *cert. denied*, 377 U.S. 943 (1964); Putnam v. Air Transp. Ass'n, 112 F. Supp. 885 (S.D.N.Y. 1953); United States v. Railway Express Agency, Inc., 101 F. Supp. 1008 (D. Del. 1951); United States v. Railway Express Agency, Inc., 89 F. Supp. 981 (D. Del. 1950).

[61] River Plate & Brazil Conferences v. Pressed Steel Car Co., 227 F.2d 60 (2d Cir. 1955); Chicago & N.W. Ry. v. Peoria & P. Union Ry., 201 F. Supp. 241, 254 (S.D. Ill. 1962), *aff'd*, 319 F.2d 117, 122 (7th Cir. 1963), *cert. denied*, 375 U.S. 969 (1964).

declared Judge Lumbard, "the court can read the score as well as the Board."[62]

There is a special problem when the interpretation of an agency order resulting in antitrust immunity arises in a criminal antitrust case. An uncommon, if not unique, attempt to upset or stay an antitrust criminal prosecution pending reference of such issue to an agency was rejected without opinion in 1962.[63] Such reference might perhaps be urged on the theory that the immunity issue is a legal defense to be resolved by the court, and the judge can call upon the assistance of the agency, analogous to his use of a master.[64] Yet this logic does not seem adequate in a criminal case, in which deference to an agency would be inconsistent with constitutional due process and right to jury trial.

The inaptness of primary jurisdiction in antitrust criminal cases is supported by analogy from the regulatory field. In criminal prosecutions for violations of the Interstate Commerce Act, issues arise that are normally thought of as within the Commission's special competence, like the interpretation of the scope of an ICC certificate when the charge is operating without certificate authority. Those issues have been uniformly decided by the criminal court and jury, although in at least one case, the matter was sufficiently recondite for the prosecutor to call a member of the Commission's staff to testify as an expert witness.[65] While the issue of agency reference was not directly confronted, the precedent is persuasive.

POSSIBLE IMMUNIZATION BY FUTURE AGENCY ACTION

This brings us to what has been a most troublesome problem in this area: the situation when an agency has the power to approve and thereby immunize the conduct charged in an antitrust case, but has not considered whether to do so because the conduct was not submitted to it for approval. The leading case here is *Far East Conference v. United States*,[66] as now construed and limited—or more candidly, as renovated in the recent *Carnation* opinion.

In *Far East*, the Court directed dismissal of an antitrust suit by the

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[62] River Plate & Brazil Conferences v. Pressed Steel Car Co., 227 F.2d 60, 63 (2d Cir. 1955).

[63] United States v. North Am. Van Lines, Crim. No. 527-61, S.D. Ind., Dec. 5, 1962, *cert. denied*, No. 14075, 7th Cir., March 20, 1963.

[64] *Cf. Ex parte* Peterson, 253 U.S. 300, 310-12 (1919). *But see* La Buy v. Howes Leather Co., 352 U.S. 249 (1957).

[65] North Am. Van Lines v. United States, 243 F.2d 693 (6th Cir. 1957); see Burnham v. United States, 297 F.2d 523 (1st Cir. 1961); Hocking Valley Ry. v. United States, 210 Fed. 735, 745 (6th Cir.), *cert. denied*, 234 U.S. 757 (1914).

[66] 342 U.S. 570 (1952).

United States to enjoin the dual-rate system of maritime industry groups. Mr. Justice Frankfurter found applicable the general principle of primary jurisdiction that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over."[67] But what were the critical "issues of fact" in *Far East*? The opinion cryptically goes on to state that reference to the agency is appropriate "even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined,"[68] and that "preliminary resort" for use of the agency's "specialization, insight and more flexible procedure" is desirable for "ascertaining the circumstances underlying legal issues."[69] These vague and sweeping statements could almost be taken as a mandate to require an agency proceeding whenever complicated industry facts are relevant or useful background for the court.[70]

The actual holding in *Far East* is more modest, of course. Mr. Justice Frankfurter's only allusion to a factual issue is to the complex of "intricate and technical facts" about industry and competitive conditions which are relevant to an agency determination "whether a given agreement . . . should be held to contravene the [Shipping] [A]ct."[71] This is evidently the issue for which agency jurisdiction was invoked. It seems clear that the Court wanted to see if the particular arrangement in *Far East* would be approved by the agency and thereby exempted from antitrust attack; if not, an antitrust suit would then be "appropriate."[72]

Carnation's restatement of the *Far East* rationale stresses two points. First, it is said, an issue in *Far East* was whether the dual-rate arrangement was valid as the "implementation" of an "approved agreement," *i.e.*, within the scope of the Commission's prior order authorizing establishment of the Conference, and there was real risk of conflict with the agency's view of its prior order. Second, *Carnation* states that *Far East* was a suit for an unconditional injunction against dual rates, and such an order would hamper the Commission's exercise of its undoubted power "to approve the prospective implementation of those agreements." The

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[67] *Id.* at 574.

[68] *Ibid.*

[69] 342 U.S. at 574-75.

[70] Some subsequent comments and lower-court decisions have come fearfully close to accepting such a mandate. See 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 19.01 (1958). See also Maddock & Miller, Inc. v. United States Lines, 365 F.2d 98 (2d Cir. 1966).

[71] 342 U.S. at 573-74.

[72] Since Mr. Justice Frankfurter stated that an antitrust suit might be commenced after completion of the agency proceeding, "if appropriate," he plainly did not accept the notion that the antitrust remedies were superseded by those of the Shipping Act, despite his reliance upon the earlier *Cunard* case. See note 54 *supra*.

Court decided *Far East* as it did, we are told, to avoid those two sources of conflict.[73]

It is of only passing interest that this rationale is not expressed in *Far East* itself. The significant and, we may hope, lasting impact of *Carnation* is that it should remove the hazard that *Far East* might be applied as a generalized instruction to obtain an agency's expert view of facts, without any close analysis of the issues relevant to antitrust immunity upon which agency advice is useful.

Concerning *Carnation*'s elucidation, the first point noted was the problem of interpreting a prior agency order. In *Far East*, there was, indeed, such a prior order, but Mr. Justice Frankfurter did not advert to it and asserted only the prospect of later agency action. Responsive to that is the second point in *Carnation*'s rationale—the avoidance of conflict with potential future agency approval of the conduct challenged. As *Carnation* makes clear,[74] this presents a problem peculiar to injunction actions; after all, the prospect of *future* agency approval is irrelevant to criminal prosecutions or to damage suits, which are directed only at past events. Even as so limited, however, the authority of *Far East* is of doubtful merit.

There is clearly no need for a federal court to withhold antitrust jurisdiction in an injunction suit because of the possibility of future agency action. Language in *Carnation* suggests that it would be proper for a court to take the statutory immunity provision literally, and to rule that until agency approval is obtained, the transaction is fully subject to the antitrust laws.[75] If illegal conduct is found, therefore, the court can assert its authority to enjoin the conduct as in any other antitrust case. And it can easily avoid any hazard of conflict with the agency by formulating an injunction aimed only at unapproved conduct, leaving the agency entirely free to exercise its powers.[76]

An interesting illustration of how this could be done is provided by

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[73] 383 U.S. at 220-24.

[74] *Id.* at 219, 222. Of course, there is also no potential conflict between antitrust and regulatory sanctions when the court finds that the regulatory remedies for past action are so comprehensive that they supersede the antitrust injunction. *Carnation* clearly overrules United States v. Alaska S.S. Co., 110 F. Supp. 104 (W.D. Wash. 1952), in which a criminal antitrust case was dismissed either on the theory that *Cunard* held the antitrust laws entirely superseded by the Shipping Act, or on the theory that *Far East* requires preliminary agency scrutiny.

[75] "The creation of an antitrust exemption for rate-making activities which are lawful under the Shipping Act [*i.e.*, because approved by the Commission] implies that unlawful [*i.e.*, unapproved] rate-making activities are not exempt." 383 U.S. at 216-17. See also *id.* at 219, 222.

[76] This course was suggested in the Government's brief in the *Far East* case. Brief for Government, p. 29 n.14, citing United States v. Terminal R.R. Ass'n, 224 U.S. 383, 412 (1912).

another bit of ICC history, dealing with antitrust immunity for Commission-approved railroad mergers. Since 1920, a railroad merger could be submitted for ICC approval and thereby immunized from the antitrust laws,[77] but until 1933, the railroads did not have to obtain Commission approval.[78] They could merge without it and take their chances under the antitrust laws. During this period the Commission itself brought a number of administrative proceedings against unapproved railroad mergers on the ground that they violated the Clayton Act, which vests concurrent enforcement authority in the Department of Justice and in a number of agencies.[79] In those cases, the Commission applied a purely antitrust standard to the unapproved mergers, and directed divestiture even though the transaction could at any time have been presented to it for approval under a public-interest standard.[80] In one case, indeed the Commission refused to stay the antitrust proceeding pending determination of a belatedly filed application for regulatory authorization.[81]

There is a good reason for an antitrust court to act in the same way. By doing so, it will avoid the curious position of requiring an agency to consider the propriety of an arrangement entered into by parties who were reluctant to voluntarily invoke that agency's jurisdiction. The court will also avoid having to determine, before reference to the agency, whether to decide upon the scope of the agency's power to approve the challenged conduct. After all, it would be argued, the statutory reach of the agency's power is susceptible to judicial resolution and it is futile to send to an agency for a public-interest determination an agreement not truly open to such determination.[82]

The difficulties of premature consideration of the scope of the regulatory authority are illustrated forcibly by the *Far East* situation itself. The very matter, which it then referred to the Maritime Commission, the Court held six years later, in *Federal Maritime Bd. v. Isbrandtsen Co.*,[83] to be outside the agency's power of approval. And the writer of the *Far*

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[77] Transportation Act of 1920, ch. 91, § 407(8), 41 Stat. 482, as amended, 49 U.S.C. § 5(11) (1964).

[78] Emergency Railroad Transportation Act, ch. 91, § 202(11), 48 Stat. 219 (1933) (now 54 Stat. 905 (1940), as amended, 49 U.S.C. § 5(2) (1964)).

[79] Section 11, 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (1964).

[80] Pennsylvania R.R., 169 I.C.C. 618, 642 (1930), *rev'd on other grounds*, 66 F.2d 37 (3d Cir. 1933); Baltimore & O.R.R., 160 I.C.C. 785, 791 (1930); Baltimore & O.R.R., 152 I.C.C. 721, 723 (1929).

[81] Baltimore & O.R.R., 160 I.C.C. 785, 791 (1930).

[82] On the other hand, it would be argued that the court should seek the agency's ruling under the regulatory law without itself first construing that law, because the agency proceeding would contribute to the court's understanding of the statutory problem. A strong agency approval of the particular transaction in the public interest would go far to show that the power to approve should exist.

[83] 356 U.S. 481 (1958).

East opinion, Mr. Justice Frankfurter, dissenting in *Isbrandtsen*, complained that *Far East* must have been an adjudication of the agency's power, and that the issue should not have been sent to the agency if the result was a legal rule deducible from the statutory language.[84]

Paradoxically, this embarrassing conflict of court and agency was caused not by the Supreme Court's arrogation of authority, but by its premature self-denial of antitrust jurisdiction in *Far East.* If the Court would consider that the antitrust laws generally reached unapproved agreements, then it would not get enmeshed in premature scrutiny of the agency's approval power in hypothetical situations. That issue would be left to appellate review of the agency's determination in an approval proceeding, initiated in the usual course by the regulated firm.

CONCLUSION

The modest objective of this paper was to examine the obscurity shrouding the application of primary jurisdiction principles in the antitrust field, and the allegedly hopeful signs. We have at the least plumbed the potentialities for obscurity. What could be more confusing, and misleading, than the idea that a consideration of primary jurisdiction somehow is a modest alternative to deciding whether antitrust jurisdiction exists, rather than a means of making such a decision, and that acceding to an agency's primary jurisdiction is meaningful and feasible after antitrust jurisdiction has been held unimpaired by the regulatory statute?[85] What could be more unnecessarily burdensome to litigants than directing them to forego prompt judicial resolution of the issue of antitrust jurisdiction, and instead to undergo an administrative proceeding in order to develop facts which are not plainly relevant to that issue?[86] *Jewel Tea* and *Carnation* should bring to an end these distressing intimations, and should commence the development of a rationale for primary jurisdiction in this context. Much attention has been paid to the substantive job of drawing sensible lines of separation between the antitrust and regulatory spheres, statute by statute. It is significant and useful that the Supreme Court is also addressing itself to a prior task, which is to make a clear and sensible allocation between court and agency of the power to decide the scope of antitrust jurisdiction.

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[84] *Id.* at 517-22. It is highly significant that Mr. Justice Frankfurter's observation on this point in his *Isbrandtsen* dissent is quoted in *Jewel Tea* in elaboration of the declaration that primary jurisdiction "is not a doctrine of futility." 381 U.S. at 686. The Justice's exasperation may have been warranted by the fact that in *Far East* the scope of the agency's authority had been canvassed by the parties and controverted by the dissent, 342 U.S. at 578-79, although it had not been discussed at all in his majority opinion.

[85] See United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[86] See Far East Conference v. United States, 372 U.S. 570 (1952).

COMMENT

GOVERNMENT CONTRACTS: APPARENT AUTHORITY AND ESTOPPEL

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AND
THOMAS L. DUNIGAN**

This brief comment is devoted to a consideration of the judicial unwillingness to apply the doctrines of apparent authority and estoppel to the acts of contract-making agents of the federal government. No attempt has been made to speak extensively on all the cases. Instead, we have summarized the ordinary agency rules, analyzed in short fashion some of the more striking and important federal judicial decisions on contracting agents of the United States Government, and then essayed an ameliorative suggestion.

INTRODUCTION

The survival of eighteenth century ideals of government is not, of course, always a matter for disparagement. Often it is a matter for positive congratulation that such ideas have proved themselves over so long a time. The very continued existence of the Constitution as the chief plan for organization of the central government is a thing of this sort.

Modified in only a few particulars, the first three articles of the Constitution endure to this day as a testament to the planning ability of our eighteenth-century founders, bearing witness to their ability to accomplish one of the essential acts of statecraft: to create a strong government apparatus without at the same time burdening it with an over-close statement of functions and powers, in other words, to build a strong engine with loosely turning parts. It is one of the facts about the central government that much of the engineering which was to provide for its articulation was left to future generations. We think it may fairly be said that what was left to future generations in the way of making the Constitution work could also be modified by them in order to achieve better efficiency. What is "better" in this context of political efficiency is something for the generations to judge, but it is always *apropos* to address criticism and make suggestions. This article addresses itself to one of these areas of articulation of the parts of the Constitution which the

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founders and draftsmen evidently left to the future: the rules which were to be followed with respect to the authority of contract-making agents of the United States Government. Specifically this article addresses itself to the question of whether the rules followed with respect to the authority of contract-making agents of the United States ought to be changed in the interest of better operation.

A SHORT RESTATEMENT OF THE RULES ON AUTHORITY OF CONTRACT-MAKING AGENTS

To one used to the ordinary rules of agency, that is to the ability of an agent to make a contract or to take contract-related actions which will bind his principal, the rules applicable to the contract-making agents of the federal government are quite unusual. In this short summary of those ordinary rules, the *Restatement of Agency, Second* will be used as guide because of its fairly general acceptance as a good presentation of the judicially developed rules commonly regarded as the "law of agency."

Generally, although not always, when we discuss the authority of agents, we are talking about contract-making or contract-related actions, and we are concerned primarily with acts which affect the business relationships between a person or organization called the "principal" and another party. "Contract making" is self-explanatory. By "contract related actions" we mean all those that bear upon the administration and termination of contracts, including, for example, the acceptance of deliveries, issuance of receipts, making of payments, negotiation of prices, and conclusion of settlements.

The point about the relationship between principal and agent and, indeed, the very reason for the relationship, is that on some occasions the agent's act will have binding legal effect on the principal, that is, be judicially enforceable against the principal. Thus, a principal employs or retains an agent for the purpose of producing such effects, and is said to "authorize" him to do so. As the *Restatement* puts it: "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestation of consent to him."[1] In ordinary parlance, such authority is said to be "actual"[2] as distinguished from what is called "apparent" authority.

Actual authority may be variously manifested.[3] For example, it may be said to be "express" or "implied," but the mainstay is that the author-

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[1] RESTATEMENT (SECOND), AGENCY § 7 (1958).

[2] This appears to be the normal usage although the *Restatement* does not appear to use the phrase "actual authority." For an example of this usage see LATTY & FRAMPTON, BASIC BUSINESS ASSOCIATIONS 240 (1963).

[3] RESTATEMENT (SECOND), AGENCY § 7, comments *b*, *c* (1958); *cf.* RESTATEMENT (SECOND), AGENCY § 26 (1958).

ity has been conveyed to the agent by *some* manifestation of authority passing from the principal to the agent. It is of no moment that persons dealing with the agent are unaware of, or are not induced to act by the authority transmitted by principal to agent.[4]

Binding legal effect may also be given to the acts of an agent in some cases where actual authority is not present. This is true in situations in which the agent is said to have "apparent" authority.[5] In these situations the manifestations of authority are again important. It is necessary, however, to notice that here the manifestations run from the principal to a third party rather than to the agent himself. This communication can be accomplished in a variety of ways.[6] Unlike the case of actual authority, the reception by the third party of this communication is significant —the third party must actually believe that the agent is authorized and such belief must be reasonable.[7] It should be stressed that where binding legal relations are premised on apparent authority, the agent need not have actual authority.[8]

A most important exchange of terminology sometimes occurs in ordinary usage, converting the term "apparent authority" into "estoppel" or using the two as alternatives. Yet technically, there is a difference between the two. As described in the *Restatement*,[9] the apparent-authority doctrines are based upon the contractual premise that one should be bound by what he says and what people hear rather than what he may intend, if that differs. Estoppel, used here in the limited sense of estoppel in pais or equitable estoppel, is directed at the prevention of loss to innocent persons.[10] Its enforcement depends not only upon manifestation to third persons, and in their reasonable reliance thereon, but also upon their change of position such that it would be unjust for the principal to go back on his manifestation.[11] Also, apparent-authority theories permit the principal to sue the third party, whereas estoppel is not thought to convey contract rights to the principal capable of affirmative

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[4] *Id.* § 7, comment *d*.

[5] The *Restatement* defines apparent authority as "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." *Id.* § 8. The *Restatement* also notes that apparent authority is often called "ostensible" authority by the courts. *Id.* § 8, comments *e*, *f*.

[6] The *Restatement* states that the manifestations of apparent authority "may be made directly to a third person, or may be made to the community, by signs, by advertising, by authorizing the agent to state that he is authorized, or by continuously employing the agent." *Id.* § 8, comment *b*.

[7] *Id.* § 8, comment *c*.

[8] *Id.* § 159, comment *c*; *id.* § 292, comment *a*.

[9] *Id.* § 8, comment *d*.

[10] *Id.* § 8B.

[11] *Id.* § 8, comment *d*. This comment distinguishes "apparent authority" from "estoppel."

assertion.[12] Despite the technical differences, "apparent authority" and "estoppel" are often found in a case side by side, so that liability of a principal can be based on either or both principles.[13]

The *Restatement* suggests that the theory of inherent agency power may be an additional justification for the imposition of liability upon a principal for the contract-making or contract-related actions of his agent.[14] Yet inherent agency power seems to be rather more a label for a conclusion than a rationalization, and it does not yet appear to have any currency in government contract cases.[15]

A SUMMARY OF THE RULES IN GOVERNMENT AGENT CASES

Whatever sort of case can be made for the unusual rules governing when a government agent's contract-making or contract-related actions impose legally binding relationships on the Government, it is clear that those rules have a judicial origin. Speculatively, at least, it is possible to point out some of the underlying factors which led the judiciary to state its ideas on the role of agency in government contract law in the unusual form they have taken. We suspect that at least the following factors must have been active in the background.

The first is the notion that the nature of the central government requires protection against the self-interest motivation and superior business acuity of its citizens. In addition, there is a suspicion that a particular agent of the Government may be negligent or even indifferent toward his responsibility to act in the best interest of the Government. The concern is that the resources of the Treasury, created from the tax contributions of the entire citizenry, should not suffer from the shrewd efforts of citizen-contractors or from the indifference of government agents.[16] An effort is made to guard against this possibility by defining functions and duties; in other words, by structuring and limiting authority. Thus it is often the case that strict authority limitations have been exceeded. The judiciary completes the rationale by a nearly blanket de-

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[12] *Id.* § 8B, comment *b*.

[13] *Id.* § 8, comment *d*.

[14] *Id.* § 8A.

[15] The reporter for the RESTATEMENT (SECOND), AGENCY (1958), Professor Warren Seavey acknowledged that the concept of inherent agency power has not gained much acceptance by the courts. SEAVEY, AGENCY 16 (1964).

[16] See Whiteside v. United States, 93 U.S. 247 (1876), in which the Court stated:

> Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment or injury of the public.

Id. at 257.

nial of responsibility on the part of the Government.[17] The functional relevance of this important protection-of-the-Treasury notion is not to be destroyed by the inflexibility of the unusual rules reflecting it, but is a consideration to be taken into account in formulating any new rule in this regard.

The second factor is the idea of constitutional symmetry, namely, that the Constitution must be viewed as a delegation of power by the states, and that all powers created under it, whether by statute or executive regulation must be viewed as delegations which have to be interpreted strictly so that the balance of powers among the central and local governments can be maintained. This could be said in another way: Because all powers of the federal government are delegated, they must be closely confined so that the residuum of power in the states and the people will be left intact.[18] Needless to say an emphasis on this outlook is somewhat old-fashioned.

The third and final factor is an ideal of intra-government distribution of power: where Congress has laid down restrictions on government action[19] or governmental spending,[20] those restrictions should never be transgressed by the executive, at least where judicial measures could control the transgression. Otherwise, the distribution of power among the three branches provided in the Constitution could to some extent be frustrated by executive insouciance in erecting facades of authority behind which to take forbidden action or spend forbidden funds.

We have spoken of the judicially articulated ideas on the authority

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[17] See, *e.g.*, Lee v. Monroe, 11 U.S. (7 Cranch) 366 (1813); United States v. Zenith-Godley Co., 180 F. Supp. 611 (S.D.N.Y. 1960), *aff'd*, 295 F.2d 634 (2d Cir. 1961).

[18] See U.S. CONST. amends. IX, X. This is developed in The Floyd Acceptances, 74 U.S. (7 Wall.) 666, 676-77 (1868).

[19] For example, 10 U.S.C. § 2313(b) (1964) requires, in effect, that certain contracts made by agencies contracting under the Armed Services Procurement Act include the so-called "examination of records" clause authorizing the Comptroller General to examine books, records, and papers of contractors and subcontractors. For text of the required clause see Armed Services Procurement Regulation (ASPR) 7-104.15, 32 C.F.R. § 7.104-15 (1966). It would be an important interference, indeed, with separation of powers if apparent authority or estoppel techniques were employed to justify a contractual undertaking by an agent of the United States that this clause were not to apply. What the result ought to be if the parties should negligently omit the clause, or mistakenly conclude that the clause is not required in a given case, is another question. The famous *Christian* decision, reading a regulation-required clause into a contract from which it was omitted, may furnish the solution. G. L. Christian & Associates v. United States, 160 Ct. Cl. 1, 312 F.2d 418, *cert. denied*, 375 U.S. 954 (1963).

[20] For example, § 623 of the Department of Defense Appropriation Act of 1967, Pub. L. No. 89-687, 80 Stat. 995 (1966), provides that no part of the appropriated funds may be used to purchase certain types of goods not grown, reprocessed, reused, or produced in the United States. There is, however, a proviso which allows foreign purchases after certain factual determinations of unavailability or emergency are made by the Secretary of the Department of Defense. Likewise, § 634 of the same act prohibits the Department of Defense from paying advertising expenses of government contractors, except in certain circumstances which are to be defined by regulations promulgated by the Department of Defense. 80 Stat. 997 (1966).

of government contract-making agents; it is now pertinent to explore them briefly. We must begin with an analysis of *Federal Crop Ins. Corp. v. Merrill*,[21] a decision which originated in a program of the Federal Crop Insurance Corporation (FCIC) for the insurance of wheat crop growers against loss in yields caused by unavoidable misfortunes such as drought. The program was based on statutory authorization[22] and implementing regulations carried in the *Federal Register*.[23] After the issuance of the regulations, the Merrills applied for a wheat crop insurance policy from the FCIC. The application was addressed to the Bonneville (Idaho) County Agricultural Conservation Committee, local agent for the FCIC. Disclosure was made, although not on the *formal* application, that a principal part of the acreage sought to be covered by the insurance was reseeded winter wheat acreage. The County Committee advised the Merrills that the entire crop was insurable and passed the insurance application on to the Denver branch office of the FCIC with a recommendation for acceptance, which was duly made. Shortly thereafter, the entire crop was destroyed by drought, and the Merrills sought recovery under their policy. Recovery was resisted by the FCIC on the ground that the Wheat Crop Insurance Regulations precluded insurance for reseeded wheat. Although the regulations did contain such provision,[24] the Merrills were able on trial[25] to introduce evidence that they did not have actual knowledge of this provision in the regulations. In addition they were permitted to show that they had been misled by the County Committee into believing that insurance was available for the reseeded wheat. The jury found for the Merrills on the whole loss, including the reseeded wheat, and the Supreme Court of Idaho upheld the resulting judgment for the Merrills.[26] As pointed out by the United States Supreme Court, the premise for the decision was "that since the knowledge of the agent of a private insurance company, under the circumstances of this case, would be attributed to, and thereby bind, a private insurance company, the Corporation is equally bound."[27]

The important issues before the Supreme Court were the notice issue (whether notice of the reseeding to the County Committee amounted to notice to the FCIC) and the estoppel issue (whether the FCIC was

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[21] 332 U.S. 380 (1947).

[22] Federal Crop Insurance Act, 52 Stat. 72 (1938), as amended, 61 Stat. 719 (1947), 7 U.S.C. §§ 1501-19 (1964).

[23] Wheat Crop Insurance Regulations §§ 414.1-.45, 10 Fed. Reg. 1586 (1945).

[24] Section 414.1(a), 10 Fed. Reg. 1586 (1945); § 414.37(v), 10 Fed. Reg. 1591 (1945).

[25] The case originated in the Idaho courts, pursuant to §§ 506(d) and 508(c) of the Federal Crop Insurance Act, 52 Stat. 73 (1938), as amended, 7 U.S.C. §§ 1506(d), 1508(c) (1964).

[26] Merrill v. Federal Crop Ins. Corp., 67 Idaho 196, 174 P.2d 834 (1946).

[27] 332 U.S. at 383.

estopped to deny liability on the policy).[28] The Court's resolution was oblique but decisive,[29] recognizing that the Government was to be treated, for the purpose of applying the rules of agency, differently than a private enterprise,[30] and stating:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.[31]

In other words, whatever the private, commercial agency principles might be and however they would operate in a situation such as this, they are inapplicable in a case involving the Government. In the government-agent cases there is an entirely different rule: the citizen must determine the permissible range of authority.

In the *Merrill* case, Congress had chosen to entrust the function of defining the multitudinous details of the insurance program to the FCIC. Thus, the authority limitations were in the agency regulations issued under its rulemaking power and published in the *Federal Register*. As the Court noted, these regulations were effective as limitations and were binding on those seeking to deal under the act. Further, there was legal notice as to their content. On this matter, the Court simply pointed out the legal-notice-as-knowledge portions of the Federal Register Act[32] pursuant to which the Wheat Crop Insurance Regulations had been published.[33]

One thing seems clear: Although the arguments dealt in apparent authority and estoppel, the Supreme Court did not do so. The Court, nonetheless, seems to presume that one cannot go outside of the borders of actual authority to find the Government bound by the contract-making act of its agent. Its comments seem to indicate that it might assume that an estoppel could not be made out against the Government. But, even so, the Court's own language appears to dissipate one of the essen-

[28] See the summaries of briefs, 92 L. Ed. 10, 11-13. An interesting sidelight is thrown on the case by the fact that A. A. Merrill of Idaho Falls, Idaho, argued the case for the respondents in the Supreme Court. A. A. Merrill was also the name of one of the respondents-plaintiffs. Whether this fact had any ponderable weight in the mind of the Court in scrutinizing issues such as legal notice through the *Federal Register* is impossible to state, but not impossible to infer.

[29] 332 U.S. at 383-84.

[30] *Id.* at 383.

[31] *Id.* at 384.

[32] Section 7, 49 Stat. 502 (1935), 44 U.S.C. § 307 (1964).

[33] *Id.* at 385.

tial bases for an estoppel, that the claimant be deemed, for legally supportable reasons, to have been misled. Publication of the regulations in the *Federal Register* seems to destroy the otherwise estoppel-creating effect of the County Committee's knowledge and the Denver branch office's acceptance. Whether the case would have been as strong in favor of the Government without the *Federal Register* publication is an interesting question. Certainly, presence or absence of publication in the *Federal Register* seems to have been regarded as unimportant in *Newman v. United States*,[34] a subsequent case in the Court of Claims.

In the *Newman* case, the plaintiff agreed with certain government transportation officials to haul aviation gasoline at rates equivalent to current rail rates. However, temporary tariffs filed by government agents in Newman's behalf with the Interstate Commerce Commission mistakenly specified rates lower than rail rates. Plaintiff later secured a permanent tariff at the same rates. In a suit against the United States to recover the difference between the amounts paid to him and amounts equivalent to rail rates, plaintiff contended that the original agreement reached with the government transportation officials governed.

The Court of Claims ruled that the agreement reached between these parties was not binding on the Government and thus plaintiff was not entitled to be paid at the rail rates. The court concluded that Army Regulation 55-105 gave "final responsibility" on the matter of rates to the Chief of Transportation of the Army;[35] accordingly the representatives present at the meeting had only a limited authority allowing them to enter into a merely temporary agreement on this subject. Plaintiff, by filing the permanent tariff at the lower rates, was considered to have agreed to them.[36]

Newman claimed to have no knowledge of the regulation, but the court stated: "this is immaterial because it is settled that he who enters into an agreement with the Government takes the risk that those who purport to act for the Government have the authority to do so."[37]

Although it is not stated in the opinion, it would seem that the Army regulation in question was not generally available or published in the *Federal Register*.[38] It is interesting to note that the *Newman* court re-

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[34] 133 Ct. Cl. 429, 135 F. Supp. 953 (1955).

[35] *Id.* at 437, 135 F. Supp. at 957.

[36] *Id.* at 439, 135 F. Supp. at 958.

[37] *Id.* at 438, 135 F. Supp. at 957, citing Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); Whiteside v. United States, 93 U.S. 247 (1876).

[38] A brief search has failed to uncover whether the cited Army regulation had been published in the *Federal Register*. As a practical matter it seems unclear what criteria are used to determine whether such regulations are to be published in the *Federal Register*. Some such regulations have been published, but the authors suspect that the vast bulk are not. Procure-

lied on *Merrill* and *Whiteside v. United States*.[39] In *Merrill*, of course, the regulation limiting the authority of the government agent was published in the *Federal Register* which, practically speaking, made it readily available to those seeking to deal with FCIC. In the *Whiteside* case, however, the regulations issued by Secretary of the Treasury, which limited the authority of the Secretary's special agents, were not published for general public reference.[40] Nevertheless they served as the basis for denying government contractual liability.

Certainly it would seem that the ready availability for general public reference of executive regulations or, indeed, the fact of constructive notice through publication in the *Federal Register* are not controlling or even important considerations in the resolution of these cases.[41] Rather it is the imposition of the duty, or the passing of the risk to the contractor, to identify the limitation on an agent's authority, in which the feasibility of meeting this burden is not a factor the courts consider. In practical terms, of course, this means that the agent must actually have authority to perform the particular act in question in order to obligate the Government. This is so whether the contractor or the agent himself knows the limitations or is able to determine them. Whatever inferences may be made from the *Newman* decision, it is clear that the *Merrill* case has been relied on as holding that apparent authority will not apply nor estoppel lie against the United States,[42] and is often referred to among the bar as absolute authority to that effect.

Presumably, all the citizens of the Republic know the contents of the public laws,[43] and this means that they are charged with accepting the consequences of application of those laws. But how does this apply

ment regulations, on the other hand, are regularly published in 32 C.F.R. (ASPR) and 41 C.F.R. (FPR).

[39] 93 U.S. 247 (1876).

[40] The regulations were issued pursuant to the Captured and Abandoned Property Act, ch. 120, 12 Stat. 820 (1863).

[41] *But see* Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963); Prestex Inc., 61-1 B.C.A. ¶ 2937 (ASBCA 1961).

[42] See United States v. Zenith-Godley Co., 180 F. Supp. 611 (S.D.N.Y. 1960), *aff'd*, 295 F.2d 634 (2d Cir. 1961). Both opinions are worth reading on the apparent authority and estoppel question. See Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963); Fansteel Metallurgical Corp. v. United States, 145 Ct. Cl. 496, 172 F. Supp. 268 (1959); Johnson, Drake & Piper, Inc., 65-2 B.C.A. ¶ 4868 (ASBCA 1965); Prestex Inc., 61-1 B.C.A. ¶ 2937 (ASBCA 1961); Pierce-Rodolph Storage Co., 58-1 B.C.A. ¶ 1605 (ASBCA 1958).

To the authors, one of the most forceful statements of the no-estoppel-against-the-Government thesis remains Utah Power & Light Co. v. United States, 243 U.S. 389, 408-09 (1917), even though it did not involve contract-making or contract-related actions. See Pine River Logging Co. v. United States, 186 U.S. 279, 291 (1902).

[43] See Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947). It is astonishing how little rationalization is devoted to this seemingly fundamental proposition in this or other cases. Apparently the proposition is regarded as axiomatic, although considering the number of statutes in existence, this may at best be dubiously fair.

in a case where an agent of the United States seeks to bind the Government to an agreement which is found, on later review, to be in violation of the law? Suppose, for example, the executive officers who represent the United States in carrying out a program interpret the law in a way which seems reasonable and then promulgate regulations which reflect their understanding. Should a citizen who makes a contract in reliance thereon be required to return to the Government sums he has received when judicial review results in the conclusion that the executive officers were wrong and payments to the contractor unauthorized by the statute? Of course, disposition of the property, including the money, of the United States is subject to congressional authorization,[44] but are reasonable reliances to be prejudiced by hindsight declarations as to the congressional mandate? *United States v. Zenith-Godley Co.*[45] seems to stand for the position that the citizen-contractor must make repayment. Obviously, if this position is right, cases involving contractors' claims for payments asserted to be due stand, as the *Merrill* case suggests, on the same footing.[46]

The question involved appears to be whether good-faith reliance on official conduct is to be upheld.[47] But underlying the good-faith reliance question is another: can the officials of the executive branch extend congressional authorization beyond its intended scope? In a clear case, we can undoubtedly answer that such officials cannot extend congressional authorization because of the obvious relevance of the ideal of separation of powers. But where the statute is not clear and the executive officers make what appears to be a reasonable interpretation, we must also ask whether the good-faith reliance by the citizen should be overcome by

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[44] U.S. CONST. art. IV, § 3; Royal Indem. Co. v. United States, 313 U.S. 289 (1941); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1935); Stone v. United States, 286 F.2d 56 (8th Cir. 1961); Fansteel Metallurgical Corp. v. United States, 145 Ct. Cl. 496, 172 F. Supp. 268 (1959).

[45] 295 F.2d 634 (2d Cir. 1961), *affirming* 180 F. Supp. 611 (S.D.N.Y. 1960).

[46] See, *e.g.*, Hawkins v. United States, 96 U.S. 689 (1877); United States v. Willis, 164 F.2d 453 (4th Cir. 1947); Byrne Organization, Inc. v. United States, 287 F.2d 582 (Ct. Cl. 1961). *But see* Carrier Corp. v. United States, 328 F.2d 328 (Ct. Cl. 1964).

[47] See Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374 (1953).

A somewhat similar question was involved in the famous United States v. Mississippi Valley Generating Co. (Dixon-Yates), 364 U.S. 520 (1961). Adolphe Wenzell, the key figure in the case, acted for the Government while at the same time retaining a position with a firm which could take advantage from the work Wenzell was doing for the Government. Wenzell's superiors in the Bureau of the Budget knew, and to a limited extent, approved of his dual position; nonetheless he was regarded by the Supreme Court as covered by Act of June 25, 1948, ch. 645, § 434, 62 Stat. 703 (one of the conflict-of-interest statutes). 364 U.S. at 541-43, 561-62.

conflicting views taken by judicial and accounting[48] officers on an after-the-fact basis.

Zenith-Godley attempts to draw a rather absolute line. In this case, the Agricultural Act of 1949[49] authorized a price-support program for farm commodities, including milk, butterfat, and the products of milk and butterfat. The statute provided that: "[S]uch price support shall be provided through loans on, or purchases of, the products of milk and butterfat."[50] Under the authority of the act, the Department of Agriculture set up a program, governed by complex regulations, whereby butter handlers could sell and ship butter to the Commodity Credit Corporation (CCC) at one price and then repurchase the same or similar butter later at a lower price.

In March 1954, seeking apparently to promote everyone's convenience, the Department changed the procedure so that the butter did not have to be shipped to the CCC, allowing the butter handlers to sell and repurchase their product without shipment. As the district court later ruled, this was really a "paper transaction, which resulted in the Government owing the butter handlers 3 cents on every pound of butter 'sold'."[51] The Comptroller General held that these transactions under the 1954 procedure were not "purchases" and hence payments made were unauthorized,[52] and the Department of Justice demanded repayment. The result was litigation in the Southern District of New York in which Zenith-Godley and other recipients were ultimately ordered to repay price-support payments they had received.[53] In his opinion the district judge observed that, even though the recipients *might* have made out a good estoppel by reason of their detrimental reliance in being forced to forego the pre-1954 price-support procedure, the rules of estoppel and apparent authority do not apply against the United States.[54] The *Merrill* case was cited for support of this proposition,[55] but the District Judge went further and stated that *Merrill* "stands also, and perhaps most basically, for the proposition that the burden is on him who deals with the government accurately to discover the scope of statutes and regulations."[56]

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[48] See, *e.g.*, 42 DECS. COMP. GEN. 124, 136-39 (1962); 40 DECS. COMP. GEN. 679, 682-83 (1961); 39 DECS. COMP. GEN. 473, 477 (1959); 38 DECS. COMP. GEN. 38, 42-43 (1958); 34 DECS. COMP. GEN. 280 (1954).

[49] 63 Stat. 1051, as amended (codified in scattered sections of 7 U.S.C.).

[50] Ch. 792, § 201(c), 63 Stat. 1053 (1949).

[51] 180 F. Supp. at 613.

[52] *Ibid.*

[53] 295 F.2d at 634.

[54] 180 F. Supp. at 615-16.

[55] *Id.* at 615.

[56] *Id.* at 616.

The case was taken before the Court of Appeals for the Second Circuit which affirmed *per curiam*.[57] The defendants attempted to distinguish their situation from that presented in *Merrill* on the grounds that in their case they had foregone a valid price-support program in reliance on the new regulations, while the plaintiffs in *Merrill* had no alternative means by which they could have insured their crops.[58] The court rejected this, stating: "The appellants misread the holding in the Merrill case. That holding was based, not upon the absence of reliance, but upon the ground that the Government is not bound by the unauthorized acts of its agent even if within the scope of the agent's apparent authority."[59]

That there may often be more fundamental issues at stake than merely the rationalization of apparent authority and estoppel doctrines is attested to by the somewhat parallel line of problems arising in the cases involving the expenditure of appropriations. In these cases, there is present the policy conflict between a possible executive extension of congressionally delegated power and the innocent citizen dealing with an agency exercising what appears to be its reasonable range of authority. Should the citizen be given some protection? If so, to what extent? The resolution of this policy problem in the appropriations situation is more easily seen than in a case like *Zenith-Godley*. The congressional prohibitions pertaining to appropriations are, however, clearly expressed.

The Constitution, in the "purse strings" clause provides: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . . ."[60] This seems to be a clear operational prohibition. Those who write checks for the United States or otherwise expend its funds may not use Treasury funds unless Congress has, by law, authorized such withdrawal. Such laws would seem, incidentally, to require presidential consent. Clearly, also, if a contract-making agent[61] of the United States makes a contract either in the absence of funds or in excess of those available by appropriation act, the only funds which may be spent on the contract are those made available by the act.[62] The contract-maker may also be liable to criminal or disciplinary action.[63] But none of this says anything conclusive about the *effectiveness* of a legal obligation of the contract made, apart from the availability of funds to make any payment thereon.

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57 United States v. Zenith-Godley Co., 295 F.2d 634 (2d Cir. 1961).

58 *Id.* at 635.

59 *Ibid.*

60 U.S. CONST. art. I, § 9, cl. 7.

61 See generally Whelan, *Purse Strings, Payments and Procurement*, 1964 PUB. L. 322.

62 U.S. CONST. art. I, § 9, cl. 7. See Anti-Deficiency Act, REV. STAT. § 3679 (1875), as amended, 31 U.S.C. § 665(a) (1964).

63 REV. STAT. § 3679 (1875), as amended, 31 U.S.C. § 665(i) (1964).

The answer may be found in Section 3732 of the *Revised Statutes*:

> No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.[64]

It would seem a direct inference that contracts made in violation of the proscription of section 3732 are invalid, and this conclusion does not seem to draw any of its strength from rules that apparent authority and estoppel do not apply against the United States. In fact, the cases seem pretty much to follow this line, even though they speak of "authority."[65]

In one interesting respect, however, the Court of Claims seems not to have followed the direct logic of the statute. Where a general appropriation, *i.e.*, a large amount appropriated for a whole area of departmental operations or projects, is involved, one contract may obligate only a small part of a vast fund, and the contractor may have no way of knowing whether the appropriation is being exceeded by his contract or not. Faced with this problem in several cases, the court has given judgment for the contractor.[66] But the rationale is slight and does not seem to rest

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[64] REV. STAT. § 3732 (1875), as amended, 41 U.S.C.A. § 11 (Supp. 1966). The 1966 amendment adds new subsection (b):

> (b) The Secretary of Defense shall immediately advise the Congress of the exercise of the authority granted in subsection (a) of this section, and shall report quarterly on the estimated obligations incurred pursuant to the authority granted in subsection (a) of this section.

Pub. L. No. 89-687, § 612, 80 Stat. 993 (1966), which includes this amendment, has other interesting provisions. For example, §§ 612(b) and (c) provide:

> (b) Upon determination by the President that such action is necessary the Secretary of Defense is authorized to provide for the cost of an airborne alert as an excepted expense in accordance with the provisions of Revised Statutes 3732 (41 U.S.C. 11).
> (c) Upon determination by the President that it is necessary to increase the number of military personnel on active duty beyond the number for which funds are provided in this Act, the Secretary of Defense is authorized to provide for the cost of such increased military personnel, as an excepted expense in accordance with the provisions of Revised Statutes 3732 (41 U.S.C. 11).

Arguably, the actions authorized to be taken in subsections (b) and (c) would have been allowable under the "excepted expense" provision of present subsection (a) of § 3732. However, the addition of the requirement of a determination of necessity by the President before the actions specified in (b) and (c) can qualify as excepted expenses appears to be a further limitation on the use of the provision.

[65] See, *e.g.*, Leiter v. United States, 271 U.S. 204 (1926); Sutton v. United States, 256 U.S. 575 (1921).

[66] Schuler & McDonald, Inc. v. United States, 85 Ct. Cl. 631 (1937); Karno-Smith Co. v. United States, 84 Ct. Cl. 110 (1936); Myerle v. United States, 33 Ct. Cl. 1, 25 (1897); Dougherty v. United States, 18 Ct. Cl. 496, 503 (1883). It must be noted however, that the Court of Claims' judgments are normally paid out of appropriations or funds made available specifically for them and not from the appropriations which the underlying contract or other claim originally charged. See 28 U.S.C. § 2517 (1964).

Appropriations which include entire projects and departments, instead of individual items, are becoming increasingly more commonplace. See, *e.g.*, Department of Defense Appropria-

on estoppel or apparent authority even though the contractor's lack of knowledge is recognized. Perhaps an awareness of the underlying conflict between the innocent contractor and the executive exercise of authority beyond prescribed limits and a concern for a fair resolution of it under the circumstances have encouraged the divergence in approach taken by the Court of Claims in the general appropriations cases from that adopted in the specific appropriations situation.

In some cases not involving expenditures in excess of appropriations, attention has been given to what fairness may require under the particular circumstances. But cases providing this attention have been infrequent and not well rationalized; nor is it clear that they involve an extention by the agency of congressionally delegated authority. Perhaps the most significant recent case in this respect is *George H. Whike Constr. Co. v. United States.*[67] There a contractor signed his contract on oral assurances from government lawyers that he would receive extra reimbursement under his contract if his workers were required to go on the 48-hour work week required by Executive Order 9301.[68] These assurances were not given by the contracting officer, who was not immediately available, but by attorneys who apparently regularly participated in the work of the contracting officer. There was nothing in the contract to negate the assurances that overtime could be separately paid for, nor, presumably, did any statute or regulation prohibit such payment. However, it is seldom that attorneys serving as such are contracting officers and it may be presumed that the two lawyers here were not given contract-making or contract-administration authority. The Court of Claims recognized the rule that the Government can be bound only by persons with authority, but eschewed the opportunity for denying recovery to the claimant on the ground that any apparent authority of the lawyers or any plea of estoppel would not do. Instead the court pointed out that

> the man who had authority to modify the contract was in the area, the two men who were his immediate counsel for the occasion were present. . . . They gave the lay contractor a very plausible assurance as to the manner in which the provisions of similar contracts were being applied in that area. In these circumstances to permit Government legal representatives who had such positions and were acting in such circumstances as to lead any normal person to regard them as having capacity to act in the matter, to escape responsibility completely would be like authorizing Government employees to set a trap to lure the unwary into

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tion Act of 1967, Pub. L. No. 89-687, 80 Stat. 980 (1966) (partially codified in scattered titles of U.S.C.A. (Supp. 1966)).

[67] 135 Ct. Cl. 126, 140 F. Supp. 560 (1956). For an earlier and somewhat inconsistent holding see Kelly v. United States, 116 Ct. Cl. 811, 91 F. Supp. 305, *cert. denied*, 340 U.S. 850 (1950); see 42 DECS. COMP. GEN. 124, 135-39 (1962).

[68] 8 Fed. Reg. 1825 (1943).

> signing a contract. We do not believe it is the purpose of responsible officials of the Government to have a part in such a procedure.[69]

That is shaving estoppel very closely, and the court premised its decision on the estoppel-related Section 90 of the *Restatement of Contracts*.[70]

On other occasions, the use of the concept of estoppel by act of the government agent has been inconsistent and even inappropriate. Such cases have added confusion rather than offered a judicial reshaping of the law affecting the contractor's dilemma. For example, in *United States v. Certain Parcels of Land*,[71] the United States was held estopped to assert any title to land or improvements thereon. The Navy Department, through authorized representatives, had negotiated a settlement of its lease interests in some harbor property in Los Angeles, and the settlement included certain improvements on the leaseholds. Although full agreement was reached, formal documents were not signed by higher officials in the Navy Department. In the view of the court, such formal memorialization and documentation was not necessary to the binding legal effect of the settlement agreement. While recognizing the validity of the *Merrill* doctrine, the court held that the United States was estopped by the actions of its settlement agents when later it sought to assert some title in the property and improvements.[72] Of course, the *point* was that in the view of the judge the settlement agents were fully authorized to act and to bind the Government, whereas in most of the "estoppel by an agent" cases we have looked at, the salient point was that the agent was acting *beyond* his actual authority. The court observed, we think inappositely:

> To summarize, the Government is bound by the doctrine of estoppel where: (1) there has been a waiver of sovereign immunity to suit . . . (2) the agent whose conduct is relied on to work an estoppel acted within the scope of his authority lawfully conferred, and (3) application of the doctrine does not bring a result that is either inequitable or contrary to law. . . .
>
> Briefly put, then, in cases where sovereign immunity to suit has been waived, the Government can be estopped by the conduct of its agents in the same circumstances as a private individual, partnership, or corporation.[73]

The conclusion of the court on estoppel seems in error because a

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[69] 135 Ct. Cl. at 131, 140 F. Supp. at 563-64.

[70] RESTATEMENT, CONTRACTS § 90 (1932), states: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

[71] 131 F. Supp. 65 (S.D. Cal. 1955).

[72] *Id.* at 76.

[73] *Id.* at 74.

nongovernmental principal can be estopped by the acts of its agents which are *beyond* the scope of their authority.[74] One wonders if the court was merely saying that the United States cannot through its agents for litigation deny the validity of the authorized acts of its contract-making agents. In any event, the conceptualization of the court is not a clear espousal of estoppel against the Government in cases where the agent has acted without actual authority.

It is interesting to observe that the same policy problem—whether doctrines of apparent authority and estoppel shall apply against the Sovereign—has arisen in the United Kingdom. The judicial statement of results does not appear to be as clear cut in the United Kingdom as in the United States. In *Robertson v. Minister of Pensions*[75] there was involved the question of whether or not a letter from the War Office that a pension claimant's injury was due to military service could work an estoppel against the Minister of Pensions. Lord Justice Denning in holding for the plaintiff stated: "The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded."[76]

The lord justice announced the same principle in *Falmouth Boat Constr. Co. v. Howell*,[77] which was private litigation involving the question whether a written license by the Admiralty was required for certain boat repairs or whether an oral license would suffice. An oral license by an Admiralty employee was relied on for some of the repairs for which payment was claimed. It appeared that the basic requirement of law that a license be obtained was not published. Lord Denning, citing his remarks in the *Robertson* case, said that the private party was enabled to rely on the assumption of authority—issuance of an oral license—by the public officer.[78] Although approving the result in the case, Lord Simonds disapproved Lord Justice Denning's reasoning in *Howell v. Falmouth Boat Constr. Co.*[79]

The law of estoppel against the Sovereign remains unsettled in England as well as in the United States. In seeking a solution to this problem, perhaps the suggestion made by Street in *Governmental Liability* is useful:

> The issue in such cases may be essentially one of agency. If the promise is within the legal competence of the Crown either at common law or

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74 See notes 5-15 *supra* and accompanying text.

75 [1949] 1 K.B. 227.

76 *Id.* at 231.

77 [1950] 2 K.B. 16, 26.

78 *Id.* at 25-26.

79 [1951] A.C. 837, 845.

> by statute, then the Crown is bound by a representation made within the scope of the ostensible authority of the agent. *Robertson's Case* may be supported on the footing that it was within the apparent authority of the Director of Personal Services to state that the plaintiff's disability was attributable to military service: on the other hand it does not follow that a representation made by any Department of the Crown will estop the Crown merely because the matter was *intra vires* the Crown—it would not, for example, it is suggested, be within the ostensible authority of the Board of Trade to write the letter written by the Director in the *Robertson Case*.[80]

CONCLUSION

In the preceding discussion we have not attempted to parse all the cases or draw all the fine lines which could be drawn, but have indicated some of the debate and pointed out most of the principal cases. It is possible we think to draw a few central conclusions about the judicially stated ideas in the United States on the authority of the Government's contract-making agents, and these conclusions may be important not only from the standpoint of the legal study of governmental operations, but also from the standpoint of a modern government's obligations to its citizens. These conclusions are that courts will not generally apply the concept of apparent authority of agents against the United States; that courts will not generally regard the United States as able to be estopped to deny the lack of authority of its agents where they are not authorized in fact; that it is the citizen-contractor's duty to discover the limits on an agent's authority, even though it is not clear how far this duty must be pressed through the morasses of paper regulation and delegation which deal with such authority; that in any event the citizen-contractor must be held to know when clear restriction of authority is given publication in the statutes or the *Federal Register*, even though it is not always clear whether he is bound to make correct inferences from publications not clear on their face. We should also say that we have no conclusion as to how these rules are applied throughout the executive branch, that is, in what must be the frequent case of an agent acting beyond his contract-making authority, whether the executive agency involved usually ratifies[81] the agent's act or relies on the defenses made available by the judiciary. It seems clear that the executive agency can make the choice between ratification and repudiation. We know of no study on the point, but one ought to be made including among its subjects the factors which

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[80] STREET, GOVERNMENTAL LIABILITY; A COMPARATIVE STUDY 158 (1953). See also 7 HALSBURY, LAWS OF ENGLAND 247 (3d ed. 1954).

[81] The ratification power was noted as early as Whiteside v. United States, 93 U.S. 247, 253 (1876). See Williams v. United States, 130 Ct. Cl. 435, 447, 127 F. Supp. 617, 623, *cert. denied*, 349 U.S. 938 (1955); Ford v. United States, 17 Ct. Cl. 60, 76-78 (1881).

agencies might rely on in making any choice between ratification and repudiation. Finally, it ought to be remarked that there are apparently circumstances in which courts will avoid the opportunity of applying the no-apparent-authority or the no-estoppel rules if other techniques or result-rationalization come plausibly to hand.[82]

SOME SUGGESTIONS

We are not satisfied that the law of agency in connection with governmental contract-making ought to be so far from the ordinary commercial law. Suggestions have been made for reducing the differences, notably by Professor John McIntire in his excellent article.[83] Congress has, at least for war or emergency purposes[84] or extraordinary contractual circumstances in contracts involving the national defense,[85] made some ameliorative authority available, although it has not for any general or permanent purposes "overruled" the judicial authority.

It is our suggestion that there should be a reevaluation by the judiciary of the foundations for the no-apparent-authority and no-estoppel rules as they relate to the contract-making function in the Government. We have indicated that there are factors of constitutional power which may underlie existing judicial attitudes; we have indicated that there are technical rationalizations, such as the notice-as-knowledge provisions of the Federal Register Act[86] and the general conviction that citizens should be held to know the statutes of the United States, which may shore up

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[82] See, *e.g.*, George H. Whike Constr. Co. v. United States, 135 Ct. Cl. 126, 140 F. Supp. 560 (1956).

[83] McIntire, *Authority of Government Contracting Officers: Estoppel and Apparent Authority*, 25 GEO. WASH. L. REV. 162 (1957).

[84] Contract Settlement Act of 1944, § 17(a), 58 Stat. 665, 41 U.S.C. § 117(a) (1964) (applicable to World War II contracts) provided:

> Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor.

It should be noted, however, that this does not go quite so far as to recognize the binding effect of a contract made by an agent in virtue of his apparent authority.

[85] Pub. L. No. 85-804, 72 Stat. 972 (1958), 50 U.S.C. §§ 1431-35 (1964), authorizes the formalization of informal commitments when it is impracticable to use normal procurement procedures. Regulations issued under the authority of the act and Exec. Order No. 10789, 23 Fed. Reg. 8897 (1958), as amended, Exec. Order No. 11051, 27 Fed. Reg. 9683 (1962), permit "formalization of an informal commitment," *i.e.*, in effect making an informal arrangement into a formal contract, in cases where persons or firms furnish or arrange to furnish property to or services in response to written or oral instructions and, in doing so, rely in good faith on the apparent authority of the government official issuing the order or instructions. See Armed Services Procurement Regulation 17-204.4, 32 C.F.R. § 17.204-4 (1961); Federal Procurement Regulations § 1-17.204-4, 41 C.F.R. § 1-17.204-4 (1966).

[86] Section 7, 49 Stat. 502 (1935), 44 U.S.C. § 307 (1964).

those attitudes. But, we believe, none of these reasons really compel the inferences that are made from *Merrill* and similar cases. In short, we think that the Republic has now grown big enough and its business and contract-making activities become huge enough to consider new rules. The old ones were, possibly, suitable for a small federal government of the late eighteenth and the nineteenth centuries which debatedly needed protection against the business acumen of its citizens. Possibly, the older constitutional ideal of preserving the neat distribution of power among federal government, state governments, and people had an overriding purpose at one time, but we think that, as a rationale for the no-apparent-authority and no-estoppel rules, it has lost its force and must recede in favor of more obvious principles of commercial fairness. Yet there is continuing validity to the policy that the executive should not be able to enlarge its delegation from Congress by self-amplification, which is one way of looking at the effect of apparent authority and estoppel as applied to contract-making agents.

We think that it would be perfectly reasonable for the policy enunciated in the *Robertson* case[87] and the suggestion made by Professor Street[88] to be melded into a useful view. The contract-making agent of a department or agency of the federal government should be able to bind the United States (a) to any agreement he is actually authorized to make, and (b) to any agreement which Congress has empowered his department or agency to make, even where he is not actually authorized to do so, on the basis of apparent authority or estoppel as normally applied and understood to agents of private parties. Concepts related to the public's knowledge of the content of statutes and regulations should be given a fair effect in reaching a decision on whether there has been created that justifiable belief in authority upon which apparent authority and estoppel fundamentally rest. By "fair effect" we mean that in cases where there is a clear-cut statutory provision or clear-cut regulation published in the *Federal Register* limiting an agent's authority, these provisions or regulations should be accepted as negating the justifiability of belief. But the burden should be on the Government to establish publication and the clear-cut nature of the limitation; the weight of inference in dubious or unclear cases should go in favor of the contractor. We have had some difficulty as far as regulations are concerned. It is at least arguable, considering the tremendous welter of executive regulations, published and unpublished, which exists today, that no regulation should be taken into account in determining whether apparent authority

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[87] See text accompanying notes 74-75 *supra.*

[88] See text accompanying note 78 *supra.*

exists or estoppel arises. Basic fairness would seem to fall on the side of discounting regulations. But the stronger technical argument may well be that justifiable belief in authority, as a basis for apparent authority and estoppel, can exist only in the light of what is known because published in the *Federal Register*. Suffice it to say that the main thrust of our approach is clear. Apparent authority and estoppel should apply to contract-making and contract-related actions by agents of the United States when they are acting within the scope of the authority given by Congress to executive organs of the Government.

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NOTES

POSTCONVICTION REMEDIES: THE NEED FOR LEGISLATIVE CHANGE

Although the Supreme Court has steadily expanded due process requirements to open increasing numbers of convictions to constitutional attack,[1] there has been no complementary renovation of the federal machinery to carry out the attack.[2] Present federal postconviction remedies are totally inadequate because they are based on common-law criminal theory with its ancient restrictions. Consequently, they fail to provide proper mechanisms for implementing modern criminology. It has become increasingly vital that illegal convictions be subject to early review. New civil-disability statutes deprive convicted felons of important civil rights, such as the right to vote and the right to hold public office.[3] Proliferation of habitual-criminal statutes in the states exposes a felon to severe punishment for a subsequent conviction on a similar charge. There is little doubt that one erroneously convicted of a felony suffers manifest injustice when he experiences loss of job opportunities, disqualification from legal, medical, and similar professions, subjection to deportation proceedings, and, perhaps most importantly, impairment of parole eligibility.[4]

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[1] See Fay v. Noia, 372 U.S. 391 (1963) (waiver requires intentional relinquishment of known right); Douglas v. California, 372 U.S. 353 (1963) (indigent's right to counsel in criminal appeal); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent's right to counsel in noncapital cases); Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained in violation of federal constitution inadmissible in state criminal trial); Griffin v. Illinois, 351 U.S. 12 (1956) (indigent's right to transcript in criminal appeal); Johnson v. Zerbst, 304 U.S. 458 (1938) (accused's right to counsel in all federal criminal proceedings).

[2] There has been increased use of existing remedies. The number of applications under 28 U.S.C. § 2241 (1964), as amended, 28 U.S.C.A. § 2241(d) (Supp. 1966), increased from 127 in 1940 to 734 in 1956 to 906 in 1961. Motions under 28 U.S.C. § 2255 (1964) increased from 102 in 1949 to 447 in 1961. See Pope, *Suggestions for Lessening the Burden of Frivolous Applications*, 33 F.R.D. 409, 411 (1962). After Gideon v. Wainwright, 372 U.S. 335 (1963), and Fay v. Noia, 372 U.S. 391 (1963), the number of applications for writs of habeas corpus by state court prisoners increased dramatically. See *Report of the Committee on Habeas Corpus*, 33 F.R.D. 363, 377 (1963).

[3] "Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities." Parker v. Ellis, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting).

[4] See Fiswick v. United States, 329 U.S. 211 (1946) (subjection to deportation proceedings). Formerly, all these substantial interests had been denominated "privileges" to which due process did not attach, the rationale being that there is no injustice when a privilege is revoked without notice or an opportunity to be heard. Dissatisfaction with this mechanical

Awareness of the importance of promptly attacking any illegal conviction has induced several courts[5] to qualify the "established law" of *McNally v. Hill*,[6] where the Supreme Court rejected impairment of parole eligibility as a basis for seeking avoidance of a future consecutive sentence through a habeas corpus proceeding. Yet unless the Supreme Court is more willing today than it was thirty-three years ago to resort to judicial lawmaking in the postconviction-relief field, the same result is dictated: the remedies found procedurally inadequate in 1934 are essentially the same remedies existing today.

This Note will evaluate the effectiveness of existing federal postconviction remedies as weapons for attacking convictions made voidable by recent Supreme Court decisions. Further, appropriate statutory modifications will be suggested to remedy the procedural pitfalls inherent in current postconviction remedies.

HABEAS CORPUS—THE GREAT WRIT

In three recent landmark decisions[7] the Supreme Court significantly lowered procedural barriers to the availability of the federal writ of habeas corpus,[8] by which both state and federal prisoners may challenge

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approach and increased concern over the importance of these interests, regardless of the label, have led in recent years to the erosion of the rights-versus-privileges distinction. If one claiming invasion of such interests is entitled to due process in a revocation proceeding, an allegation of actual or potential loss of these interests should be a sufficient basis for gaining relief in a postconviction proceeding and dismissal of these allegations as insufficient is manifestly unjust. See generally Reich, *The New Property*, 73 YALE L.J. 733 (1964); Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L., C. & P.S. 175 (1964); Note, *Liquor License—Privilege or Property?*, 40 NOTRE DAME LAW. 203 (1965); Note, *The Use and Misuse of the Right-Privilege Distinction in License Revocation*, 31 U. CHI. L. REV. 577 (1964); Note, *Notice and Hearing in Government Exclusionary Action*, 110 U. PA. L. REV. 1009 (1962).

[5] "[T]he majority of the Federal courts more recently confronted with the problem regard that decision [McNally v. Hill] as qualified by later cases . . . ." State *ex rel.* Holm v. Tahash, 372 Minn. 123, 126, 139 N.W.2d 161, 165 (1965). The cases referred to include United States v. Morgan, 346 U.S. 502 (1954); Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965); United States *ex rel.* Durocher v. LaVallee, 330 F.2d 303 (2d Cir.), *cert. denied*, 377 U.S. 998 (1964).

[6] 293 U.S. 131 (1934).

[7] Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963). *Sanders* held that successive motions by a federal prisoner asserting new grounds for relief under 28 U.S.C. § 2255 (1964) may not be dismissed solely because a prior motion was dismissed. 373 U.S. at 15-17. *Noia* held that a state prisoner petitioning in federal court could be deemed to have exhausted state remedies as required by 28 U.S.C. § 2254 (1964) despite his failure to appeal his conviction. 372 U.S. at 434-45. *Townsend* requires federal courts to hold evidentiary hearings on a state prisoner's petition where no state court has reliably found the relevant facts. 372 U.S. at 318.

[8] 28 U.S.C. §§ 2241-55 (1964), as amended, 28 U.S.C.A. § 2241(d) (Supp. 1966), as amended, 28 U.S.C.A. §§ 2244, 2254 (Feb. Supp. 1967). The Supreme Court early disclaimed any inherent or common-law power to grant the writ, holding that its only jurisdiction to do so was conferred by the Constitution and by statute. *Ex parte* Bollman, 8 U.S. (4 Cranch) 74, 93

in federal courts the constitutionality of their convictions.[9] The Court, however, left untouched an important obstacle to effective postconviction relief: the requirement, arising both from the statute and from its antediluvian judicial construction,[10] that the petitioner be "in custody" under the sentence he is attacking,[11] and that he assert a present right to be released.[12]

The most striking legal consequence of this requirement is that a prisoner serving two consecutive sentences must generally await expiration of the first sentence if he wishes to challenge only the second by federal habeas corpus.[13] The rationalization for this compelled delay is that until the first sentence has been fully served, the prisoner's application for relief from the second is premature; his existing custody is not the result of the challenged sentence, and thus he is not claiming a present right to release. The practical effect on the prisoner is that in jurisdictions where the date of eligibility for parole is computed on the basis of the total term of imprisonment,[14] the right to be considered for parole may be deferred or completely forfeited.[15] In addition, evidence

(1807) (Marshall, C.J.). The Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9. This provision necessarily implies judicial action. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868); see *Ex parte* Bollman, *supra* at 95. Congress first granted the power in the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81.

[9] 28 U.S.C. § 2241(c)(3) (1964) confers jurisdiction on federal courts to grant the writ where a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." A prisoner in federal custody must first move to vacate sentence under 28 U.S.C. § 2255 (1964), a remedy held to be "exactly commensurate" with habeas corpus. Sanders v. United States, 373 U.S. 1, 14 (1963). The sole reason for creating separate sections in the statute to govern proceedings by state and federal prisoners was to ease administrative problems in federal courts. United States v. Hayman, 342 U.S. 205, 219 (1952).

[10] See, *e.g.*, Heflin v. United States, 358 U.S. 415 (1959); McNally v. Hill, 293 U.S. 131 (1934).

[11] 28 U.S.C. §§ 2241, 2255 (1964), as amended, 28 U.S.C.A. § 2241(d) (Supp. 1966).

[12] The requirement that the prisoner assert a present right to release is not explicitly included in § 2241, but the effect of decisions holding § 2255 to be equivalent implies it. See, *e.g.*, Heflin v. United States, 358 U.S. 415 (1959); United States v. Hayman, 342 U.S. 205 (1952).

[13] *E.g.*, Heflin v. United States, 358 U.S. 415 (1959) (§ 2255); McNally v. Hill, 293 U.S. 131 (1934) (habeas corpus); United States *ex rel.* Konigsberg v. McFarland, 348 F.2d 215 (3d Cir. 1965) (habeas corpus); Johnson v. Taylor, 347 F.2d 365 (10th Cir. 1965) (habeas corpus and § 2255); Young v. United States, 337 F.2d 753 (5th Cir. 1964) (§ 2255). *Contra*, Williams v. Peyton, —— F.2d —— (4th Cir. 1967); Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965).

[14] *E.g.*, 18 U.S.C. § 4202 (1964); LA. REV. STAT. ANN. § 15:574.3A (Supp. 1966); MASS. GEN. LAWS ANN. ch. 127, § 133 (Supp. 1965); VA. CODE ANN. § 53-251 (1958).

[15] A federal prisoner is eligible for parole upon completion of one-third of his term of imprisonment. 18 U.S.C. § 4202 (1964). Consecutive sentences are to be aggregated in computing the term. *E.g.*, Walker v. Taylor, 338 F.2d 945 (10th Cir. 1964); Newcombe v. Carter, 291 F.2d 202 (5th Cir. 1961). A prisoner who has received consecutive five- and ten-year sentences and wishes to challenge only the second will never be eligible for parole under the first; he must wait until the first expires to bring his petition.

may be lost to both the prosecution and the prisoner[16] so that neither side is as able to sustain its factual claims as it would were the petition permitted at an earlier date. Finally, if the conviction on the future sentence is in fact invalid, the prisoner may nonetheless be forced to serve a significant portion of it while awaiting judicial action on his deferred attack.[17]

The major obstacle to granting relief from a future sentence today

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[16] See, *e.g.*, Johnson v. United States, 344 F.2d 401 (5th Cir. 1965). There petitioner sought to attack by a § 2255 motion a three-year sentence for contempt of court to begin at the expiration of a fifteen-year term for bank robbery. One basis of his petition was mental incompetency. The court denied relief under § 2255 but elected to treat the motion as one for the extraordinary remedy of coram nobis. *Id.* at 409-10. It reasoned that to postpone determination of the competency issue for fifteen years would "certainly frustrate, if not foreclose forever, any intelligent answer to these . . . questions which depend so much on evanescent psychiatric data and opinions." *Id.* at 411. The Pennsylvania Supreme Court has noted that the prosecution would also be handicapped by such a delay. Commonwealth *ex rel.* Stevens v. Myers, 419 Pa. 1, 15, 213 A.2d 613, 621-22 (1965).

[17] See, *e.g.*, Parker v. Ellis, 362 U.S. 574 (1960) (5-to-4 decision). Nearly five years elapsed while a petitioner challenging a single seven-year sentence for forgery exhausted state remedies, then proceeded by habeas corpus in federal court. *Id.* at 577-78, 581 (Warren, C.J., dissenting). The federal habeas corpus proceedings had consumed three years before petitioner, with time off for good behavior, was unconditionally released while his case was pending before the Supreme Court. *Id.* at 575, 581. The case was dismissed as moot since there was no longer a restraint of liberty. *Id.* at 575. Although *Parker* is still good law, its authority must be deemed weak. Only three Justices joined the opinion of the Court. In a separate opinion, Justices Harlan and Clark concurred on the further ground that petitioner's criminal record included other outstanding felony convictions, any one of which would have the same adverse affect on his civil rights as the conviction before the Court. *Id.* at 576. Mr. Chief Justice Warren, joined by Justices Black, Douglas, and Brennan, wrote a bitter dissent. *Id.* at 577.

The Fourth Circuit refused to follow *Parker* in a 1964 case. Thomas v. Cunningham (*Thomas II*), 335 F.2d 67, 69 (4th Cir. 1964). Compare Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1966). In the *Thomas* cases, the petitioner had received six consecutive two-year sentences in one Virginia county (Buchanan) and a five-year consecutive sentence in another (Dickenson). 335 F.2d at 68. While serving his final Buchanan County sentence, he brought habeas corpus to attack it and the Dickenson County sentence. Thomas v. Cunningham (*Thomas I*), 313 F.2d 934, 936 (4th Cir. 1963). The district court's denial of his petition was reversed in *Thomas I*, but by the time an order granting his release or retrial was made on remand, he had finished the Buchanan County sentence. 335 F.2d at 68. In *Thomas II* the court noted the problem of the justiciability of the attack on the Buchanan County sentences but went on to affirm the grant of relief for *all six* of them as well as the Dickenson sentence. *Id.* at 68-69. It found support for ignoring *Parker* in the *ratio decidendi* of the Supreme Court's holding in 1963 that a parolee was "in custody" within the meaning of 28 U.S.C. § 2241 (1964), as amended, 28 U.S.C.A. § 2241(d) (Supp. 1966). *Ibid.*, citing Jones v. Cunningham, 371 U.S. 236 (1963). For a full discussion of *Jones* and the Fourth Circuit's approach to "custody," see notes 61-92 *infra* and accompanying text.

In other cases, the mootness aspect of the custody problem has received uneven treatment. See, *e.g.*, Eagles v. United States *ex rel.* Samuels, 329 U.S. 304, 306-08 (1946). Where the writ was *denied* in the lower court and petitioner is *appellant*, his release or escape from custody has been held to moot the case. *E.g.*, Parker v. Ellis, *supra* (release); Ragsdale v. Cameron, 117 U.S. App. D.C. 278, 329 F.2d 233 (1963) (escape). Where the writ has been *granted* below and the petitioner is *appellee*, release or escape have not mooted the case. *E.g.*, Eagles v. United States *ex rel.* Samuels, *supra* at 306-08 (release); Cameron v. Mullen, —— F.2d ——, —— n.4 (D.C. Cir. 1967) (escape). The reason given in *Samuels* is that affirmance by the appellate court makes the prisoner's release final, while reversal permits a lawful resumption of custody. 329 U.S. at 308.

lies in the federal statutory scheme.[18] But even prior to the statute relief was not always available. In *McNally v. Hill*[19] the Supreme Court gave forceful expression to the prematurity concept by flatly rejecting an argument that the present denial of parole eligibility should permit the attack of a future sentence.[20] The habeas corpus statute then in effect left the writ undefined except to state its purpose as "inquiry into the cause of restraint of liberty,"[21] and to restrict its availability to prisoners "in custody under . . . the authority of the United States [or] . . . in violation of the Constitution . . . ."[22] To interpret this general language, the *McNally* Court turned to English law to ascertain the appropriate meaning and use of the writ.[23] Ignoring the changes both in penology[24] and in the function of the writ[25] which have occurred since colonial times, it examined pre-1789 English authorities and digests[26] but found no case in which the writ was used to seek relief other than immediate release.[27] The Court concluded that

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[18] The basic provisions of the current statute were enacted as part of the 1948 revision of Title 28 of the *United States Code*. Act of June 25, 1948, ch. 646, 62 Stat. 869; see notes 32-48 *infra* and accompanying text.

[19] 293 U.S. 131 (1934).

[20] *Id.* at 135.

[21] REV. STAT. § 752 (1875).

[22] REV. STAT. § 753 (1875).

[23] 293 U.S. at 136. The Supreme Court traditionally has looked to English common law for the proper interpretation of federal habeas corpus statutes. See, *e.g.*, *Ex parte* Parks, 93 U.S. 18 (1876); *Ex parte* Bollman, 8 U.S. (4 Cranch) 74 (1807).

[24] *E.g.*, Federal Parole Act, 18 U.S.C. §§ 4201-10 (1964). Provisions for the parole of federal prisoners were first enacted in 1902. Act of June 21, 1902, ch. 1140, 32 Stat. 397. One state court, permitting an advance habeas corpus attack on a future sentence, observed:

> That rule [prematurity] was satisfactory in a day when the sentence imposed . . . was served in full. In this day of more enlightened penology, the rule will not work. It fails to take into consideration the modern usages of the indeterminate sentence, the fixing of the term by trained penologists . . . the good conduct statutes and the more liberal use of supervised parole and probation.

Landreth v. Gladden, 213 Ore. 205, 222, 324 P.2d 475, 483 (1958).

[25] See notes 29-30 *infra* and accompanying text.

[26] 293 U.S. at 137-38.

[27] *Id.* at 138. It is noteworthy that the Court's search of the English authorities failed to uncover any cases in which attack on a future sentence was *denied*. The most it could say of petitioner's attempted use of the writ was that it was "without the support of history." *Ibid.* The Court's research *did* disclose two Supreme Court decisions disposing of habeas corpus petitions on grounds other than premature application, although in each case the petitioner had not served the valid part of his sentence when the attack was brought. *Id.* at 139 n.5. In one case, the Court had denied the petition on the merits. Morgan v. Devine, 237 U.S. 632 (1915). In the other, the petition was dismissed on the ground that habeas corpus is not a substitute for a writ of error. *Ex parte* Spencer, 228 U.S. 652 (1913). In *Morgan v. Devine*, the district court had granted the petition, ordering the release of the prisoners at the expiration of the admittedly valid part of their sentences. 237 U.S. at 637. The authority of these cases on the prematurity problem is inconclusive, however. Because premature application raises questions of standing, it should logically be dealt with before either of the points on which *Morgan* and *Spencer* were decided. Neither decision, however, discussed the prematurity issue or foreclosed the possibility that by the time each case was decided, the valid sen-

> without restraint of liberty, the writ will not issue. . . . Equally, without restraint which is unlawful, the writ may not be used. A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry.[28]

Even in 1934 the application of inflexible common-law principles, resulting in the decision that only a present sentence may be challenged by habeas corpus, was inappropriate for two reasons. First, the writ was not primarily a postconviction remedy at common law,[29] and second, even at common law the element of physical restraint was not always a prerequisite to the writ.[30] Perhaps the real failure of the *McNally* Court, however, lay in its refusal to take a fresh approach to the novel problem presented by petitioner's loss of parole eligibility. It unquestioningly assumed an eighteenth-century vantage point from which to view a modern problem. As a result, obsolete principles were reaffirmed and perpetuated in federal habeas corpus law.[31]

Against this background, Congress revised the federal habeas corpus

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tence had expired and the sentences under attack had begun. See 237 U.S. at 637; 228 U.S. at 659.

The *McNally* Court noted that with the exception of the Eighth Circuit, the weight of circuit authority strongly supported denial of relief from a future sentence. 293 U.S. at 139 n.6 and cases cited therein.

[28] *Id.* at 138.

[29] At common law, the writ was principally used to secure a prisoner's pretrial admission to bail. See 1 CHITTY, CRIMINAL LAW *130-31. "[T]he evil the writ was chiefly intended to remedy, is the neglect of the accuser to prosecute in due time." *Ibid.* While it was also available after conviction, the grounds for its issuance were extremely narrow. It "tested only the jurisdiction of the authority imposing restraint, and the concept of jurisdiction for this purpose was extremely limited." Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 465-66 (1960); see 1 CHITTY, CRIMINAL LAW *127.

The writ evolved from the rivalry between common-law courts, courts of inferior jurisdiction, and later courts of chancery. 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 109-12 (1938). The Habeas Corpus Act of 1679, 31 Car. 2, c. 2, cited by the *McNally* Court, was chiefly inspired by the political rivalry between the King and Parliament. 9 HOLDSWORTH, *op. cit. supra* at 112-25; see 3 BLACKSTONE, COMMENTARIES *135-36. One historian dismissed the development of the writ as "hardly . . . within the scope of a history of the criminal law." 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 243 (1883). In the United States, the development of the writ as a postconviction remedy was slow. See generally Oakes, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243 (1965). The background of the writ does not indicate the wisdom of relying on common-law practice for answers to modern problems of criminal procedure.

[30] See Rex v. Delaval, 3 Burr. 1434, 97 Eng. Rep. 913 (K.B. 1763). In *Delaval* Lord Mansfield issued the writ to discharge a female minor from the custody of private persons, despite the absence of any showing she was detained against her will. *Id.* at 1437-39, 97 Eng. Rep. at 914-16. This and other English cases were relied on by the Supreme Court in Jones v. Cunningham, 371 U.S. 236 (1963), to support a somewhat *expanded* concept of custody. *Id.* at 238-39. Perhaps the lesson of *Jones* and *McNally* is that he who seeks support in the common law shall find.

[31] See, *e.g.*, Parker v. Ellis, 362 U.S. 574, 575 (1960); Heflin v. United States, 358 U.S. 415, 421 (1959); Wells v. California, 352 F.2d 439, 443 (9th Cir. 1965); Gailes v. Yeager, 324 F.2d 630, 632 (3d Cir. 1963); United States *ex rel.* Milligan v. Rundle, 261 F. Supp. 275, 276 (E.D. Pa. 1966); Fay v. Noia, 372 U.S. 391, 432 (1963) (dictum).

statute in 1948,[32] and in so doing, apparently wrote the *McNally* rule into it. Section 2241 of the Judicial Code, which confers on federal courts the power to grant the writ, continued the broad language of the prior statute.[33] In addition to this generally worded section, however, Congress concurrently enacted section 2255 which was intended to be the basic postconviction remedy for prisoners attacking federal sentences.[34] The object of the latter section was to alleviate administrative burdens which had developed in federal courts[35] by requiring a federal prisoner to petition the court which sentenced him rather than permitting him to proceed by habeas corpus under section 2241 in the district of his confinement.[36]

Unlike section 2241, section 2255 contains explicit and specific requirements. The prisoner must be in custody under the challenged sentence *and*, more importantly, he must be asserting a present right to release.[37] The importance of these features lies in the repeated statements

[32] The 1948 revision is now 28 U.S.C. §§ 2241-55 (1964), as amended, 28 U.S.C.A. § 2241(d) (Supp. 1966), as amended, 28 U.S.C.A. §§ 2244, 2254 (Feb. Supp. 1967).

[33] The writ, still undefined, remained available to "a prisoner [who] . . . is in custody in violation of the Constitution or laws or treaties of the United States . . . ." 28 U.S.C. §§ 2241 (a), (c)(3) (1964). The phrase "for the purpose of an inquiry into the cause of restraint of liberty" was omitted as merely descriptive of the writ. H.R. REP. NO. 308, 80th Cong., 1st Sess. A175 (1947).

[34] United States v. Hayman, 342 U.S. 205, 219 (1952); see Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 175 (1949). The *Hayman* opinion is especially important, for the Court regards its statement of the legislative history of § 2255 as particularly definitive. Heflin v. United States, 358 U.S. 415, 420-21 (1959). The reason for this respect is that the *Hayman* opinion was written by Mr. Chief Justice Vinson, who presided over the Judicial Conference of the United States. The Conference deliberations and report comprise almost the entire legislative history of the section. *Ibid.*; see Hill v. United States, 368 U.S. 424, 427 (1962).

[35] The first half of the century witnessed the expansion of grounds for collateral attack through habeas corpus. See, *e.g.*, United States *ex rel.* McCann v. Adams, 320 U.S. 220 (1943) (right to trial by jury in federal court); Waley v. Johnston, 316 U.S. 101 (1942) (coercion of guilty plea); Johnson v. Zerbst, 304 U.S. 458 (1938) (right to counsel in federal court); Moore v. Dempsey, 261 U.S. 86 (1923) (mob domination of trial). One consequence was a high concentration of petitions for federal habeas corpus in districts in which major federal penitentiaries were located. United States v. Hayman, 342 U.S. 205, 213-14 & n.18 (1952). Another problem was that court records and witnesses were less available in the district of confinement. *Id.* at 213-14. "[T]he sole purpose [of § 2255] was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." *Id.* at 219; see Parker, *supra* note 34, at 175.

[36] Until 1966, a habeas corpus action could be brought only in the district of confinement. Ahrens v. Clark, 335 U.S. 188 (1948). Compare Carbo v. United States, 364 U.S. 611, 621 (1961). In 1966, Congress amended § 2241 by adding a provision which permits prisoners of states with more than one judicial district to apply for the writ either in the district of confinement or in the district wherein the sentencing court is located. 28 U.S.C.A. § 2241(d) (Supp. 1966). The considerations prompting this amendment were similar to those behind the enactment of § 2255—the concentration of prisoners in the district where the state penitentiary is located and the inaccessibility of witnesses and evidence when the district of confinement is not that of the sentencing court. See S. REP. NO. 1502, 89th Cong., 2d Sess. 2 (1966), in 1966 U.S. CODE CONG. & AD. NEWS 2968, 2969.

[37] Section 2255 provides in part:

of the Supreme Court that section 2255 was intended by Congress to provide a remedy with a scope identical to section 2241.[38] Because the peacetime privilege of habeas corpus is guaranteed by the Constitution,[39] the Court has committed itself to this view of the section in order to avoid passing on its constitutionality.[40] In so doing, it has recognized that if the remedies are not equivalents, section 2255 may represent an unconstitutional "suspension" of the writ of habeas corpus.[41] This position, though, tends to wed the federal remedy of habeas corpus to the rigid custody requirements of section 2255.

If section 2241 stood alone, it could be argued that an unconstitutional future sentence should be subject to collateral attack because it renders the custody a "violation of the Constitution" by depriving the prisoner of his statutory right to parole eligibility without due process of law.[42] Arguably, the prisoner is then "in custody in violation of the Constitution." With section 2255, however, such a construction of 2241 would raise numerous problems. Either the Supreme Court would have to distort the clear language of section 2255 in order to keep its scope coextensive with the expanded construction of section 2241, or it would have to deny that the remedies were intended to be commensurate. The

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> A prisoner *in custody under sentence* of a [federal] court . . . *claiming the right to be released* upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

28 U.S.C. § 2255 (1964). (Emphasis added.)

[38] See, *e.g.*, Sanders v. United States, 373 U.S. 1, 14 (1963); Hill v. United States, 368 U.S. 424, 427 (1962); Heflin v. United States, 358 U.S. 415, 421 (1959); United States v. Hayman, 342 U.S. 205, 219 (1952).

[39] U.S. CONST. art. I, § 9, quoted note 8 *supra.*

[40] See Sanders v. United States, 373 U.S. 1, 13 (1963); United States v. Hayman, 342 U.S. 205, 223 (1952). In *Hayman*, the Ninth Circuit had held § 2255 unconstitutional. Hayman v. United States, 187 F.2d 456 (9th Cir. 1950), *modified*, 187 F.2d 471 (9th Cir. 1951), *rev'd on other grounds*, 342 U.S. 205 (1952). Although the Supreme Court has yet to rule on the issue, the constitutionality of the section has been consistently upheld in other circuits. See, *e.g.*, Stirone v. Markley, 345 F.2d 473 (7th Cir.), *cert. denied*, 382 U.S. 829 (1965); Martin v. Hiatt, 174 F.2d 350 (5th Cir. 1949).

[41] "[I]f [the prisoner] . . . were subject to any substantial procedural hurdles which made his remedy under § 2255 less swift and imperative than federal habeas corpus, the gravest constitutional doubts [about § 2255] would be engendered . . . ." Sanders v. United States, 373 U.S. 1, 14 (1963).

[42] 54 GEO. L.J. 1004, 1008-10 (1966). Compare *In re* Bonner, 151 U.S. 242 (1894); Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944); Cahill v. Biddle, 13 F.2d 827 (8th Cir. 1926); O'Brien v. McClaughry, 209 Fed. 816 (8th Cir. 1913). In all these cases the *form*, not the *fact* of restraint was challenged. In 1966 a district court granted the writ to a state prisoner who sought only to be released from the solitary confinement in which prison officials had placed him for assisting his fellow inmates in drafting habeas corpus pleadings. Johnson v. Avery, 252 F. Supp. 783, 784 (M.D. Tenn. 1966). The court observed that even if the Supreme Court were to follow *McNally* today, a very real release from custody would be effected by issuance of the writ since "solitary confinement . . . is, in a sense, a jail within a jail." *Id.* at 787.

latter course could be based on the provision of section 2255 that habeas corpus remains available to federal prisoners where motion under the section is inadequate.[43] Through this provision the constitutionality of the section could be salvaged[44] if it were recognized that the section was inadequate to test a future sentence, and if an immediate challenge were then permitted under section 2241 lest the writ be suspended while the prisoner exhausted his remedy by motion.[45] Such an approach, however, would entail overruling Supreme Court precedent.[46] More importantly, it would compel the Court to disavow its assertions that Congress intended the remedies to be coextensive[47] and would involve judicial rewriting of the section's legislative history. Furthermore, it would tend to frustrate the purpose of section 2255 by permitting federal prisoners attacking future sentences to proceed in the district of confinement rather than in the sentencing court.[48]

Despite the clear language of section 2255, the prematurity doctrine came close to extinction in *Heflin v. United States*,[49] the latest prematurity case to reach the Court. There, four Justices argued that the provision that "a motion for such relief may be made *at any time*" permitted attack of a future sentence under section 2255.[50] A majority of the Court rejected this approach, holding that the section

> is available only to attack a sentence under which a prisoner is in custody. This is what the statute says. That is what the legislative history shows. That is what federal courts, faced almost daily with the statute's application, have unanimously concluded.[51]

Permitting the motion to be made at any time, the majority stated, merely

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[43] An application for a writ of habeas corpus in behalf of a prisoner . . . shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255 (1964).

[44] See Sanders v. United States, 373 U.S. 1, 14 (1963).

[45] See *ibid.*; Note, *Section 2255 of the Judicial Code: The Threatened Demise of Habeas Corpus*, 59 YALE L.J. 1183 (1950).

[46] McNally v. Hill, 293 U.S. 131 (1934).

[47] *E.g.*, Sanders v. United States, 373 U.S. 1, 14 (1963); Hill v. United States, 368 U.S. 424, 427 (1962); Heflin v. United States, 358 U.S. 415, 421 (1959); United States v. Hayman, 342 U.S. 205, 219 (1952).

[48] See notes 34-36 *supra* and accompanying text.

[49] 358 U.S. 415 (1959).

[50] This was the position of the opinion of the Court, joined in by a minority of the Justices. *Id.* at 416-18. A majority of the Court concurred in relief from the future sentence, but, finding that the sentence was illegal, reached the result by way of FED. R. CRIM. P. 35, which permits correction of an illegal sentence at any time. See notes 153-65 *infra* and accompanying text.

[51] 358 U.S. at 420.

served to eliminate such obstacles as the statute of limitations, res judicata, and the doctrine of laches.[52] The majority demonstrated that the word "motion" was qualified by the phrase "for such relief" which it deemed to refer to "the right to be released" in the first paragraph of the section.[53] Such construction of the time provision appears to be compelled by the language of the section, however undesirable the result. The contrary view would put the statute into irreconcilable conflict with itself,[54] and the minority Justices in *Heflin* failed to suggest an adequate resolution of this conflict.[55]

While lower federal courts have generally followed the *McNally* and *Heflin* decisions,[56] there have been important departures,[57] one of which[58] suggests a possible judicial solution to the prematurity problem. Recent cases in the Fourth Circuit[59] demonstrate the unwillingness of that court

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[52] *Ibid.*

[53] *Ibid.* The relevant portions of § 2255 are quoted in note 37 *supra.*

[54] The Maryland Court of Appeals construed a similar time provision in the Uniform Post-Conviction Procedure Act to permit the attack of a future sentence. MD. ANN. CODE art. 27, § 645A(e) (Supp. 1966), Simon v. Director of the Patuxent Institution, 235 Md. 626, 629, 201 A.2d 371, 373 (1964); *cf.* Roberts v. Warden of the Md. Penitentiary, 221 Md. 576, 579-80, 155 A.2d 891, 893 (1959).

[55] The Justices who were in the minority on this issue argued that the provision that the motion may be made at any time "means what it says," and that immediate correction of the future sentence would affect the right to release, even though that right would not be immediately realized. 358 U.S. at 418 (opinion of Douglas, J.).

[56] See, *e.g.*, Kagen v. United States, 360 F.2d 30, 32 (10th Cir. 1966); United States *ex rel.* Konigsberg v. McFarland, 348 F.2d 215, 216 (3d Cir. 1965); Johnson v. United States, 344 F.2d 401, 409 (5th Cir. 1965); Moon v. United States, 106 U.S. App. D.C. 301, 302, 272 F.2d 530, 531 (1959).

[57] Some federal courts have been willing to entertain attacks by habeas corpus or § 2255 on the *first* of several consecutive sentences although a favorable determination of the petition will not result in the petitioner's release from custody. *E.g.*, Parker v. United States, 358 F.2d 50, 53 (7th Cir. 1965); United States *ex rel.* Milligan v. Rundle, 261 F. Supp. 275, 276 (E.D. Pa. 1966). A contrary result was reached in the Ninth Circuit on the authority of *McNally.* Wells v. California, 352 F.2d 439, 443 (9th Cir. 1965), *cert. denied*, 384 U.S. 1009 (1966). The unchallenged future sentence in *Wells* was for life imprisonment without possibility of parole. *Id.* at 441. In United States *ex rel.* Milligan v. Rundle, 261 F. Supp. 275 (E.D. Pa. 1966), relator attempted to challenge by habeas corpus two consecutive sentences for burglary. The district court granted the petition for the first sentence but denied it for the second on the authority of *McNally*, even though it recognized the latter sentence was invalid for the same reasons as the first. *Id.* at 276. Perhaps the explanation for this ruling is that after his conviction on the challenged counts, petitioner was sentenced to fifteen to thirty years on unrelated offenses. *Id.* at 276 n.1. The decision, however, not only meant that relator was remanded to custody under a sentence the court recognized was invalid, but it apparently violated the federal policy against piecemeal litigation. *Cf.* Di Bella v. United States, 369 U.S. 121 (1962).

[58] Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965).

[59] Mathis v. United States, 369 F.2d 43 (4th Cir. 1966) (coram nobis attacking future federal sentence); Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1966) (habeas corpus attacking state sentence already served); Martin v. Virginia, *supra* note 58 (habeas corpus attacking future state sentence); Thomas v. Cunningham, 335 F.2d 67 (4th Cir. 1964) (habeas corpus attacking past state sentence).

to remain confined by what Mr. Chief Justice Warren called in a different context the " 'time-is-of-the-essence' strait jacket" of the custody requirement.[60]

The most significant of these cases is the widely noted *Martin v. Virginia*.[61] In *Martin*, a state prisoner who conceded the validity of the murder sentence he was then serving invoked the Declaratory Judgment Act[62] to challenge a future consecutive sentence for escape and larceny.[63] As in *McNally*, the gist of the attack was the postponement of consideration for parole, for which petitioner would have been eligible but for the allegedly invalid future sentences. In a unanimous en banc decision, the Fourth Circuit elected to treat the motion as one under section 2241[64] and held that because petitioner's future sentences barred his eligibility for parole, he was in custody under them within the meaning of that section.[65] The court acknowledged that if *McNally* stood alone, it would be bound to follow it.[66] It concluded, however, that later Supreme Court decisions had relaxed the strictness of the *McNally* rule[67] and supplied "reasonable ground for thinking that were the Supreme Court faced with the issue today it might well reconsider McNally."[68] While the conclusion that the Supreme Court might overrule *McNally* today may be sound,[69] it is questionable whether that inference can validly be drawn

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[60] Parker v. Ellis, 362 U.S. 574, 586 (1960) (dissenting opinion).

[61] 349 F.2d 781 (4th Cir. 1965) (en banc), 54 GEO. L.J. 1004 (1966). Other discussions of *Martin* appear in Note, 66 COLUM. L. REV. 1164 (1966); Note, 65 MICH. L. REV. 172 (1966); 52 CORNELL L.Q. 149 (1966).

[62] 28 U.S.C. § 2201 (1964).

[63] 349 F.2d at 783.

[64] *Id.* at 783-84. Federal courts generally have demonstrated that they will not be bound by the name a petitioner has given his postconviction motion and are willing to consider other theories of relief as well. See, *e.g.*, Heflin v. United States, 358 U.S. 415, 418, 422 (1959) (§ 2255 and rule 35); Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967) (habeas corpus and request for injunctive relief); Azzone v. United States, 341 F.2d 417, 419 (8th Cir.), *cert. denied*, 381 U.S. 943 (1965) (§ 2255, habeas corpus, and coram nobis); United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963) (§ 2255 and coram nobis). *But cf.* Matysek v. United States, 339 F.2d 389, 395 (9th Cir. 1964), *cert. denied*, 381 U.S. 917 (1965) (court not required to treat § 2255 motion as other relief).

[65] 349 F.2d at 784.

[66] *Id.* at 783. See also Lichter Foundation, Inc. v. Welch, 269 F.2d 142, 145 (6th Cir. 1959).

[67] [Habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

349 F.2d at 784, quoting Jones v. Cunningham, 371 U.S. 236, 243 (1963) (dictum).

[68] 349 F.2d at 783-84.

[69] The most convincing sign that members of the Court are dissatisfied with the prematurity doctrine is the Opinion of the Court in Heflin v. United States, 358 U.S. 415 (1959). Four of the Justices who joined in it would have subjected § 2255 to an intolerable internal conflict in order to permit an attack on a future sentence. See notes 49-55 *supra* and accompanying text.

from the cases on which the *Martin* court relied, *Jones v. Cunningham*,[70] and *Fay v. Noia*.[71]

In *Jones*, the Supreme Court held that a petitioner on parole was sufficiently "in custody" to meet the requirement of section 2241.[72] This holding does not support the proposition that the Court is ready to repudiate *McNally*. It is merely a logical result of the concept of parole, that is, that parole is "in legal effect imprisonment."[73] Further, the *Jones* opinion reveals that the petitioner was subjected to actual, though intangible, restraints on his physical liberty.[74] For these reasons, the holding in *Jones* cannot be regarded as an augury of how the Court will decide a prematurity case where the sentence attacked imposes no present restraint on physical liberty or the prisoner seeks, not release, but consideration for parole. Finally, in *Fay v. Noia*,[75] decided after *Jones*, the Court cited *McNally* to support the "settled principle that if a prisoner is detained lawfully under one count of the indictment, he cannot challenge the lawfulness of a second count on federal habeas."[76]

The equivocal nature of the authority cited in *Martin* serves to emphasize the novelty of the court's holding that a prisoner may be "in custody" under a sentence he has not begun to serve and may therefore

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[70] 371 U.S. 236 (1963).

[71] 372 U.S. 391 (1963).

[72] 371 U.S. at 243. It is interesting to note that it was the Fourth Circuit which had denied relief to petitioner. Jones v. Cunningham, 294 F.2d 608 (4th Cir. 1961). In a concurring opinion in the lower court, then Chief Judge Sobeloff, author of the *Martin* decision, had questioned the denial of a "statutory fiction of constructive custody" to parolees but found debate on the point foreclosed by the Supreme Court. *Id.* at 613.

[73] Anderson v. Corrall, 263 U.S. 193, 196 (1923); *accord*, Hoptowit v. United States, 274 F.2d 936, 938 (9th Cir. 1960); United States *ex rel.* Binion v. O'Brien, 273 F.2d 495, 498 (3d Cir. 1959), *cert. denied*, 363 U.S. 812 (1960). Note, however, that the Court's unanimous decision in *Jones* overruled an earlier case in which the Court denied certiorari on the ground that petitioner's release on parole rendered the case moot. Weber v. Squier, 315 U.S. 810 (1942) (memorandum decision). *Weber* was cited to support denial of relief where petitioner had been unconditionally released. Parker v. Ellis, 362 U.S. 574, 575-76 (1960). Before *Jones*, there was a conflict among the circuits whether a parolee was in custody within the meaning of the federal habeas corpus statutes. *Compare* Johnson v. Eckle, 269 F.2d 836 (6th Cir. 1959), *and* United States *ex rel.* St. John v. Cummings, 233 F.2d 187 (2d Cir. 1956), *with* Hoptowit v. United States, 274 F.2d 936 (9th Cir. 1960).

[74] The parole order placed petitioner in the "custody and control" of the Virginia Parole Board. He was directed to (1) live with his aunt and uncle; (2) obtain the permission of his parole officer in order to leave the community, change residence, or own or operate a motor vehicle; (3) make monthly reports to his parole officer; (4) permit the officer to visit his home or place of employment at any time; and (5) follow the officer's instructions and advice. 371 U.S. at 237. The Court concluded that these conditions "significantly confine and restrain his freedom." *Id.* at 243. See generally GIARDINI, THE PAROLE PROCESS (1959); Arluke, *A Summary of Parole Rules*, in THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 225 (Johnston, Savitz, Wolfgang ed. 1962).

[75] 372 U.S. 391 (1963).

[76] *Id.* at 432.

challenge it by habeas corpus.[77] Even in *Jones v. Cunningham*, the Supreme Court dealt with restraints on liberty which had a physically confining effect, and habeas corpus has traditionally been available to test the legality of physical restraint.[78] Only in a strained way, however, can it be said that Martin was in physical custody resulting from the sentences he challenged. Nor can the right asserted—the right to be considered for parole[79]—be equated with the rights asserted in *Jones* to leave the community, change residences, and be free of any restraint on freedom of physical movement. The effect of *Martin* is to create a fictional "custody" which requires neither physical restraint under the sentence attacked nor the assertion of a right to immediate release.[80]

In a recent decision, *Williams v. Peyton*,[81] the Fourth Circuit began to delineate the outlines of the custody fiction, extending the *Martin* principle beyond its factual setting, *de jure* denial of parole eligibility, and holding that possible *de facto* prejudice to parole rights might also constitute "custody."[82] The petitioner in *Williams* was a state prisoner seeking to attack four future sentences at a time when he was *already* eligible for parole under all his sentences, valid and invalid.[83] The court refused to distinguish *Martin* on this point.[84] Rather, it took an expansive view of the case and held that because Williams' multiple sentences *might* influence the parole board in its consideration of his case, he was in custody under them within the meaning of the statute.[85] In explaining this result, the court observed that

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[77] 349 F.2d at 784.

[78] 3 BLACKSTONE, COMMENTARIES *135-37.

[79] While the court found that petitioner presented a strong case for parole, it implied that this fact was irrelevant. 349 F.2d at 784.

[80] *Martin* does not represent the first case to employ a fiction in order to expand the function of the writ. An earlier fictional concept was that a trial court could lose "jurisdiction" over the proceedings before it by an error of constitutional dimensions and thus render the proceedings subject to collateral attack. See, *e.g.*, Johnson v. Zerbst, 304 U.S. 458, 468 (1938). See generally Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 660-62 (1948).

[81] —— F.2d —— (4th Cir. 1967).

[82] *Id.* at ——.

[83] The allegedly invalid future sentences, though to be served after the sentences petitioner was then serving, had in fact been imposed before. How this happened is made clear in the opinion of the Supreme Court of Appeals of Virginia when it disposed of the petitioner's state habeas corpus petition, denying it as premature. Peyton v. Williams, 206 Va. 595, 601, 145 S.E.2d 147, 151-52 (1965). In 1956 petitioner had been sentenced to a total of twelve years in prison on four counts of robbery. He was paroled in 1960 but three years later was convicted of robbery and received a six-year sentence. On his return to prison the remaining five and a half years of his 1956 sentences were set to commence on completion of his 1963 sentence. Later that same year he was also sentenced to a year for escape. *Id.* at 596-97, 145 S.E.2d at 149-50.

[84] The district court had made this distinction and summarily denied relief. —— F.2d at ——.

[85] *Id.* at ——. The court acknowledged that the weight of these factors was for the parole

> in *Martin* we had no assurance that the prisoner would be paroled if his subsequent convictions were . . . set aside. The *mere possibility* of Martin's . . . obtaining [parole] . . . more rapidly was enough to persuade us to allow the challenge. The same factor motivates us here.[86]

Despite the solution which *Martin* and *Williams* afford where parole rights are at issue, neither holding provides the kind of complete solution to the problems of custody in federal habeas corpus law which is available through statutory amendment.[87] In each case the sentences attacked affected, although indirectly, the prisoner's present opportunity for the limited freedom of parole.[88] Neither, however, reaches a case where parole is not at issue[89] and the considerations which favor allowing the present attack of a future sentence are to insure that evidence will not be lost and that the prisoner will be released as soon as his lawful confinement ends. Further, it is uncertain whether the Fourth Circuit will permit use of the fiction to attack a future sentence under section 2255,[90] since it will be faced with *Heflin v. United States*,[91] and more explicit statutory language. The more specific requirements of section 2255 should not bar relief, though, if the *Martin-Williams* concept of custody is followed to its logical conclusion. Once it has been established that a prisoner may be in custody under a future sentence, it would seem logically to follow that he can claim the right to be released from that custody. While statutory amendment offers a preferable solution, it is to be hoped that other federal courts adopt the Fourth Circuit's novel concept of the function of habeas corpus.[92]

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board to decide but added that "we must conclude that the number of convictions and aggregate sentences are factors which every parole board probably considers in regard to any prisoner seeking parole." *Id.* at ——. No authority was cited for this proposition.

[86] *Id.* at ——. (Emphasis added.)

[87] See notes 187-97 *infra* and accompanying text.

[88] See Williams v. Peyton, —— F.2d ——, —— (4th Cir. 1967).

[89] Such a case would arise where the statute the prisoner violated precluded the possibility of parole. *E.g.*, INT. REV. CODE OF 1954, § 7237(d) (narcotic drugs and marihuana).

[90] The court in one case avoided the problem by permitting petitioner to proceed by writ of error coram nobis. Mathis v. United States, 369 F.2d 43 (4th Cir. 1966), approved in Williams v. Peyton, —— F.2d ——, —— (4th Cir. 1967).

[91] 358 U.S. 415, 420 (1959).

[92] A recent Ninth Circuit decision, relying in part on *Martin*, permitted a state prisoner to attack a sentence he had fully served where its effect had been to render him ineligible for probation at the time of sentencing for his current conviction. Arketa v. Wilson, —— F.2d —— (9th Cir. 1967). The court noted that it had repeatedly followed the *McNally* rule and found "little substantive difference" between a prisoner's seeking a ruling making him eligible for parole and one making him eligible for probation. *Id.* at ——. It found that the *McNally* doctrine had been eroded by later decisions, however, and did not apply it. *Id.* at ——.

CORAM NOBIS

The ancient common-law writ of error coram nobis[93] was traditionally available only in extraordinary circumstances, when one claiming relief could show an error of fact during the trial undiscovered and undiscoverable by reasonable diligence,[94] correction of which would have resulted in a different verdict.[95] While appeal was available for correcting errors on the face of the record, the writ of error coram nobis was invoked to correct errors outside the record.[96]

Since the writ was concerned only with factual errors rather than errors of law or lack of due process, it was never a popular remedy—at least on the federal level.[97] Indeed, there was argument[98] that the writ was abolished by section 2255[99] or Rule 60(b) of the Federal Rules of Civil Procedure.[100] It is now clear, however, that the writ is still available, and that it has assumed a new vital role as an alternative remedy to habeas corpus in postconviction-relief cases.[101] Unlike section 2255,

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93 "Coram nobis" means "before us"; the writ was so called because the record remained in the King's Bench, and the writ issued to another branch of the same court. An alternate writ issued to a judgment of the Court of Common Pleas was called "writ of error coram vobis." Both writs allowed the courts to correct their records in regard to a "vital fact" revealed for the first time. See Dwyer v. State, 151 Me. 382, 389-90, 120 A.2d 276, 280-81 (1956). For a brief treatment of the history and use of the writ coram nobis, see Fugate v. State, 85 Miss. 94, 37 So. 554 (1904); FRANK, CORAM NOBIS §§ 1.01-.04 (1953).

94 *E.g.*, Jenkins v. State, 223 Ark. 245, 247, 265 S.W.2d 512, 513, *cert. denied*, 347 U.S. 956 (1954); State *ex rel.* Gaulke v. County of Winona, 259 Minn. 183, 184, 106 N.W.2d 560, 561 (1960), *cert. denied*, 365 U.S. 848 (1961); Hawk v. State, 151 Neb. 717, 720, 39 N.W.2d 561, 565 (1949), *cert. denied*, 339 U.S. 923 (1950).

95 *E.g.*, Dunn v. United States, 238 F.2d 908, 911 (6th Cir. 1956), *cert. denied*, 353 U.S. 939 (1957); Farnsworth v. United States, 91 U.S. App. D.C. 121, 122, 198 F.2d 600, 601 (1952); United States v. Moore, 166 F.2d 102, 104 (7th Cir.), *cert. denied*, 334 U.S. 849 (1948).

96 See, *e.g.*, Karrell v. United States, 247 F.2d 706, 710 (9th Cir. 1957); United States v. Rader, 185 F. Supp. 224, 228-29 (W.D. Ark.), *aff'd*, 288 F.2d 452 (8th Cir. 1960), *cert. denied*, 268 U.S. 851 (1961); United States *ex rel.* Laino v. Warden of Wallkill Prison, 246 F. Supp. 72, 83 n.5 (S.D.N.Y. 1965) (dictum), *aff'd*, 355 F.2d 208 (2d Cir. 1966).

97 As late as 1914, the Supreme Court expressly refused to rule that it had power to issue the writ. United States v. Mayer, 235 U.S. 55, 68-69 (1914). Coram nobis did not become a recognized remedy until the 1940's. See FRANK, CORAM NOBIS § 5.01, at 90-91 (1953).

98 See United States v. Morgan, 346 U.S. 502, 513 (1954) (Minton, J., dissenting).

99 28 U.S.C. § 2255 (1964), quoted in part note 37 *supra.*

100 Rule 60(b) permits relief from a final judgment for several reasons, including mistake, inadvertence, excusable neglect, and fraud, and further provides: "Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." FED. R. CIV. P. 60(b). This abolition applies to civil, but not to criminal proceedings. Abel v. Tinsley, 338 F.2d 514, 515 (10th Cir. 1964), citing United States v. Morgan, 346 U.S. 502, 505 (1954).

101 See, *e.g.*, Williams v. United States, 310 F.2d 696, 698 (7th Cir. 1962); Mathis v. United States, 246 F. Supp. 116, 118 (E.D.N.C. 1965), *rev'd*, 369 F.2d 43 (4th Cir. 1966); Sanchez Tapia v. United States, 227 F. Supp. 35, 36 (S.D.N.Y.), *aff'd*, 338 F.2d 416 (2d Cir. 1964), *cert. denied*, 380 U.S. 957 (1965); United States v. Marcello, 210 F. Supp. 892, 895 (E.D. La. 1962), *aff'd*, 328 F.2d 961 (5th Cir. 1963), *cert. denied*, 377 U.S. 992 (1964).

there is no custody requirement[102] so that the prisoner may invoke coram nobis to attack a sentence even though he is not in actual custody.[103] Furthermore, while section 2255 relief is intended solely to release the prisoner from detention, the writ of error coram nobis may be preferable because it expunges the record.[104] This facet of the writ is important to anyone who has lost civil rights through a conviction,[105] and to anyone who is subsequently convicted of a similar offense and thus subjected to a habitual-offender statute.[106]

Absence of a custody requirement should theoretically make the writ a satisfactory and complete postconviction remedy, for most of the defects in habeas corpus petitions arise from the stringent custody requirement. Upon a proper showing in the petition for coram nobis, a prisoner serving consecutive sentences may attack a future sentence,[107] a prisoner serving concurrent sentences may challenge just one of the sentences,[108] and one who has already served a sentence may attack the consummated sentence.[109] Indeed, some courts have made this writ effective practically

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[102] *E.g.*, Azzone v. United States, 341 F.2d 417, 419 (8th Cir.), *cert. denied*, 381 U.S. 943 (1965); United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963); Shelton v. United States, 242 F.2d 101, 111-12 (5th Cir.), *rev'd on rehearing en banc*, 246 F.2d 571 (5th Cir. 1957), *rev'd on confession of error*, 356 U.S. 26 (1958).

[103] For example, coram nobis might be used to attack a future consecutive sentence. *E.g.*, Thomas v. United States, 106 U.S. App. D.C. 234, 236-37, 271 F.2d 500, 502-03 (1959); Williams v. United States, 267 F.2d 559, 560 (10th Cir. 1959).

[104] Of course, after gaining relief under § 2255, the petitioner would regain his rights if he is vindicated in a subsequent trial. But if the prosecutor does not bring a second trial—which he will never do if the petitioner's innocence becomes apparent in the appellate proceeding—petitioner will have to bring coram nobis to clear the record. See Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 HARV. L. REV. 422, 429 (1966).

[105] *E.g.*, Kyle v. United States, 288 F.2d 440 (2d Cir. 1961) (right to vote). See generally Note, *Post-Conviction Remedies—The Need for Coram Nobis*, 57 NW. U.L. REV. 467 (1962).

[106] The statutes require only a conviction and judgment, not imposition of sentence, so that a suspended sentence or a pardoned sentence may be the basis for increased punishment for subsequent convictions. See, *e.g.*, N.Y. PEN. LAW § 1941; PA. STAT. ANN. tit. 18, § 5108 (1939). The sentencing judge may not inquire into the validity of the former conviction. See O'Neill v. Tahash, 265 Minn. 407, 411, 122 N.W.2d 165, 167-68 (1963); People v. Bonano, 11 App. Div. 2d 384, 386, 207 N.Y.S.2d 115, 117 (1960), *aff'd*, 9 N.Y.2d 689, 173 N.E.2d 242, 212 N.Y.S.2d 423 (1961).

[107] See cases cited note 103 *supra*.

[108] Positing an attack via coram nobis of only one concurrent sentence is indeed very theoretical. Obviously the prisoner is under custody and meets the requirement of § 2255. Coram nobis is never granted when there is another remedy available and would probably be denied. The problem is that when the motion is treated as a § 2255 motion, the correlative requirement that petitioner be claiming immediate release arises as well as res judicata problems, and he will be turned down. See notes 32-48 *supra* and accompanying text. Thus, when there has been an error of fact, it appears that the prisoner will be realistically able to attack only a future sentence or a consummated sentence, but not a present concurrent sentence. See the discussion in Burns v. United States, 210 F. Supp. 528, 530-32 (W.D. Mo. 1962), *aff'd*, 321 F.2d 893 (8th Cir.), *cert. denied*, 375 U.S. 959 (1963).

[109] United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963); Kyle v. United States, 288 F.2d 440, 441 (2d Cir. 1961); United States v. Morgan, 39 F.R.D. 323, 326 (N.D. Miss. 1966) (dictum).

as well as theoretically. Almost all federal courts now follow the Supreme Court's *United States v. Morgan*[110] in construing mislabeled or inapposite habeas corpus petitions or other motions as motions for the writ of coram nobis.[111] Some of these courts have recognized that their legal contortions have created a mutant by speaking of a motion "in the nature of" a writ of error coram nobis.[112] A number of them have even abandoned the concept that the writ is *extraordinary* in nature and instead more readily grant the writ upon a showing of present or future adverse effect.[113]

A recent Fourth Circuit case, *Mathis v. United States*,[114] indicates a very liberal departure from the common-law requirements. A bench warrant had been issued for Mathis' arrest as a parole violator on a federal crime. Before the warrant was served, he was arrested by Florida officials for a state crime, and a federal detainer was lodged with the state officials. While serving the state sentence, Mathis appealed the district court's denial of his coram nobis petition on the ground of failure to show "present restraint or imposition" from the federal conviction. The sole question before the court was the availability of coram nobis to challenge a conviction and future sentence absent an allegation of impairment of parole eligibility.[115]

The *Morgan* case had frequently been interpreted as relaxing the common-law requirements of coram nobis, but only when the petitioner was suffering a present adverse effect, such as lack of eligibility for parole consideration.[116] Rejecting this interpretation, the *Mathis* court said:

> While in *Morgan* the defendant's status as a second offender constituted a "present imposition" flowing from the prior conviction, the Court did not expressly or impliedly lay down such a requirement for the granting of the writ. Indeed, to the extent that the "present imposition" doctrine is analogous to the "in custody" proviso in section 2255, the

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110 346 U.S. 502 (1954).

111 *E.g.*, Kyle v. United States, 288 F.2d 440 (2d Cir. 1961) (§ 2255 motion treated as petition for coram nobis); United States v. Morgan, 39 F.R.D. 323, 326-27 (N.D. Miss. 1966) (rule 32(d) motion treated as petition for coram nobis); Johnson v. United States, 344 F.2d 880 (6th Cir.) (dictum), *cert. denied*, 380 U.S. 935 (1964) (rule 35 motion may be treated as petition for coram nobis). Apparently there is no limitation to the *Morgan* "ignore the label" doctrine. See Gajewski v. United States, 368 F.2d 533 (8th Cir. 1966) (declaratory judgment action treated as petition for coram nobis).

112 *E.g.*, Owensby v. United States, 353 F.2d 412, 416 (10th Cir. 1965), *cert. denied*, 383 U.S. 962 (1966); United States v. Campbell, 278 F.2d 916, 919 (7th Cir. 1960); Thomas v. United States, 106 U.S. App. D.C. 234, 238, 271 F.2d 500, 504 (1959).

113 *E.g.*, United States v. Morgan, 346 U.S. 502 (1954); Kyle v. United States, 288 F.2d 440 (2d Cir. 1961).

114 369 F.2d 43 (4th Cir. 1966).

115 *Id.* at 44-45.

116 Impairment of consideration for parole failed to meet the requirement of custody for habeas corpus in the judgment of the Supreme Court. McNally v. Hill, 293 U.S. 131 (1934).

> court implicitly rejected it as a prerequisite to the grant of coram nobis by holding that Congress did not intend to restrict other post-conviction remedies by enacting section 2255.[117]

In denying Mathis' petition, the lower court had relied on *Martin v. Virginia*,[118] and *Young v. United States*,[119] but the appellate court found this reliance unjustified.[120] In clear recognition of the fact that its expansion of the coram nobis remedy created a remedy unknown at common law, the Fourth Circuit Court of Appeals refused to require a showing of present adverse effect as a condition of granting coram nobis.[121]

Apart from the dissatisfaction with creating a new judicial remedy under the guise of merely interpreting common-law requirements, few defects can be found in the Fourth Circuit's use of coram nobis as a post-conviction remedy. On the basis of *Mathis*, the prisoner need show no present restraint or present adverse effect; mere allegation of future adverse effects will be sufficient. However, since coram nobis must be addressed solely to the sentencing court,[122] this altered form of the writ will be limited to federal prisoners sentenced in the Fourth Circuit; it is not available to a state prisoner or a federal prisoner sentenced in another circuit.

Prisoners seeking coram nobis in its traditional form will encounter four major obstacles. Foremost among these is the requirement that the writ be issued only in the "extraordinary" circumstances when it is necessary to prevent "manifest injustice."[123] What showing is required is still unclear:

> [C]oram nobis is not merely a means of evading the jurisdictional prerequisites of a section 2255 motion; something more than the lack of availability of the latter remedy is required. . . .

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117 369 F.2d at 47.

118 349 F.2d 781 (4th Cir. 1965).

119 337 F.2d 753 (5th Cir. 1964).

120 The lower court interpreted *Martin* to hold that relief can be granted only when petitioner's *present* right to parole is affected, and interpreted *Young* to hold that relief is not available to attack a federal detainer against a state prisoner when petitioner does not allege that "the detainer restrained his parole from the state prison or that the federal conviction in any other way influenced his present incarceration." Mathis v. United States, 246 F. Supp. 116, 119 (E.D.N.C. 1965). However, the Court of Appeals found the *Martin* case inapposite because relief was granted in that case under § 2241 without resort to coram nobis. It found *Young* not controlling since the same court less than a year later, in Johnson v. United States, 344 F.2d 401 (5th Cir. 1965), granted the writ to contest a sentence which would not commence for fifteen years. 369 F.2d at 47.

121 *Id.* at 48. The court did in fact find a present adverse effect in the delay caused by waiting to be in custody under § 2255 to attack an admittedly unconstitutional sentence. *Id.* at 48-49.

122 United States *ex rel.* Gomori v. Maroney, 196 F. Supp. 190, 191 (W.D. Pa.), *aff'd*, 300 F.2d 755 (3d Cir. 1961).

123 Kagen v. United States, 360 F.2d 30, 32 (10th Cir. 1966); Alire v. United States, 339 F.2d 702, 703 (10th Cir. 1964); Young v. United States, 337 F.2d 753, 756 (5th Cir. 1964).

> Just what this "something more" may be is not readily discernible in the decisions.[124]

Essentially, each case will have to be considered on its own merits in the discretion of the trial judge. It is clear that a mere procedural technicality will not suffice; the error must be so fundamental as to render the trial irregular.[125] An allegation of innocence may be required, perhaps with the assertion of a valid defense.[126] The evidentiary argument will be sufficient only if the evidence is inherently evanescent; beyond these few guidelines, the equitable factors are undefined.[127]

A second obstacle to the federal prisoner is the mootness argument. Although in theory a prisoner may attack, via the writ of error coram nobis, a sentence he has already served,[128] some courts couple the mootness doctrine with the "extraordinary" aspect of the writ to deny relief.[129] The most common case in which a prisoner wishes to attack a consummated sentence occurs when he claims to be subject to the habitual-criminal statutes.[130] The courts will dismiss this petition as moot if the petitioner cannot support this allegation by demonstrating that he will be subject to further penalties under state or federal law.[131]

A third major obstacle to the prisoner will be the confusion surrounding the due process requirements of this writ. It is unclear whether the petitioner has a right to jury trial for disputed factual issues, whether the judge has discretion to refuse a hearing, whether there is a right of appeal, or whether res judicata applies.[132] The *Morgan* Court pulled this

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[124] United States v. Morgan, 39 F.R.D. 323, 327 (N.D. Miss. 1966).

[125] Abel v. Tinsley, 338 F.2d 514, 515 (10th Cir. 1964); Moon v. United States, 106 U.S. App. D.C. 301, 303, 272 F.2d 530, 532 (1959); Azzone v. United States, 245 F. Supp. 145, 146 (D. Minn. 1965).

[126] *Cf.* Shores v. United States, 352 F.2d 485, 487-88 (5th Cir. 1965), *cert. denied*, 382 U.S. 1029 (1966). See also United States v. Norstrand Corp., 168 F.2d 481, 482 (2d Cir. 1948).

[127] *Compare* United States v. Morgan, 39 F.R.D. 323 (N.D. Miss. 1966), *with* Johnson v. United States, 344 F.2d 401 (5th Cir. 1965).

[128] See cases cited note 109 *supra.*

[129] "While the *Morgan* decision, by making coram nobis available, alleviates the harshness of the habeas corpus 'custody' requirement, the issue of mootness raised in habeas corpus petitions remains unresolved." Note, *Post-Conviction Remedies—The Need for Coram Nobis*, 57 NW. U.L. REV. 467, 475 (1962). See generally Note, *Postrelease Remedies for Wrongful Conviction*, 74 HARV. L. REV. 1615 (1961).

[130] See, *e.g.*, United States v. Lavelle, 306 F.2d 216 (2d Cir. 1962); United States v. Campbell, 278 F.2d 916 (7th Cir. 1960); Ansourian v. United States, 240 F. Supp. 864 (S.D.N.Y. 1965), *cert. denied*, 383 U.S. 949 (1966).

[131] In one case, the prisoner had been convicted in a state court for a state offense, was subjected to a habitual-criminal statute because of a prior state offense, and was attacking a previous federal sentence. The court held that even if the prior federal sentence was vacated, the habitual-criminal statute would still impose increased punishment because of the prior state offense. United States v. Oddo, 129 F. Supp. 564 (S.D.N.Y. 1955).

[132] Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 HARV. L. REV. 422, 430-31 (1966), and cases cited therein.

writ from "the limbo to which it presumably had been relegated"[133] and put it in the limelight of postconviction remedies without determining its scope. A remedy shrouded in confusion will frequently prove ineffective.

A fourth obstacle is the "dehors the record" requirement,[134] although ordinarily this problem will be encountered only in conservative courts. The errors of fact outside the record needed for reversal at common law —typically, fraud, duress, or mental incompetency of the defendant[135]— are so limited that coram nobis can seldom be used. Moreover, the defect must not have been discovered or discoverable by due diligence at the time of trial,[136] an obstacle which makes coram nobis inapplicable in most postconviction attacks.

Much of the litigation in the coram nobis field during the next few years will occur on the state level. Spurred on by recent Supreme Court rulings on the availability of federal postconviction remedies to state prisoners,[137] many states have revived the writ of error coram nobis and have expanded it to prevent state prisoners from seeking relief by means of federal habeas corpus.[138] Even those states which have abolished the writ in favor of various postconviction-hearing acts provide for "motions in the nature of the writ of error coram nobis"[139] so that the scope and effectiveness of this writ will continue to be litigated and discussed.

FEDERAL RULES OF CRIMINAL PROCEDURE

In addition to the writs of habeas corpus and coram nobis, some post-

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133 United States v. Morgan, 346 U.S. 502, 513 (1954) (Minton, J., dissenting).

134 See cases cited note 96 *supra.*

135 See Keane v. State, 164 Md. 685, 689-93, 166 Atl. 410, 411-13 (1933).

136 See cases cited note 94 *supra.*

137 *E.g.*, Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

138 "Alabama developed this remedy [coram nobis] reluctantly and due to pressure of Federal decisions and did so in order to maintain some control over its penal system and the administration of its criminal laws." Address by Bernard F. Sykes, Asst. Att'y Gen. of Ala., Judicial Conference of the Fifth Circuit, April 14-15, 1965, in 38 F.R.D. 376, 391 (1965). Prior to 1943 Alabama had no postconviction remedy. *Id.* at 377. For a brief treatment of the Wyoming experience, see Note, *Postconviction Remedies*, 19 WYO. L.J. 213 (1965). Expansion of coram nobis in the states has won some support. See Note, *Post-Conviction Remedies —The Need for Coram Nobis*, 57 NW. U.L. REV. 467, 473-76 (1962). One restrictive requirement of state coram nobis that must be abolished is the rule that an applicant for the writ must be physically present in the state when he seeks relief. See United States *ex rel.* Savini v. Jackson, 250 F.2d 349 (2d Cir. 1957) (Michigan coram nobis); People v. Deutsch, 23 App. Div. 2d 732, 258 N.Y.S.2d 228 (1965) (New York coram nobis). However, while expanding coram nobis beyond the common-law requirements, the courts may impose new limitations on the remedy which make it useless. Sykes, *supra* at 382-83. See generally Briggs, *"Coram Nobis"—Is It Either an Available or the Most Satisfactory Post-Conviction Remedy To Test Constitutionality in Criminal Proceedings?*, 17 MONT. L. REV. 160 (1956).

139 *E.g.*, ILL. REV. STAT. ch. 38, § 122 (1965); MD. ANN. CODE art. 27, §§ 645-A to -J (Supp. 1966) (modeled after Uniform Post-Conviction Procedure Act); ORE. REV. STAT. §§ 138.500-.680 (1963) (modeled after 28 U.S.C. § 2255 (1964)).

conviction relief is available under Rules 32(d), 33, 34, and 35 of the Federal Rules of Criminal Procedure. But unless attack on the sentence is made within a very short time after sentencing, only rules 32(d) and 35 are effective.[140]

Rule 32(d) allows, in the court's discretion, withdrawal of a plea of guilty or *nolo contendere* after sentence has been imposed in order to "correct manifest injustice." The most typical cases involving this rule are those in which a defendant claims that his plea was the result of threats or promises made by a government agent,[141] that he was represented by incompetent counsel,[142] that the plea was made without an understanding of its nature,[143] or that he was misled about the severity of the probable sentence.[144]

The first problem encountered is that the granting of the 32(d) motion is discretionary. There is no absolute legal right to withdraw a plea of guilty;[145] denial of the motion will be reversed only when there is an abuse of discretion.[146] Relief is limited to the situation in which the motion must be granted to correct manifest injustice,[147] and the burden of

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[140] Rule 33 allows a new trial "if required in the interest of justice," but imposes a seven-day limitation upon the motion, although a motion based on newly discovered evidence may be brought within two years. Since the motion is addressed to the sentencing court, customarily before sentence is imposed, and since the time allowed for filing the motion absent new evidence is so restrictive, this rule can be considered a postconviction remedy only in a very limited sense. The same is true of rule 34, providing for a motion in arrest of judgment to be made within seven days "if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged."

[141] *E.g.*, Pinedo v. United States, 347 F.2d 142, 147 (9th Cir. 1965), *cert. denied*, 382 U.S. 976 (1966); United States v. Finney, 242 F. Supp. 112, 114-15 (W.D. Pa. 1965).

[142] *E.g.*, United States v. Baysden, 326 F.2d 629, 631 (4th Cir. 1964); United States v. Scott, 292 F.2d 49, 50 (6th Cir.), *cert. denied*, 368 U.S. 879 (1961); United States v. Napolitano, 212 F. Supp. 743, 745 (S.D.N.Y. 1963).

[143] *E.g.*, Pinedo v. United States, 347 F.2d 142, 146 (9th Cir. 1965), *cert. denied*, 382 U.S. 976 (1966); United States v. Washington, 341 F.2d 277, 283 (3d Cir.), *cert. denied*, 382 U.S. 850 (1965); United States v. Finney, 242 F. Supp. 112, 114 (W.D. Pa. 1965).

Because rule 11 prohibits the court from accepting a plea of guilty "without first . . . determining that the plea is made voluntarily with understanding of the nature of the charge," this argument is usually unsuccessful. *But see* United States v. Mack, 249 F.2d 421, 423 (7th Cir. 1957).

[144] *E.g.*, Verdon v. United States, 296 F.2d 549, 553 (8th Cir. 1961), *cert. denied*, 370 U.S. 945 (1962); United States v. Parrino, 212 F.2d 919, 921 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954); United States v. Napolitano, 212 F. Supp. 743, 747 (S.D.N.Y. 1963).

[145] Oksanen v. United States, 362 F.2d 74, 78 (8th Cir. 1966); Miller v. United States, 351 F.2d 598, 599 (9th Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); United States v. Giuliano, 348 F.2d 217, 221 (2d Cir.), *cert. denied*, 382 U.S. 946 (1965); Criser v. United States, 319 F.2d 849, 850 (10th Cir. 1963).

[146] United States v. Moore, 360 F.2d 146, 147 (2d Cir. 1966); Pinedo v. United States, 347 F.2d 142, 148 (9th Cir. 1965), *cert. denied*, 382 U.S. 976 (1966); United States v. Scott, 292 F.2d 49, 51 (6th Cir.), *cert. denied*, 368 U.S. 879 (1961); United States v. Mack, 249 F.2d 421, 423 (7th Cir. 1957).

[147] Rule 32(d) has two clauses, one pertaining to withdrawal of a plea before sentence and one for withdrawal after sentence. The requirement of "manifest injustice" is imposed

proving manifest injustice if the motion is denied rests on the defendant.[148] The court is confronted with a balancing problem, and no list of requisite factors is possible. It is almost universally held, however, that there must be at least an assertion of innocence and a prima facie case,[149] although the mere assertion will not necessarily result in the granting of the motion.[150]

A further problem raised in this area is the argument of mootness. While it is true that there is no time within which a rule 32(d) motion must be made, it will not be granted after the sentence has been served unless the defendant can show deprivation of substantial rights.[151] In this regard, a rule 32(d) motion is similar to petitioning for a writ of error coram nobis. In extraordinary circumstances, the motion will be treated as one for coram nobis, which requires less stringent standards.[152]

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in the latter case. The rule to be applied in the former case is usually held to be: "The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for *any reason* the granting of the privilege seems *fair* and *just*." Gearhart v. United States, 106 U.S. App. D.C. 270, 273, 272 F.2d 499, 502 (1959), quoting Kercheval v. United States, 274 U.S. 220, 224 (1927). The courts interpret this to mean that before sentence the motion should be granted freely. *E.g.*, Pinedo v. United States, 347 F.2d 142, 148 (9th Cir. 1965), *cert. denied*, 382 U.S. 976 (1966); Everett v. United States, 119 U.S. App. D.C. 60, 62-63, 336 F.2d 979, 981-82 (1964); Kadwell v. United States, 315 F.2d 667, 670 (9th Cir. 1963). But, of course, if the motion is made before sentence, it cannot truly be called a post-conviction procedure.

One court has held that "manifest injustice" is not the criterion for allowing withdrawal of the plea.

> The showing of "manifest injustice" as required by Rule 32(d) is directed solely at the setting aside of the judgment of conviction. Once the procedural bar of the outstanding judgment has been properly removed . . . the decision of whether the prior guilty plea may be withdrawn is addressed to the sound discretion of the trial court. "Manifest injustice" plays no part in this decision.

Oksanen v. United States, 362 F.2d 74, 77 (8th Cir. 1966). Defendant, who had already served the sentence, moved to withdraw his plea because of lack of counsel during the sentencing. The court, finding "manifest injustice," set aside the conviction, but, in its discretion, did not allow withdrawal of the plea. See *id.* at 78.

[148] United States v. Washington, 341 F.2d 277, 281 (3d Cir.), *cert. denied*, 382 U.S. 850 (1965); Watts v. United States, 107 U.S. App. D.C. 367, 370-71, 278 F.2d 247, 250-51 (1960); United States v. Mack, 249 F.2d 421, 423 (7th Cir. 1957).

[149] *E.g.*, Zaffarano v. United States, 330 F.2d 114, 115 (9th Cir.), *cert. denied*, 379 U.S. 825 (1964); Smith v. United States, 116 U.S. App. D.C. 404, 408-09, 324 F.2d 436, 440-41 (1963), *cert. denied*, 376 U.S. 957 (1964); Watts v. United States, *supra* note 148, at 370-71, 278 F.2d at 250-51. See generally Note, 112 U. PA. L. REV. 865, 877 n.74 (1964).

[150] *E.g.*, United States v. Washington, 341 F.2d 277, 286 (3d Cir.), *cert. denied*, 382 U.S. 850 (1965); United States v. Napolitano, 212 F. Supp. 743, 745-46 (S.D.N.Y. 1963).

[151] A long lapse of time before bringing the motion casts doubt on the good faith of defendant, but the court will entertain the motion when there are valid grounds. See Oksanen v. United States, 362 F.2d 74 (8th Cir. 1966) (relief granted after ten years because lack of counsel at sentencing); United States v. Washington, 341 F.2d 277 (3d Cir.), *cert. denied*, 382 U.S. 850 (1965) (no mootness after five years where defendant alleged loss of voting rights).

[152] *E.g.*, United States v. Morgan, 39 F.R.D. 323 (N.D. Miss. 1966). The court said that the stringent standard of "manifest injustice" applied to rule 32(d) motions is "substantially more liberal" than the requirement that coram nobis be granted only in "extraordinary" or "peculiar" circumstances. *Id.* at 329.

Rule 35 provides for the correction of an illegal sentence at any time.[153] The motion is strictly limited to reviewing the legality of the sentence rather than reviewing errors committed during the trial or errors of fact not appearing on the face of the record.[154] It is intended to bring a sentence not authorized by the conviction into conformity with the law.[155] Since it presupposes a valid conviction,[156] it may not be used as a collateral attack upon the conviction,[157] and relief will not result in a new trial.[158] Nor is it intended to meet the problems raised in habeas corpus or coram nobis proceedings.[159]

The motion under rule 35 provides an effective remedy when consecutive sentences have been imposed on separate counts which constitute but one offense,[160] when a single general sentence is imposed for multicount convictions,[161] when the doctrine of merger of the offenses applies,[162] or when the sentence imposed exceeds the statutory limit.[163] There is no time limitation hampering its effectiveness. The motion may be used to attack a future sentence[164] or a sentence already served.[165]

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153 The second sentence of rule 35 provides for the reduction or correction of a sentence imposed in an illegal manner within 120 days. The nature of a motion invoking this second sentence is different from a postconviction remedy, for this motion is essentially a plea to the sentencing court for leniency. Jones v. United States, 117 U.S. App. D.C. 169, 173-74, 327 F.2d 867, 871-72 (1963); Poole v. United States, 102 U.S. App. D.C. 71, 76, 250 F.2d 396, 401 (1957). Granting of the motion is discretionary. Lott v. United States, 309 F.2d 115, 126-27 (5th Cir. 1962), *cert. denied*, 371 U.S. 950 (1963); Beitel v. United States, 306 F.2d 665 (5th Cir. 1962). Rule 45(b) expressly disallows extension of the 120-day period.

154 Glouser v. United States, 340 F.2d 436 (8th Cir.), *cert. denied*, 381 U.S. 940 (1965) (admissibility of evidence); Stegall v. United States, 279 F.2d 872 (6th Cir. 1960) (improper jury instructions); Killebrew v. United States, 275 F.2d 308 (5th Cir. 1960) (defect in indictment); United States v. French, 274 F.2d 297 (7th Cir. 1960) (admissibility of confession).

155 Pinedo v. United States, 347 F.2d 142, 148 (9th Cir. 1965), *cert. denied*, 382 U.S. 976 (1966); Green v. United States, 274 F.2d 59, 60 (1st Cir. 1960), *aff'd*, 365 U.S. 301 (1961); United States v. Hough, 157 F. Supp. 771, 774 (S.D. Cal. 1957).

156 Jones v. United States, 117 U.S. App. D.C. 169, 173-74, 327 F.2d 867, 871-72 (1963); United States v. Lawrenson, 298 F.2d 880, 888-89 (4th Cir.), *cert. denied*, 370 U.S. 913 (1962); United States v. Rader, 185 F. Supp. 224, 228-29 (W.D. Ark. 1960), *aff'd*, 288 F.2d 452 (8th Cir.), *cert. denied*, 368 U.S. 851 (1961).

157 Johnson v. United States, 334 F.2d 880, 883 (6th Cir. 1964), *cert. denied*, 380 U.S. 935 (1965); Migdol v. United States, 298 F.2d 513, 514 (9th Cir. 1961); Callanan v. United States, 274 F.2d 601, 605 (8th Cir. 1960), *aff'd*, 364 U.S. 587 (1961).

158 United States v. Lawrenson, 298 F.2d 880, 888 (4th Cir.), *cert. denied*, 370 U.S. 913 (1962).

159 Duggins v. United States, 240 F.2d 479, 483-84 (6th Cir. 1957); Holloway v. United States, 89 U.S. App. D.C. 332, 335, 191 F.2d 504, 507 (1951).

160 Gilinsky v. United States, 335 F.2d 914 (9th Cir. 1964).

161 Hall v. United States, 356 F.2d 424 (5th Cir. 1966).

162 Redfield v. United States, 315 F.2d 76 (9th Cir. 1963).

163 Duggins v. United States, 240 F.2d 479 (6th Cir. 1957) (dictum).

164 Holloway v. United States, 89 U.S. App. D.C. 332, 191 F.2d 504 (1951).

165 Scarponi v. United States, 313 F.2d 950 (10th Cir. 1963).

In the latter case, however, petitioner will be compelled to allege the deprivation of substantial rights to avoid the mootness argument.

Both rule 32(d) and 35 are useful remedies, but they are quite limited in range, for they are concerned solely with the actual sentencing procedure. Neither provides an effective weapon to attack the increasing number of convictions subject to constitutional defects, nor the solution for the obstacles to attacking a sentence by habeas corpus or coram nobis.

MANDAMUS

In many cases, federal and state courts, while denying habeas corpus to a petitioner attacking a future consecutive sentence on the basis of impairment of parole eligibility, have indicated by way of dictum that mandamus is available.[166] That writ, however, is far too limited to be effective, since it lies only to compel the performance of an indisputable duty.[167] It is granted only in the exercise of judicial discretion when the petitioner can show that his claim is clear and certain and that the duty of the official is ministerial, plainly defined, and peremptory.[168] There must be a showing of manifest injustice,[169] either by demonstrating that the official has refused to grant relief when petitioner has met all the qualifications or that the minister has abused his discretion.

Mandamus as a postconviction remedy is used in an attempt to force the parole board to hear defendant's claim. This use of the writ is unauthorized for two reasons: First, parole is not a right but a privilege[170] to be granted in the discretion of the parole board[171] with which the courts may not interfere, [172] and the claim of right is indispensable to the

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166 *E.g.*, McNally v. Hill, 293 U.S. 131, 140 (1934); Brown v. United States, 256 F.2d 151, 152 (5th Cir. 1958); *In re* Carey, 372 Mich. 378, 382, 126 N.W.2d 727, 730 (1964).

167 *E.g.*, McWhorter v. Kennedy *ex rel.* Seattle, 324 F.2d 793, 794 (8th Cir. 1963); Massachusetts v. Connor, 248 F. Supp. 656, 659 (D. Mass. 1966).

168 United States *ex rel.* U.S. Borax Co. v. Ickes, 68 App. D.C. 399, 409, 98 F.2d 271, 281, *cert. denied*, 305 U.S. 619 (1938); Parrott v. Cary, 234 F. Supp. 572, 574 (D. Colo. 1964).

169 Bartsch v. Clarke, 293 F.2d 283, 285 (4th Cir. 1961); United States v. Carter, 270 F.2d 521 (9th Cir. 1959); U.S. SUP. CT. R. 30.

170 Eligibility for parole is a matter of legislative grace. Smith v. United States, 116 U.S. App. D.C. 404, 409, 324 F.2d 436, 441 (1963), *cert. denied*, 376 U.S. 957 (1964); Lathem v. United States, 259 F.2d 393, 397 (5th Cir. 1958); Woods v. Steiner, 207 F. Supp. 945, 951 (D. Md. 1962). Determination of the eligibility date is wholly within the discretion of the parole board. Walker v. Taylor, 338 F.2d 945, 946 (10th Cir. 1964); Hyser v. Reed, 115 U.S. App. D.C. 254, 263, 318 F.2d 225, 234, *cert. denied*, 375 U.S. 957 (1963).

171 18 U.S.C. § 4203(a) (1964) provides in part:

> If it appears to the Board of Parole . . . that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.

172 For example, the Supreme Court construed the provisions for probation so as to "avoid

granting of mandamus; second, although exercise of the discretion vested in the parole board may be compelled when the board has jurisdiction,[173] it has no authority to hear the claim until the prisoner has served the statutory minimum for parole eligibility.[174] If a future sentence is voidable, the board still may not hear the petition until that sentence is actually voided by a court. In the leading case of *Clark v. Memolo*,[175] the United States Court of Appeals for the District of Columbia Circuit pointed out:

> The Attorney General must follow that record in computation of parole eligibility dates. To do otherwise would amount to a collateral attack on such judgment by the Attorney General. In the present case a writ of mandamus would require the Attorney General: a) to disregard his duty as to the basis of computation imposed by statute, and b) to declare a judgment void.[176]

The courts cannot force the parole board, an agency of the executive body, to become a judicial body when such statutory power is not given.[177]

Even if the jurisdictional problem did not exist, the petitioner would most likely encounter a serious handicap of prejudice.[178] A parole board is likely to view with disfavor the application of a prisoner who has compelled the board to review his case. Because the board is vested with so much discretion, this obstacle in practice might be more serious than the jurisdictional problem. That such prejudice is not subject to documentation does not mean that it does not exist.

DECLARATORY JUDGMENT

A petitioner may occasionally invoke the Federal Declaratory Judgment Act[179] as a postconviction remedy, primarily when he wishes to

interference with the parole and clemency powers vested in the Executive Branch." Affronti v. United States, 350 U.S. 79, 83 (1955); *cf.* Cagle v. Harris, 349 F.2d 404 (8th Cir.), *cert. denied*, 382 U.S. 965 (1965); Normandale v. Hiatt, 210 F.2d 941 (5th Cir. 1954).

173 The courts can compel exercise of discretion, though they may not interfere with the discretion itself. United States v. Nebbia, 357 F.2d 303 (2d Cir. 1966); United States v. Hester, 325 F.2d 654 (9th Cir. 1963); Parrott v. Cary, 234 F. Supp. 572 (D. Colo. 1964).

174 A federal prisoner is eligible for parole after serving one-third of his term or terms. 18 U.S.C. § 4202 (1964). In computing the date, consecutive sentences are aggregated. Walker v. Taylor, 338 F.2d 945, 946 (10th Cir. 1964); Brown v. United States, 256 F.2d 151, 154 (5th Cir. 1958).

175 85 U.S. App. D.C. 65, 174 F.2d 978 (1949).

176 *Id.* at 67-68, 174 F.2d at 980-81.

177 Mandamus is issued by the federal courts under the All Writs Act which allows the courts to issue the writ "in aid of their respective jurisdictions," but not to enlarge their jurisdictions. 28 U.S.C. § 1651(a) (1964).

178 Parole boards are very sensitive to intrusion upon their authority. The Sixth Circuit recently had to invalidate a statute which allowed a parole board to delay for one year consideration of an application of one who petitions for federal habeas corpus. Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967).

179 The Declaratory Judgment Act, 28 U.S.C. § 2201 (1964), provides:

attack a future sentence in order to obtain present eligibility for parole.[180] The act is not, however, a substitute for appeal, habeas corpus, coram nobis, or other procedures available to state[181] or federal prisoners[182] for attacking a sentence or conviction. The major reason the act may not be invoked is that its principal purpose is the adjudication of rights not previously adjudicated, while a postconviction remedy necessarily seeks review of a final judgment.[183] Moreover, because of the sensitiveness of federal-state relations, federal courts will entertain petitions of state prisoners only by a motion under section 2241, after state remedies have been exhausted.[184] The federal courts hold that their only right is to act on the person with regard to his illegal detention, and not on the judgment.[185]

Since the Declaratory Judgment Act is not available as a postconviction remedy, the petitioner cannot have his rights declared before he has status to attack a future sentence, that is, before he is in custody under that sentence. Abolition of the custody requirement would solve the prejudice to a prisoner incurred in waiting to be in "custody" to attack a future sentence.[186] But the courts are undoubtedly correct in ruling

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> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[180] See, *e.g.*, Davis v. Board of Parole, 113 U.S. App. D.C. 194, 306 F.2d 801 (1962); Clark v. Memolo, 85 U.S. App. D.C. 65, 174 F.2d 978 (1949).

[181] United States *ex rel.* Bennett v. Illinois, 356 F.2d 878, 879 (7th Cir.), *cert. denied*, 384 U.S. 946 (1966); Forsythe v. Ohio, 333 F.2d 678, 679 (6th Cir. 1964); Waldon v. Iowa, 323 F.2d 852, 853 (8th Cir. 1963).

[182] Gajewski v. United States, 368 F.2d 533, 534 (8th Cir. 1966); Coronado v. United States, 341 F.2d 918, 919 (5th Cir.), *cert. denied*, 381 U.S. 943 (1965); Clark v. Memolo, 85 U.S. App. D.C. 65, 68, 174 F.2d 978, 981 (1949). While the prisoner will not be able to obtain a declaratory judgment, he may still have relief. Many of the federal courts, following the lead of United States v. Morgan, 346 U.S. 502 (1954), and Azzone v. United States, 341 F.2d 417 (8th Cir.), *cert. denied*, 381 U.S. 943 (1965), will treat a declaratory judgment complaint as some other appropriate petition. *E.g.*, Gajewski v. United States, 368 F.2d 533 (8th Cir. 1965) (declaratory judgment action treated as petition for coram nobis); Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965) (petition for declaratory judgment treated as application for habeas corpus).

[183] Clark v. Memolo, 85 U.S. App. D.C. 65, 68, 174 F.2d 978, 981 (1949).

[184] Nor is there any basis to contend that the remedy as thus previously existing [§ 2241] is inadequate so as to call for application of the declaratory judgment statute, in inharmonious purpose, inconsistent policy and provocative circumvention as to exhausting state remedies and as to permitting federal judicial reach to be made, not against the judgment, but as [to] the unconstitutional restraint existing.

Christopher v. Iowa, 324 F.2d 180, 181 (8th Cir. 1963).

[185] *E.g.*, *ibid.*; Waldon v. Iowa, 323 F.2d 852, 853 (8th Cir. 1963). There has been a suggestion that coram nobis under the All Writs Act, 28 U.S.C. § 1651(a) (1964), which operates on the judgment, is available in extraordinary circumstances. See Gajewski v. United States, 368 F.2d 533, 534 (8th Cir. 1966).

[186] At least one state court gives declaratory judgment relief in a habeas corpus proceeding

that the act was never passed for the purpose of remedying the statutory defects in habeas corpus petitions.

CONCLUSION

In recent years federal courts confronted with the custody requirement of habeas corpus have demonstrated that they are unwilling to be strictly bound by it. Rather, they have either resorted to an interpretation of "custody" which makes it a legal fiction[187] or they have employed remedies other than habeas corpus to afford postconviction relief.[188] These efforts, based on theories of relief ranging from the Civil Rights Act of 1871[189] to a modern version of coram nobis,[190] reflect judicial awareness that present federal habeas corpus statutes do not permit courts to approach current postconviction problems with sufficient flexibility. Although the courts have often fashioned some means to grant relief, no single complete remedy is now available; the theories of relief that have proliferated in recent years all are defective in some respect.

Manifestly, the best solution to the custody problem is amendment of the habeas corpus statute, which should, like the Constitution,[191] leave the peacetime availability of the writ undefined. Specifically, the writ should not be restricted to prisoners in custody,[192] in accord with which the writ should lie to attack *convictions* instead of only sentences.[193] Finally, the language that such a postconviction attack may be made at any time should be continued. Prisoners would thus be insured their parole rights and their right to be released from confinement as soon as its lawful term has expired, rather than being forced to serve part of an invalid sentence while awaiting disposition of their petitions. Furthermore, neither the prisoner nor the prosecution would be hampered in the presentation of

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by ruling that a judgment wholly void or void in part is subject to collateral attack and the enforcement of such judgment will be prevented in a habeas corpus proceeding. State *ex rel.* Widmeyer v. Boles, 144 S.E.2d 322, 326-27 (W. Va. 1965); State *ex rel.* Bullett v. Boles, 149 W. Va. 700, 703-04, 143 S.E.2d 133, 135-36 (1965); State *ex rel.* Beckett v. Boles, 149 W. Va. 112, 120, 138 S.E.2d 851, 858 (1964).

187 Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965).

188 *E.g.*, Heflin v. United States, 358 U.S. 415 (1959) (rule 35); United States v. Morgan, 346 U.S. 502 (1954) (coram nobis).

189 17 Stat. 13, 42 U.S.C. § 1983 (1964), Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967).

190 *E.g.*, United States v. Morgan, 346 U.S. 502 (1954).

191 U.S. CONST. art. I, § 9, quoted note 8 *supra.*

192 Such a recommendation has found recent expression in ADVISORY COMM. ON SENTENCING AND REVIEW, AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, POST-CONVICTION REMEDIES § 2.3 (Tent. Draft 1967) [hereinafter cited as POST-CONVICTION REMEDIES]. Interestingly, Judge Sobeloff, author of both the *Martin* and *Mathis* opinions, was chairman of the committee.

193 See Second Revised Uniform Post-Conviction Procedure Act, § 1 (1966); POST-CONVICTION REMEDIES § 2.1(a). Compare ORE. REV. STAT. §§ 138.510-.680 (1965).

the case by the loss of witnesses and evidence which may result from postponement of the collateral attack.

Although it has been argued that abolition of the prematurity doctrine, which such an amendment would effect, will lead to a flood of frivolous petitions,[194] this position seems invalid with respect to the federal statutes. First, abolition of prematurity will affect only the *timing* of a collateral attack, not the number of petitions a prisoner can bring. Second, aware of the heavy burdens on federal courts from habeas corpus petitions,[195] Congress acted last year to provide greater finality to habeas corpus judgments. It amended the habeas corpus statute[196] to permit district courts to refuse to entertain successive applications for the writ which do not state new grounds for relief.[197] Thus no good reason can be advanced for perpetuating in modern law the anachronistic custody concept; practicality and fairness dictate its abolition.

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[194] Commonwealth *ex rel.* Stevens v. Myers, 419 Pa. 1, 26-28, 213 A.2d 613, 627-28 (1965) (Cohen, J., dissenting).

[195] See S. REP. NO. 1797, 89th Cong., 2d Sess. (1966), in 1966 U.S. CODE CONG. & AD. NEWS 3663.

[196] 28 U.S.C.A. §§ 2244, 2254 (Feb. Supp. 1967).

[197] 28 U.S.C.A. § 2244 (Feb. Supp. 1967).

DUTY TO BARGAIN: SUBCONTRACTING, RELOCATION, AND PARTIAL TERMINATION

Section 8(a)(5) of the National Labor Relations Act[1] imposes upon an employer a duty to bargain collectively with the certified representative of his employees concerning wages, hours, and other terms and conditions of employment. Performance of this duty demands more than a "willingness to enter upon a sterile discussion of union-management differences";[2] the act does not compel an employer to reach an agreement with the union[3] but merely requires that the employer engage in good-faith collective bargaining.[4] To change the conditions of employment unilaterally without bargaining is a violation of section 8(a)(5), for by circumventing the duty to negotiate it frustrates the objectives of the act.[5] The primary focus of this Note will be on the employer's duty to bargain when he unilaterally subcontracts, relocates, or partially terminates his operation.[6] Although violation of section 8(a)(5) is often an outgrowth of antiunion animus on the part of the employer, and thus is frequently associated with violations of section 8(a)(3), which prohibits employer discrimination against employees for union activity,[7] section

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[1] Reenacted by 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964): It is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ."

[2] NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1951).

[3] *Id.* at 404; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937); McGregor Printing Corp., 163 N.L.R.B. No. 113 (1967); S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935) (report dealing with Wagner Act).

[4] Section 8(d) of the act provides that

> to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .

61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

[5] See NLRB v. Katz, 369 U.S. 736, 743 (1962) (unilateral wage and merit increases and changes in sick-leave benefits); NLRB v. Crompton-Highland Mills, 337 U.S. 217 (1949) (unilateral wage increases).

[6] Complete cessation has been said to be immune from an unfair labor practice charge. Textile Workers v. Darlington Mills, 380 U.S. 263 (1965). The Supreme Court held that complete cessation does not violate § 8(a)(3), even though there is an antiunion motive. It would seem that complete cessation could not have as its sole motive antiunion animus, for such a finding would assume that the employer would cut off his nose to spite his face. But in *Darlington* it is not clear whether the Court was referring merely to the 8(a)(3) violation with its antiunion element, or also to an 8(a)(5) violation, which has been traditionally held possible without antiunion animus. The subsequent application of the *Darlington* principle in the circuits has included the latter violation within the scope of that decision. See notes 289-94 *infra* and accompanying text.

[7] 61 Stat. 140 (1947), as amended, 73 Stat. 525 (1959), 29 U.S.C. § 158(a)(3) (1964); see, *e.g.*, NLRB v. Gorlick, 364 F.2d 508 (9th Cir. 1966); Truck Drivers v. NLRB, 364 F.2d 682 (D.C. Cir. 1966).

8(a)(3) will be discussed only as it relates to the duty to bargain.[8]

Two types of subcontracting can be distinguished. On one hand, subcontracting of work which could have been performed by the employees may result in *diminution* of work for the bargaining unit. The unit is not destroyed but shorter hours do result, with a concurrent loss of wages. In the second type—*replacement* subcontracting—the employees of an independent contractor are substituted for employees in the existing bargaining unit to do the same work, in effect destroying the bargaining unit.

Relocation occurs when an employer decides to discontinue all or part of his operations at one location and transfer the work to another of his plants, either new or existing. Partial termination involves suspension of operations, but unlike relocation, no work is transferred to other divisions of an employer's enterprise; nor does he have any immediate intention to reestablish the terminated operations. Relocation, in the majority of cases, and partial termination, like replacement subcontracting, destroy the bargaining unit.

The Supreme Court decision in *Fibreboard Paper Prods. Corp. v. NLRB* (*Fibreboard*)[9] has had a great effect in these situations although the Court attempted to limit its holding to replacement subcontracts.[10] The impact of *Fibreboard* has established a duty to bargain about the decision to subcontract, has reaffirmed that duty in relocation cases, and has resolved the issue of decision-bargaining with respect to partial termination.

SUBCONTRACTING

THE BOARD CASES

Pre-Fibreboard Duty to Effect-Bargain

Timken Roller Bearing Co.[11] was the first case in which the duty to bargain regarding subcontracting was considered by the National La-

[8] An employer's act of subcontracting, relocating, or partially terminating his enterprise can lead to multiple violations of the same section, each violation focusing on a different aspect of the same act. If one of the above acts is unilaterally executed *to avoid* bargaining with the union, the act itself will be found to be a violation of § 8(a)(5). See Local 57, ILGWU v. NLRB (Garwin), —— F.2d —— (D.C. Cir. 1967). The same unilateral act can lead to another type of 8(a)(5) violation, since it in itself can constitute a refusal to bargain; it is this latter violation which will be considered in this Note.

[9] 379 U.S. 203 (1964).

[10] *Id.* at 215. It should be noted that neither the National Labor Relations Board nor the courts have drawn clear distinctions when dealing with subcontracting cases. The Supreme Court in *Fibreboard* designated the subcontract at issue to be the replacement type and noted that there were other business arrangements falling under this heading but did not draw the replacement-diminution dichotomy. *Id.* at 215 & n.8.

[11] 70 N.L.R.B. 500 (1946), *enforcement denied*, 161 F.2d 949 (6th Cir. 1947).

bor Relations Board.[12] Timken had customarily subcontracted certain maintenance and production work,[13] and when the union requested bargaining about this practice, the employer based its refusal on management prerogative.[14] Although the NLRB held that Timken violated its duty to bargain,[15] it did not indicate whether the company was required to bargain about the *decision* to subcontract itself or only about the *effects* of the subcontracting on the bargaining unit.[16] *Timken* was nevertheless revolutionary in that it contained no charge of antiunion animus; the Board upheld the union's contention that, notwithstanding an extensive history of subcontracting and economically desirable reasons for doing so, the company had a duty to bargain. This was a bold invasion into the sacred preserve of management's prerogative to subcontract which

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[12] The unfair labor practice charge filed by the union was not directed solely at the refusal to bargain with respect to subcontracting. The complaint also charged that Timken violated the act by refusing to bargain about other issues, including issuance of plant rules and penalties, increase of working hours, and change of working conditions in one department. *Id.* at 511. In an earlier case the Mahoning Mining Co., beset by a labor shortage, unilaterally subcontracted with another mining firm to take over part of its operations. The issue there was not the unilateral nature of the decision but rather the duty of the original employer to bargain with the workers of the successor employer. In exonerating Mahoning from this duty on the ground that the workers were employees of an independent contractor, the Board indicated in dictum that subcontracting for economic reasons was permissible and that the company did not have to notify the union about that decision. Mahoning Mining Co., 61 N.L.R.B. 792, 803 (1945).

[13] At the time the charge was filed, Timken was doing business with some ninety-one subcontractors. Testimony before the trial examiner indicated that as early as 1919 the company had a policy of subcontracting. 70 N.L.R.B. at 515 n.10.

[14] A management-rights clause in the collective-bargaining agreement provided in part that the "management of the works and the direction of the working forces . . . is vested exclusively in the Company." *Id.* at 511. Timken argued that this clause would be nugatory if its refusal to bargain with respect to subcontracting was found violative of the act. *Id.* at 515.

The theoretical basis for management prerogative is the right to hold private property with concomitant rights to manage and control it for one's own benefit. O'Shaughnessy, *Management Rights: Control or Anarchy*, 8 LAB. L.J. 25, 40 (1957); Note, *Management Prerogatives No Longer Include Right To Make Unilateral Decision To Subcontract*, 38 NOTRE DAME LAW. 288, 290 (1963). Management prerogative has been used to preclude a duty to bargain when an employer subcontracts, relocates, or partially terminates. See Rapid Bindery, Inc. v. NLRB, 293 F.2d 170 (2d Cir. 1961) (relocation); Jays Foods, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961) (subcontracting); Pepsi-Cola Bottling Co. (Montgomery), 72 N.L.R.B. 601 (1947) (partial termination).

[15] The Board affirmed the trial examiner's contention that since the subcontracting had affected the conditions of employment by undermining the employees' tenure, it was properly amenable to the collective-bargaining process and the refusal to bargin was a violation of 8(5) of the act. 70 N.L.R.B. at 504, 521.

[16] The Sixth Circuit, in denying enforcement, never confronted the issue of a duty to bargain as it pertains to subcontracting. Timken Roller Bearing Co. v. NLRB, 161 F.2d 949 (6th Cir. 1947). The court viewed the case as a dispute over the meaning of the management-rights clause. Since the collective-bargaining agreement contained grievance procedures, the court directed the parties to use those procedures to resolve the issue whether subcontracting was properly within management's prerogative. *Id.* at 955.

the NLRB did not again pursue until much later in *Town & Country Mfg. Co.*[17] and *Fibreboard Paper Prods. Corp. (Fibreboard II)*.[18]

Four cases subsequent to *Timken* contained combinations of two unfair labor practice charges against the employer: Violation of section 8(a)(3) for illegal discrimination against employees in the bargaining unit and violation of section 8(a)(5) for refusal to bargain in good faith. The decisions did not differentiate between decision-bargaining and effect-bargaining;[19] the Board in each case held that the employer had a duty to effect-bargain without explicitly considering the possibility of a duty to bargain over the decision to subcontract.

In *Houston Chronicle Publishing Co.*,[20] the Board found the newspaper's attempt to discourage union activity constituted a violation of 8(a)(3).[21] The Board further found that, since the subcontracting was in effect a countermeasure to defeat union organizing and was without economic validity,[22] the employer had a duty to discuss his intended business changes, the breach of which violated 8(a)(5).[23] In *Brown-Dunkin Co.*,[24] the NLRB sustained an 8(a)(3) charge on the basis of un-

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[17] 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

[18] 138 N.L.R.B. 550 (1962), *enforced sub nom.* East Bay Union of Machinists v. NLRB, 116 U.S. App. D.C. 198, 322 F.2d 411 (1963), *aff'd sub nom.* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964). The NLRB initially held that the employer had no duty to bargain about a decision to subcontract which was economically motivated. Fibreboard Paper Prods. Corp. (Fibreboard I), 130 N.L.R.B. 1558, 1559 (1961). Upon reconsideration, the Board reversed itself to require such bargaining. Fibreboard Paper Prods. Corp. (Fibreboard II), 138 N.L.R.B. 550 (1962).

[19] In the area of relocation, such a distinction was made, but even here it has not been consistently drawn. See notes 154-84 *infra* and accompanying text.

[20] 101 N.L.R.B. 1208 (1952), *enforcement denied*, 211 F.2d 848 (5th Cir. 1954). The newspaper had distributed its papers through a circulation department employing approximately ninety employees. When it learned that those employees had begun to engage in union activities, all nonsupervisory personnel were discharged and the Chronicle contracted with Blue Bonnet Express to haul its papers to the carriers. *Id.* at 1209.

[21] The Board found that while the Chronicle was exploring the feasibility and desirability of subcontracting, its supervisors were warning the employees that a "change of system would indeed be the . . . reaction to their union demands." *Id.* at 1212.

[22] *Id.* at 1213. The paper contended that it modified operations to reduce costs and arrest its decline as the leading local newspaper. The Board pointed out that, contrary to the paper's contentions, the remuneration of the independent contractor was undecided at the time the Chronicle's operations were altered, nor was evidence presented on the comparative cost of the new system or on how the system was calculated to arrest the decline.

[23] *Id.* at 1215-16. In his Intermediate Report, the trial examiner relied on *Timken*, pointing out: "It is settled law that an employer is obligated to bargain upon demand . . . regarding changes in the tenure or working conditions of his employees before putting the changes into effect . . . ." *Id.* at 1243-44. Although this statement may be interpreted as meaning that a duty to decision-bargain exists, the trial examiner cited as authority a relocation case limiting the duty to effect-bargaining. Howard Rome (Rome Prods. Co.), 77 N.L.R.B. 1217 (1948). In subcontracting, this statement should be interpreted to mean that the duty to bargain extended only to effects of the decision since *Town & Country* and *Fibreboard II* originated the duty to decision-bargain. See note 27 *infra*.

[24] 125 N.L.R.B. 1379 (1959), *enforced*, 287 F.2d 17 (10th Cir. 1961). After the union

refuted testimony that the company would subcontract if the union was certified,[25] finding arguments of economic motivation proffered by the company unconvincing.[26] Further, the Board found that Brown-Dunkin violated 8(a)(5) by entering into the subcontract without notification or consultation with the union concerning the employees' tenure and benefits.[27]

Economic reasons were again offered as justification for subcontracting in *J. M. Lassing* (*Consumer Gasoline Stations*).[28] The Board found 8(a)(3) and 8(a)(5) violations in accelerated changes in operations to avoid recognition of and bargaining with the union.[29] The Board noted that the failure to bargain about the effects of the decision to subcontract was a basis for finding an 8(a)(5) violation.[30] In *Jays Foods, Inc.*,[31] to avoid prohibitive costs in maintaining its own vehicle-repair shop, the employer contracted out that portion of its operations, discharged one of its employees, and transferred the remaining employees to another of its plants. Rejecting the economic validity of such con-

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was certified as representative of the company's service employees, Brown-Dunkin informed the union that it was contemplating contracting out that unit's work, which it did after numerous refusals to bargain with the union. *Id.* at 1383.

[25] A former store manager, Scudder, so testified. *Id.* at 1384.

[26] Scudder's successor testified that he had made a study of the existing system and came to the conclusion that a subcontractor could perform the work more efficiently and more inexpensively even though the subcontractor would pay higher wages under a cost-plus contract. *Ibid.*

[27] The Board cited Shamrock Dairy, Inc., 119 N.L.R.B. 998 (1957), *supplemented*, 124 N.L.R.B. 494 (1959), *enforced*, 108 U.S. App. D.C. 117, 280 F.2d 665, *cert. denied*, 364 U.S. 892 (1960). In *Shamrock*, an 8(a)(5) violation was found for failure to effect-bargain about subcontracting, relying on Brown Truck & Trailer Mfg. Co., 106 N.L.R.B. 999 (1953) (relocation). *Shamrock* has erroneously been used as authority for the proposition that an employer has a duty to decision-bargain. Fibreboard Paper Prods. Corp. (Fibreboard I), 130 N.L.R.B. 1558, 1563 (1961) (Fanning, Member, dissenting). It is apparent from its use of *Brown Truck* that the Board intended *Shamrock* to require only a duty to effect-bargain. See *id.* at 1560.

[28] 126 N.L.R.B. 1041, *enforcement denied*, 284 F.2d 781 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961). At the time unfair labor practice charges were filed, Lassing, with one exception the only independent station owner using his own transportation facilities for hauling, decided to contract it out if his costs increased. *Id.* at 1047 & n.2. After the union was certified, but before Lassing met with it, he subcontracted his hauling operations and discharged his drivers. *Id.* at 1048.

[29] *Id.* at 1042. The trial examiner held: "[I]t is not enough for [the employer's] . . . purposes to insist that its actions were taken for valid economic reasons. Over and above that, it is incumbent upon [him] . . . to show that the economic program precipitately implemented was *not* for discriminatory purposes." Id. at 1049. The trial examiner cited T. A. Tredway (Diaper Jean Mfg. Co.), 109 N.L.R.B. 1045 (1954), *enforced sub nom.* NLRB v. Tredway, 222 F.2d 719 (5th Cir. 1955); Brown Truck & Trailer Mfg. Co., 106 N.L.R.B. 999 (1953); New Madrid, 104 N.L.R.B. 117 (1953), *enforced in part*, 215 F.2d 908 (8th Cir. 1954), and Howard Rome (Rome Prods. Co.), 77 N.L.R.B. 1217 (1948). All of these were relocation cases requiring effect-bargaining.

[30] 126 N.L.R.B. at 1042 & n.5.

[31] 129 N.L.R.B. 690 (1960), *enforcement denied*, 292 F.2d 317 (7th Cir. 1961).

tracting,[32] the Board held that Jays Foods had violated both 8(a)(3) and 8(a)(5).[33]

In each of these cases three factors coalesced. First, antiunion animus was present; the company sought to frustrate the union's activities and subcontracting, with its concurrent discharge of workers, offered an expedient means to avoid dealing with the union. Second, replacement subcontracting was always used. This destroyed the bargaining unit and allowed the company to avoid collective bargaining. Finally, either the economic reasons or absence of antiunion animus alleged by the employer to justify his actions, was found wanting by the Board.[34]

The NLRB considered these factors and determined, in effect, that management's prerogative was not absolute. When management's decision to make a replacement subcontract was either without economic validity or was prompted by a desire to remove the union as the bargaining agent of its employees,[35] the employer had a duty to bargain, at least about the effects of its decision. Rather than unilateral subcontracting itself being branded as an unfair labor practice, the 8(a)(5) violation was dependent on a preliminary finding of antiunion animus or an absence of economic justification and was thereby rendered empty of separate significance. The Board did not emphasize the affirmative duty of the employer to recognize the union's status as the statutory bargaining representative for all changes in conditions of employment, but sought to exact a "penalty" from the employer because he attempted to destroy the union by a replacement subcontract.

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[32] The Board expressly concurred in the trial examiner's findings that, prior to the discharge of unit members no comparative cost analysis had been made by Jays Foods, and that no attempt was made by the employer to discover the union's minimum wage demands to ascertain their potential impact on maintaining a private repair shop. Moreover, there was no probative evidence of the actual savings from the change in operations. *Id.* at 690 n.1, 696-97; *cf.* Stilley Plywood Co., 94 N.L.R.B. 932 (1951), *enforced in part*, 199 F.2d 319 (4th Cir. 1952), *cert. denied*, 344 U.S. 933 (1953) (subcontracting and discriminatory discharge held 8(a)(3) and 8(a)(5) violations).

[33] No authority was cited by the trial examiner to support the findings of an 8(a)(5) violation, only the naked assertion that "the abolishment of the department . . . and the Respondent's refusal to meet and bargain with the Union . . . were both violative of Section 8(a)(5) . . . ." 129 N.L.R.B. at 698. In adopting the examiner's findings, the Board likewise gave no authority, and the appellate court denied enforcement. Jays Foods, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961).

[34] In *Jays Foods, Inc.* and *Houston Chronicle Publishing Co.* the NLRB found economic justification wanting, whereas in *Brown-Dunkin Co.* and *J. M. Lassing (Consumer Gasoline Stations)* antiunion animus was present. Apparently in a case where *both* of these criteria were satisfied, *i.e.*, economic justification and lack of antiunion animus, the Board during this period would not have found an 8(a)(5) violation.

[35] See also NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963). "Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by a showing of an intent to encroach upon protected rights. The employers' claim of legitimacy is totally dispelled." *Id.* at 228, commenting on, *inter alia*, NLRB v. Brown-Dunkin Co., 287 F.2d 17 (10th Cir. 1961).

The courts of appeals, however, generally disagreed with the conclusions, if not the rationale, of the NLRB. In all but one case, two of the three factors justifying the Board's decisions, antiunion animus and lack of economic validity, were found to be absent.[36] The courts opted in favor of management's prerogative and implied that this right was inherent in a free enterprise system when exercised for economic rather than antiunion motives. The *Brown-Dunkin* court alone held that management has a duty to bargain about the *effects* of its decision to subcontract. It recognized that to allow unilateral changes in the terms and conditions of employment would minimize the effectiveness of union organization and collective bargaining.[37] Noting that the judicial function is to determine whether there is a "rational basis" for the NLRB's decision, the court conceded that "economy is a legitimate reason for good faith subcontracting,"[38] yet concluded that the Board was justified in finding that section 8(a)(3) was violated. The court stated further that the union had not been given a fair opportunity to bargain about the effects of the subcontracting on the unit, thereby violating 8(a)(5).[39]

For the most part, however, the courts were not inclined to find antiunion animus in subcontracting situations, hesitating to impede management's business discretion by expanding the scope of "terms and conditions of employment."[40] Their philosophy was that the bargaining unit was a creature of the business structure upon which it depended for justification and that management could change this structure unilaterally.

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[36] In *Houston Chronicle*, the court perceived the issue to be "whether the respondent actually in good faith had business motives for the change, or whether the change was illegally motivated." NLRB v. Houston Chronicle Publishing Co., 211 F.2d 848, 851 (5th Cir. 1954). The court, holding the discharge of the employees to be the effectuation of good business judgment, an ordinary act of business management, denied enforcement. *Id.* at 855.

The *Lassing* court also found an absence of antiunion animus and contended that the change was made because of reasonably anticipated costs, noting: "It is completely unrealistic in the field of business to say that management is acting arbitrarily or unreasonably in changing its method of operations based on reasonably anticipated increased costs, instead of waiting until such increased costs actually materialize." NLRB v. Lassing, 284 F.2d 781, 783 (6th Cir. 1960). Because the employer's operations were validly discontinued, the court concluded that it was not incumbent upon management to engage in collective bargaining with the union. *Ibid.*

Judge Schnackenberg, in *Jays Foods*, held that there was no antiunion animus motivating the discharge of the employees. He also noted: "An employer has a right to consider objectively and independently the economic impact of unionization of his shop and to manage his business accordingly." Jays Foods, Inc. v. NLRB, 292 F.2d 317, 320 (7th Cir. 1961).

[37] NLRB v. Brown-Dunkin Co., 287 F.2d 17, 20 (10th Cir. 1961), *enforcing* 125 N.L.R.B. 1379 (1959).

[38] *Id.* at 19.

[39] *Id.* at 19-20.

[40] Compare Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330, 336-37 (1960) (Railway Labor Act). For the relevance of a Railway Labor Act violation to the National Labor Relations Act, see note 242 *infra* and accompanying text.

The incidental destruction of the bargaining unit was considered immaterial.[41]

Fibreboard and Town & Country

In the Board decisions discussed above, the NLRB spoke of a duty to bargain about the *effects* of the decision to subcontract. In *Fibreboard I*,[42] the employer, for purely economic reasons,[43] had subcontracted the work of its maintenance department.[44] The Board limited the scope of collective-bargaining duty to the effects of this business change[45] and explicitly rejected a duty to decision-bargain.[46] This decision was quickly

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[41] *Cf.* Mahoning Mining Co., 61 N.L.R.B. 792, 803 (1945) (dictum) (unilateral subcontracting for economic reasons permissible).

[42] 130 N.L.R.B. 1558 (1961), *rev'd*, 138 N.L.R.B. 550 (1962), *enforced sub nom.* East Bay Union of Machinists v. NLRB, 116 U.S. App. D.C. 198, 322 F.2d 411 (1963), *aff'd sub nom.* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

[43] The trial examiner found, and the Board agreed, that economic considerations motivated the subcontracting and that there was no evidence that it was discriminatorily motivated. *Id.* at 1559.

[44] Concerned with increased maintenance costs, Fibreboard undertook a cost study of this phase of its operations and concluded that an independent-contractor arrangement would accomplish substantial savings. At the union's request, a meeting to discuss a new collective-bargaining agreement was held, at which time Fibreboard notified the union that it was definitely instituting an independent-contractor plan at the expiration of the collective-bargaining agreement. The company further stated that it was not obligated to bargain for a new contract since union members would no longer perform the maintenance work. At this meeting there was no resolution of Fibreboard's rights to subcontract, but Fibreboard agreed to meet later with the union about this matter. Meanwhile the company selected an independent contractor and, at the subsequent meeting, presented its action as a *fait accompli.* The next day the company discharged its employees. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 204-07 (1964).

[45] 130 N.L.R.B. at 1560; see, *e.g.*, Brown-Dunkin Co., 125 N.L.R.B. 1379 (1959), *enforced*, 287 F.2d 17 (10th Cir. 1961) (subcontracting); Houston Chronicle Publishing Co., 101 N.L.R.B. 1208 (1952), *enforcement denied*, 211 F.2d 848 (5th Cir. 1954) (subcontracting).

Member Fanning, dissenting in *Fibreboard I*, contended that it was incumbent upon the employer to bargain about its decision because "it is entirely possible that the parties could have arrived at a solution to the problem short of subcontracting the entire maintenance operation." 130 N.L.R.B. at 1565; see Mount Hope Finishing Co., 106 N.L.R.B. 480, 495 (1953), *enforcement denied*, 211 F.2d 365 (4th Cir. 1954) (relocation).

Subsequent to *Fibreboard I*, the NLRB held that section 8(a)(5) required an employer to bargain with the union concerning a change in working conditions even if this change was prompted by economic necessity. Servette, Inc., 133 N.L.R.B. 132 (1961), *enforcement denied*, 313 F.2d 67 (9th Cir. 1962). It is unclear from the wording of the decision and the authority cited therein whether the duty was to effect- or decision-bargain. Because there existed valid economic reasons and because the company was willing to bargain with the union, the *Servette* court refused to enforce the Board's order on the basis of a waiver theory. The court, however, never focused on the scope of management's bargaining duty.

[46] 130 N.L.R.B. at 1561. The General Counsel of the NLRB had argued in his exceptions to the trial examiner's report that Fibreboard had a statutory duty to bargain about its decision to subcontract. The NLRB noted that the statutory language of 8(a)(5) was broad and included the obligation to bargain concerning matters affecting unit members while they are employed, including their termination and posttermination rights. With respect to the latter, the Board said:

repudiated in *Town & Country Mfg. Co.*[47] Notwithstanding management's prerogative to subcontract,[48] the Board found that Town & Country violated both 8(a)(3) and 8(a)(5) by discharging its employees for union activities and by refusing to bargain with their certified representative.[49] For the first time, the NLRB unequivocally held that where antiunion animus exists, decision-bargaining is mandatory[50] in addition to the duty to effect-bargain.[51] The Board indicated in dicta that even if the company had subcontracted for purely economic reasons it had a statutory duty to bargain about that *decision.*[52] Upon reconsideration in

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> None of the obligations heretofore imposed with respect to this latter category concern . . . the question whether . . . termination will occur; all . . . are concerned solely with such matters as selection for termination among present employees, and benefits flowing from present employment which employees may be entitled to receive at the time of or following the termination of employment.

Id. at 1559-60. The Board further noted: "[A]though the statutory language is broad, we do not believe it is so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort." *Id.* at 1561. Compare this statement with that of the appellate court in *Fibreboard II*, note 55 *infra*. *Cf.* Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960).

[47] 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963). See generally Goetz, *The Duty To Bargain About Changes in Operations*, 1964 DUKE L.J. 1; Comment, *Employer's Duty To Bargain About Subcontracting and Other "Management" Decisions*, 64 COLUM. L. REV. 294 (1964).

[48] Town & Country had been investigated by the Interstate Commerce Commission for violations of the Commission's requirements with respect to its trucking operations and thought it desirable to subcontract these operations rather than incur further violations of ICC orders. This, it was contended, was within management's prerogative. 136 N.L.R.B. at 1024-25. Member Rodgers' dissent accepted this view and considered termination "a prerogative exercisable without negotiation." *Id.* at 1033.

[49] *Id.* at 1026. The Board found that the employer had violated 8(a)(3) by discharging the workers who had joined the union.

[50] *Ibid.* It has been contended that a duty to decision-bargain existed prior to *Town & Country*. Fibreboard Paper Prods. Corp. (Fibreboard I), 130 N.L.R.B. 1558, 1560 (1961) (Fanning, Member, dissenting); Address by Chief Counsel Arnold Ordman, Meeting of Georgia Bar Ass'n, March 15, 1963, in 52 L.R.R.M. 86 (1963). This contention is of questionable validity. See note 27 *supra.*

[51] 136 N.L.R.B. at 1028 n.10.

[52] *Id.* at 1027. To justify this conclusion and to define the scope of the duty to bargain, the Board contended that *Fibreboard I* unduly extended

> the area within which an employer may curtail or eliminate entirely job opportunities for its employees without notice to them or negotiation with their bargaining representative. . . . [T]he duty to bargain about a *decision* to subcontract work does not impose an undue . . . burden upon the employer. . . . This obligation to bargain in nowise restrains an employer from formulating or effectuating an economic decision to terminate a phase of his business operations. Nor does it obligate him to yield to a union's demand that a subcontract not be let, or that it be let on terms inconsistent with management's business judgment.

Ibid. (Emphasis added.)

The Board thus heeded Member Fanning's dissent in *Fibreboard I*, *supra* note 45. This approach toward collective bargaining has been attributed to the advent of Chairman McColloch to the Board. See Address by Theophil Kammholz, General Meeting of American Iron & Steel Institute, May 28, 1964, in 56 L.R.R.M. 137 (1964). The *Fibreboard I* decision was essentially a product of the pre-McColloch Board which was under the leadership of Chairman Leedom. (While *Fibreboard I* was decided twenty days after Chairman McColloch had been

Fibreboard II, the Board, relying on its dicta in *Town & Country*,[53] concluded that the company was obligated to bargain with respect to its decision to subcontract the work of its maintenance department.[54] This was a significant departure from earlier decisions since no antiunion animus was present.[55] This nascent duty to decision-bargain was affirmed

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appointed to the Board, he had not yet taken part in any of its decisions and orders). The view of Member Leedom on the scope of the bargaining duty is indicated by his refusal to concur with the Board in overruling *Fibreboard I* in *Town & Country*. Member Leedom has gone on record in a number of decisions vigorously protesting any incursion into management prerogative by the Board in its decision-bargaining opinions. Adams Dairy Co., Cloverleaf Div., 147 N.L.R.B. 1410, 1420 (1964) (concurring in part); Pepsi-Cola Bottling Co. (Beckley), 145 N.L.R.B. 785, 786 n.1 (concurring in part), *aff'd sub nom.* Teamsters Union v. NLRB, 50 CCH Lab. Cas. ¶ 19388 (D.C. Cir. 1964); Northwestern Publishing Co., 144 N.L.R.B. 1069, 1074 (1963), *supplemented*, 146 N.L.R.B. 457 (1964), *enforced*, 343 F.2d 521 (7th Cir. 1965) (concurring in part); Adams Dairy, Inc., 137 N.L.R.B. 815 (1962), *modified and enforced in part*, 322 F.2d 553 (8th Cir. 1963), *vacated and remanded*, 379 U.S. 644, *modified*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966) (concurring opinion); Town & Country Mfg. Co., 136 N.L.R.B. 1022, 1028 n.10 (1962) (concurring in part), *enforced*, 316 F.2d 846 (5th Cir. 1963). See generally Note, *The NLRB Under Republican Administration: Recent Trends and Their Political Implications*, 55 COLUM. L. REV. 852 (1955) (effect of new appointments on Board policy).

[53] Between its *Town & Country* and *Fibreboard II* decisions the Board ruled that a company had violated its duty to bargain when it subcontracted part of its work without notification or consultation with the union about that decision. Renton News Record, 136 N.L.R.B. 1294 (1962). The Board found, however, since it was imperative to automate in order to remain competitive, that valid economic reasons existed for the subcontracting. In shaping the remedy, the Board did not order Renton to bargain about its decision to subcontract, but did order bargaining over the effects of that decision. *Id.* at 1297-98. This was the first case to apply the dicta of *Town & Country* and was a harbinger of the Board's flexibility in finding a violation and structuring its remedial order. See, *e.g.*, Westinghouse Elec. Corp. (Bettis), 153 N.L.R.B. 443 (1965) (violation found in subcontracting case); Pepsi-Cola Bottling Co. (Beckley), 145 N.L.R.B. 785, *aff'd sub nom.* Teamsters Union v. NLRB, 50 CCH Lab. Cas. ¶ 19388 (D.C. Cir. 1964). The limited remedial order, unlike *Fibreboard II*'s order requiring decision-bargaining, reduced *Renton*'s significance in the evolution of the duty to bargain about the decision to subcontract. Its importance lies in the fact that this decision indicated the NLRB's willingness to apply the decision-bargaining principle to decisions to subcontract prompted by the economic necessity to automate. See note 180 *infra*.

[54] Fibreboard Paper Prods. Corp. (Fibreboard II), 138 N.L.R.B. 550, 551 (1962), *enforced sub nom.* East Bay Union of Machinists v. NLRB, 116 U.S. App. D.C. 198, 322 F.2d 411 (1963), *aff'd sub nom.* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); see Fairbanks Dairy, Div. of Cooperdale Dairy Co., 146 N.L.R.B. 893 (1964); Adams Dairy, Inc., 137 N.L.R.B. 815 (1962), *modified and enforced in part*, 322 F.2d 553 (8th Cir. 1963), *vacated and remanded*, 379 U.S. 644, *modified*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

In his dissent to the *Fibreboard II* decision Member Rodgers argued that the decision to subcontract should not be made a mandatory subject of collective bargaining. To do so would inhibit management's freedom to determine unilaterally whether it should discontinue an uneconomical operation because, if it did so, it would act at its peril. 138 N.L.R.B. at 559-60.

[55] Both *Fibreboard II* and *Town & Country* were subsequently enforced. The Fifth Circuit in *Town & Country* conceded that the company might have been economically motivated, but relied heavily on the presence of antiunion animus in its decision. Town & Country Mfg. Co. v. NLRB, 316 F.2d 846 (5th Cir. 1963); *accord*, NLRB v. Brown-Dunkin Co., 287 F.2d 17 (10th Cir. 1961). *Compare* NLRB v. Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954) (enforcement denied), *with* Town & Country Mfg. Co. v. NLRB, 316 F.2d 846 (5th Cir. 1963) (order enforced). The District of Columbia Circuit in *Fibreboard II* was even more emphatic in asserting that "it is not necessary to find an anti-union animus

by the Supreme Court[56] even though the decision to subcontract was economically motivated and no antiunion animus was present. Speaking for the majority, Mr. Chief Justice Warren noted that the subcontracting did not alter Fibreboard's basic operation, that no capital investment was contemplated, and that the company "merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment."[57] The Court restricted its decision to these facts and asserted that the decision "need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy."[58]

POST-FIBREBOARD II CASES

Following the *Town & Country* and *Fibreboard II* Board decisions, an employer's duty to bargain was no longer restricted to the effects of his decision to enter a replacement subcontract. The subsequent decisions can be grouped into two categories: Those involving both 8(a)(3) and 8(a)(5) violations and those involving an 8(a)(5) violation alone. Decisions comprising the first category are really progeny of *Town & Country*. In these cases, the NLRB, consistent with its attempt to prevent management from extinguishing the bargaining unit by a replacement subcontract under the guise of economic necessity,[59] asserted that the duty to bargain extended to the decision itself.[60]

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as a predicate for a conclusion that the employer violated Section 8(a)(5) . . . ." East Bay Union of Machinists v. NLRB, 116 U.S. App. D.C. 198, 201, 322 F.2d 411, 414 (1963). Compare cases cited notes 36-37 *supra*. It was the court's contention that Congress had purposely drafted the statute broadly and that its decision was a "recognition that collective bargaining must be kept flexible . . . so that the Act could be administered to meet changing conditions." 116 U.S. App. D.C. at 201, 322 F.2d at 414; *cf.* Mill Floor Covering, Inc., 136 N.L.R.B. 769, 772 (1962) (dictum), *enforced sub nom.* NLRB v. Detroit Resilient Floor Operators, 317 F.2d 269 (6th Cir. 1963) (8(b)(1), (3) violations).

[56] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

[57] *Id.* at 213.

[58] *Id.* at 215. The impact of the *Fibreboard* doctrine has been felt in diminution subcontracting, relocation, and partial termination cases, which was, in general terms, predicted by Mr. Justice Stewart in his concurrence. *Id.* at 217-18.

[59] See notes 20-35 *supra* and accompanying text.

[60] Swack Iron & Steel Co., 146 N.L.R.B. 1068 (1964); National Food Stores, Inc., 142 N.L.R.B. 340 (1963), *enforced as modified*, 332 F.2d 249 (7th Cir. 1964); Brown Transp. Corp., 140 N.L.R.B. 954 (1963), *enforced*, 334 F.2d 243 (5th Cir. 1964).

Without notifying the union, Brown Transport terminated its pick-up and delivery operation, discharged its employees, and subcontracted with an independent contractor. Although the company had argued economic necessity for its action, the Board noted that the company made no attempt to show what economic burdens it would incur by accepting a union contract and refused to document its financial status. The NLRB also alluded to attempts of company officials to discourage union membership. *Id.* at 955-57.

National Food dismissed all its inventory clerks and subcontracted the work. The Board, adopting the trial examiner's report, found that, before the union was elected bargaining representative, the company attempted to discourage union membership. After the election,

The second distinguishable line of cases involved *only* a finding that management had violated section 8(a)(5) by refusing to bargain with the union. In *Adams Dairy, Inc.*,[61] the NLRB applied the rationale of *Town & Country* and *Fibreboard II* to find that Adams had violated its duty to decision-bargain by instituting an independent-contractor method of product distribution.[62] The Board withheld decision on the 8(a)(3) charge as not necessary for its remedial order.[63] The Eighth Circuit declined to follow the rationale of the Board, asserting that intent was "a crucial factor in a determination of whether or not certain acts can be labeled as unfair labor practices . . . ."[64] Concluding that there was no

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but before the union had met with the employer to discuss a collective-bargaining contract, the employer presented the subcontract to the union as a *fait accompli*. The trial examiner had rejected the economic arguments proffered by the employer and noted that this was the first time that the employer had ever subcontracted the inventory work. 142 N.L.R.B. at 344-45, 347-48. The Seventh Circuit enforced that part of the NLRB order which stipulated that subcontracting was a by-product of antiunion animus and therefore a violation of §§ 8(a)(1), (3), and (5), but refused to pass on that part of the Board decision which held that the employer had violated 8(a)(5) separately by refusing to bargain about its decision to subcontract. National Food Stores, Inc. v. NLRB, 332 F.2d 249 (7th Cir. 1964). The court declined to decide whether the decision to subcontract was a mandatory subject of bargaining since such a decision was unnecessary for enforcement of the NLRB order and the Supreme Court was, at the time, considering that very issue in an attempt to resolve a conflict in the circuits. *Id.* at 253. *Compare* NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963), *vacated and remanded*, 379 U.S. 644, *modified*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966) (no duty to decision-bargain), *with* East Bay Union of Machinists v. NLRB, 116 U.S. App. D.C. 198, 322 F.2d 411 (1963), *aff'd sub nom.* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) (duty to decision-bargain).

In the *Swack* case, the company had contracted out its hauling work, discharged its employees, and argued that this change in operations was due to a decline in sales. The trial examiner rejected the employer's economic-motivation arguments and noted that Swack, from the outset, had been opposed to the union and its attempt to become the certified representative of his employees. 146 N.L.R.B. at 1078-80.

See generally Blue Cab Co., 156 N.L.R.B. 489 (1965), *enforced on other grounds sub nom.* Teamsters Union v. NLRB, —— F.2d —— (D.C. Cir. 1967) (cab drivers not converted to independent contractors); Assonet Trucking Co., 156 N.L.R.B. 350 (1965) (trailer drivers laid off when employer subcontracted); Northwestern Publishing Co., 144 N.L.R.B. 1069 (1963), *supplemented*, 146 N.L.R.B. 457 (1964), *enforced*, 343 F.2d 521 (7th Cir. 1965) (drivers discharged upon subcontracting).

[61] 137 N.L.R.B. 815 (1962), *modified and enforced in part*, 322 F.2d 553 (8th Cir. 1963), *vacated and remanded*, 379 U.S. 644, *modified*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

[62] *Id.* at 816. Although Adams had sold its products through both independent contractors and its own salesmen, it sought to reduce delivery costs. The union agreed to cooperate in a reduction of such costs but Adams, according to the union, made no concrete proposals to accomplish this objective. The company contended that the initiative for such proposals lay with the union. During this time, the company had secretly made the decision to switch totally to an independent-contractor system and completed negotiations for the changeover. The union first learned of Adams' decision when the employer discharged unit members, none of whom were offered an independent distributorship. *Id.* at 820-22. Compare Smith's Van & Transp. Co., 126 N.L.R.B. 1059 (1960).

[63] 137 N.L.R.B. at 816.

[64] 322 F.2d at 556. The Eighth Circuit relied exclusively on the Supreme Court decision in NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), interpreting the words, "Cases in this Court dealing with unfair labor practices have recognized the relevance and importance of

direct or indirect motivation to discriminate against the union, the court found that Adams' "decision [to subcontract] . . . did not constitute an objectively illegal result . . . ," that is, the decision would not "naturally tend to discourage union membership."[65] After finding that the decision to subcontract was within the ambit of management's prerogative, the court held that there was no 8(a)(5) violation for failure to decision-bargain; it did, however, require effect-bargaining.[66]

In both *Hawaii Meat Co.*[67] and *Robert S. Abbott Publishing Co.*,[68] the employer had entered into a replacement subcontract during a strike without notifying the union.[69] Notwithstanding its recognition in *Hawaii Meat* that subcontracting may be useful in combatting the impact of a strike[70] or the finding of the trial examiner in *Robert S. Abbott* that the subcontract was utilized to continue the operations of the plant,[71] the Board concluded that a strike does not relieve the company of the duty to bargain with the striking union about the decision to subcontract. Replacement subcontracting not only impaired the right of the union to bargain collectively, but also infringed the workers' right to engage in concerted activities.[72] By finding an 8(a)(5) violation, the Board considered these rights paramount to the business reasons proffered by the employers.[73]

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showing the employer's intent or motive to discriminate," *id.* at 227, to demand discriminatory intent as a prerequisite to an 8(a)(5) violation. 322 F.2d at 556, 559. This interpretation is questionable because the issue argued before the Supreme Court did not involve an 8(a)(5) charge. Moreover, the Court, without expressly repudiating *Erie*, subsequently found an employer guilty of an 8(a)(5) violation in *Fibreboard* in the absence of a showing of discriminatory intent.

[65] Id. at 557-58. Compare Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 275 (1965) (8(a)(3) violation found in partial termination case).

[66] 322 F.2d at 562.

[67] 139 N.L.R.B. 966 (1962), *enforcement denied*, 321 F.2d 397 (9th Cir. 1963).

[68] 139 N.L.R.B. 1328 (1962), *enforcement denied*, 331 F.2d 209 (7th Cir. 1964).

[69] Hawaii Meat leased its trucks to an independent contractor who made deliveries formerly made by Hawaii's employees. In the *Abbott* case, the company permanently contracted out the work done by its composing department and discharged the employees. In both cases the subcontracting resulted in the elimination of the bargaining unit. Compare Memorial Consultants, Inc., 153 N.L.R.B. 1 (1965); Empire Terminal Warehouse Co., 151 N.L.R.B. 1359 (1965), *aff'd sub nom.* Dallas General Drivers v. NLRB, 122 U.S. App. D.C. 417, 355 F.2d 842 (1966).

[70] 139 N.L.R.B. at 969. Compare Shell Oil Co. (Shell Chem. Co. Div.), 149 N.L.R.B. 298 (1964); Shell Oil Co. (Norco), 149 N.L.R.B. 283 (1964). These were cases involving temporary subcontracts made during a strike.

[71] 139 N.L.R.B. at 1342.

[72] See National Labor Relations Act § 7, as amended, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

[73] Compare NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). The unilateral replacement of strikers in *Mackay* was allowed by the NLRB and the Supreme Court because those replaced remained within the bargaining unit. Hence, the authority and status of the union as bargaining representative was not impaired. Hawaii Meat Co., 139 N.L.R.B. 966, 969 (1962), *enforcement denied*, 321 F.2d 397 (9th Cir. 1963).

The Board's orders in both cases were denied enforcement.[74] The courts felt that the strikes constituted emergencies,[75] and the companies' obligations to advertisers and customers made it imperative that the businesses be kept in operation. The *Abbott* court said it would be

> a startling doctrine . . . to tell companies and employers faced with extinction because of a strike, that before they can make economic business decisions to contract out work in order to continue operations, they must first consult the union that caused the threat of extinction.[76]

Again the courts, predisposed towards management, paid deference to business judgments concerning the operations of a plant. Despite such judicial reluctance to enforce its decisions, the Board has continued to apply the *Fibreboard II* duty. In a recent case, *Southern Cal. Stationers*,[77] the Board reaffirmed its holdings in *Hawaii Meat* and *Robert S. Abbott*.[78] The significance of this decision rests in the broad application of the principle of decision-bargaining. Notwithstanding the fact that the strike imperiled the future existence of the employer's print shop, the NLRB adopted the "startling doctrine" rejected by the *Abbott* court, but found that the employer satisfied his duty to decision-bargain.[79]

It has been suggested that the Board has rejected the absolutism of *Fibreboard II* and has adopted a more realistic outlook.[80] With respect to replacement-subcontract cases this view is without merit. Because of the imminent destruction of the bargaining unit the NLRB necessarily must decide against management without balancing management's and labor's interests.[81] In diminution subcontracting, however, the union's existence

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[74] NLRB v. Robert S. Abbott Publishing Co., 331 F.2d 209 (7th Cir. 1964); Hawaii Meat Co. v. NLRB, 321 F.2d 397 (9th Cir. 1963).

[75] Other courts have noted that an emergency situation may relieve an employer from a duty to bargain over the decision to subcontract. See District 50, UMW v. NLRB, 358 F.2d 234 (4th Cir. 1966); Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983 (1st Cir. 1966).

[76] 331 F.2d at 213.

[77] 162 N.L.R.B. No. 146 (1967). During an economic strike, the employer terminated his printing-department operations and subcontracted the work.

[78] The Board adopted the trial examiner's report which, rejecting the precedential influence of courts of appeals decisions, asserted that Board precedent not reversed by the NLRB or the Supreme Court controls the decision. *Id.* at ——; *accord*, Lenz Co., 153 N.L.R.B. 1399, 1401 (1965).

[79] The employer had fulfilled his statutory obligation by demonstrating a willingness to consider union proposals. The union, however, never came forth with proposals to break the impasse in the collective-bargaining negotiation which precipitated the strike. 162 N.L.R.B. at ——.

[80] Seagle, *The Duty of an Employer To Bargain in Postcontract Negotiations*, 51 CORNELL L.Q. 523 (1966); see Westinghouse Elec. Corp. (Bettis), 153 N.L.R.B. 443 (1965); Oviatt, *The Aftermath of Fibreboard: Some Unanswered Questions*, 19 N.Y.U. CONFERENCE ON LABOR 397 (1967); Zeman, *The Aftermath of Fibreboard: The Cooling Off Period*, 19 N.Y.U. CONFERENCE ON LABOR 413 (1967).

[81] The one limitation on this rule is that the employer need not bargain regarding his decision to subcontract where that decision is not "peculiarly suitable for resolution within

is not imperiled although its position as a bargaining agent is weakened. In these cases, therefore, the Board must strike a balance between the competing interests of management and labor.[82]

In diminution subcontracting[83] the employer contracts out work that *could* be performed by his employees.[84] Notwithstanding that such managerial decisions are economically motivated and are based on sound business judgment, the employer has a duty to bargain about such subcontracting,[85] but the duty is not absolute. The duty to decision-bargain arises when "significant detriment" would accrue to the union. Every management decision affects the terms and conditions of employment to some degree; only when it substantially intrudes upon and undermines the rights of the bargaining unit will sufficient detriment be present to support a violation of 8(a)(5).[86] To ascertain that prohibitive quantum of detriment in diminution subcontracting the NLRB considers various factors—the significance of the fact that it is diminution subcontracting, the existence and scope of a management-rights clause,[87] the opportunity for the union to negotiate, and the existence of an established practice of subcontracting.[88]

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the collective bargaining framework . . . ." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 213-14 (1964); see Central Ruffina, 161 N.L.R.B. No. 59 (1966); note 131 *infra*.

[82] *E.g.*, General Tube Co., 151 N.L.R.B. 850 (1965); Superior Coach Corp., 151 N.L.R.B. 188 (1965); Kennecott Copper Co., 148 N.L.R.B. 1653 (1964).

[83] See, *e.g.*, Westinghouse Elec. Corp. (Bettis), 153 N.L.R.B. 443 (1965); American Oil Co. (Oil Workers), 152 N.L.R.B. 56 (1965); Allied Chem. Corp., 151 N.L.R.B. 718 (1965), *enforced sub nom.* District 50, UMW v. NLRB, 358 F.2d 234 (4th Cir. 1966); Fafnir Bearing Co., 151 N.L.R.B. 332 (1965); Superior Coach Corp., 151 N.L.R.B. 188 (1965); Westinghouse Elec. Corp. (Mansfield), 150 N.L.R.B. 1574 (1965); Kennecott Copper Co., 148 N.L.R.B. 1653 (1964).

[84] Diminution subcontracts may expedite completion of the work. Kennecott Copper Co., 148 N.L.R.B. 1653 (1964). Such subcontracts may allow the employer to continue production without cutbacks necessitated by the unit's performance of the work. See, *e.g.*, Fafnir Bearing Co., 151 N.L.R.B. 332 (1965); Superior Coach Corp., 151 N.L.R.B. 188 (1965).

[85] [I]t is plainly immaterial that the decision to subcontract was economically motivated . . . . Managerial decisions are normally economically motivated and may well be sound, but the statutory violation which inheres in a failure to negotiate with [the union] . . . is not cured by a showing that the unilateral decision was sound or was the product of economic necessity. The Union's right to bargain over subcontracting is the same . . . .

Hartmann Luggage Co., 145 N.L.R.B. 1572, 1578 (1964).

[86] Where an employer has caused a significant decrease in wages and hours and/or has laid off a number of unit members by unilaterally subcontracting, the Board will find a violation of the duty to bargain about that decision. See Cities Serv. Oil Co., 158 N.L.R.B. 120 (1966) (loss of overtime earnings resulting from subcontracting significant). Compare General Tube Co., 151 N.L.R.B. 850 (1965) (nine hours of lost overtime in seven weeks not significant). See generally ABA PROCEEDINGS: SECTION OF LABOR RELATIONS LAW 152 (1965); 13 NLRB ANN. REP. 75-76 (1965).

[87] A management-rights clause can be relevant in a replacement subcontract situation. It should be noted, however, that no case has specifically dealt with this question.

[88] Several commentators have noted that management also suffers detriment by being re-

By a specific subcontracting clause or a broad management-rights clause,[89] an employer can protect his right to make changes in the means and methods of conducting his operations.[90] For example, in *Kennecott Copper Co.*[91] the employer had secured a fairly broad management-rights clause in the collective-bargaining agreement.[92] Consequently the Board found no duty to bargain about the decision to subcontract overhauling of machinery.[93] By consenting to the inclusion of such a clause in a collective-bargaining agreement, the union, in effect, acquiesced in the employer's conduct and was precluded from objecting to unilateral entrepreneurial action within the ambit of the clause.[94] It forfeited the right

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quired to notify and consult with the union prior to implementation of a business decision. For example, confidential plans may become public information when revealed to the union, making the contemplated change in operation impractical. Goetz, *The Duty To Bargain About Changes in Operations*, 1964 DUKE L.J. 1; Comment, *The Duty To Bargain Before Implementing Business Decisions*, 54 CALIF. L. REV. 1749 (1966). This type of detriment has not been a factor considered by the NLRB in subcontracting cases. Nor has the Board adopted the basic/nonbasic business change dichotomy suggested by the Supreme Court. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 213 (1964). This was applied by the Eighth Circuit. NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966); Comment, 45 B.U.L. REV. 127 (1966) (criticizing the dichotomy).

[89] See Westinghouse Elec. Corp. (Bettis), 153 N.L.R.B. 443 (1965); Fafnir Bearing Co., 151 N.L.R.B. 332 (1965); *cf.* Druwhit Metal Prods. Co., 153 N.L.R.B. 346 (1965) (complete termination); Ador Corp., 150 N.L.R.B. 1658 (1965) (partial termination).

[90] More than seventy-five per cent of major collective-bargaining agreements (1,309 of 1,686 contracts) contain no reference to limitations on contracting out work that could be done by unit members. SUBCONTRACTING CLAUSES IN MAJOR COLLECTIVE BARGAINING AGREEMENTS 3 (Bureau of Labor Statistics, Bull. No. 1304, 1961). See generally Comment, *The Duty To Bargain Before Implementing Business Decisions*, 54 CALIF. L. REV. 1749 (1966).

[91] 148 N.L.R.B. 1653 (1964).

[92] The clause read in part:

> [N]othing in this agreement shall be construed to limit or impair the right of the company to . . . alter, rearrange or change, extend, limit or curtail its operations . . . or to shut down completely . . . when in its discretion it may deem it advisable to do all or any of said things.

Id. at 1655-56.

[93] *Id.* at 1656. Compare General Motors Corp., 149 N.L.R.B. 396 (1964), *remanded*, 60 L.R.R.M. 2283 (D.C. Cir. 1965), *supplemented*, 158 N.L.R.B. No. 24 (1966), *enforcement denied*, —— F.2d —— (D.C. Cir. 1967). In *General Motors* the employer contracted out part of its operation and reassigned unit employees to other jobs. In its collective-bargaining agreement with the union, the company had secured a broad management-rights clause and its subcontracting and reassignment were held permissible as a change in methods of operation. *Id.* at 400; *accord*, Shell Oil Co. (Shell Chem. Co. Div.), 149 N.L.R.B. 298 (1964) (specific subcontracting clause allowed occasional subcontracting); Shell Oil Co. (Norco), 149 N.L.R.B. 283 (1964).

[94] In another decision the Board hesitated to adopt the findings of the trial examiner. The latter had stated that the management-rights clause allowed the employer to contract out unilaterally without violating the duty to bargain imposed by 8(a)(5). Fafnir Bearing Co., 151 N.L.R.B. 332 n.1 (1965). The Board has said it would not go beyond the facts of a case to determine the employer's responsibility if it decided "to expand its subcontracting practices beyond the occasional maintenance projects covered by [the Board's decision] . . . ." Shell Oil Co. (Shell Chem. Co. Div.), 149 N.L.R.B. 298, 301 (1964). See generally Note, *The Development of the Fibreboard Doctrine: The Duty To Bargain Over Economically Motivated Subcontracting Decisions*, 33 U. CHI. L. REV. 315 (1966).

to demand bargaining with the employer with respect to his subcontracting on the ground of significant detriment.[95] Another rationale is that since the union knew or should have known that subcontracting might occur, it could not argue surprise.[96]

Another factor upon which the Board has focused to determine if significant detriment exists is the opportunity afforded a union to discuss anticipated subcontracting during the collective-bargaining agreement negotiations.[97] A union can discuss and attempt to limit the employer's right to subcontract. Even if no specific provision is ultimately incorporated into the contract, the willingness to bargain with respect to contracting out at the time the collective-bargaining agreement is negotiated is a relevant consideration in the Board's determination to impose a duty to bargain. When an employer enters into hundreds of subcontracts under an established practice, bargaining to restrict these recurrent practices is enough to satisfy the employer's duty and no significant detriment accrues to the union since it had an opportunity to bargain about those contracts.[98] The Board, however, has consistently held that an employer must still enter postcontract negotiations where its subcontracting activity tended to seriously impair the bargaining unit. The NLRB has been unwilling to find a forfeiture of the right to demand decision-bargaining when the collective-bargaining agreement contained no restrictions on management's right to subcontract, although such restrictions were sought at the time the agreement was negotiated.[99] After

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[95] Management's claim of an absence of a duty to bargain because of the existence of a management-rights clause will be closely scrutinized. See, *e.g.*, New York Mirror, 151 N.L.R.B. 834 (1965) (complete termination); International Shoe, 151 N.L.R.B. 693 (1965) (relocation); General Motors Corp., 149 N.L.R.B. 396 (1964), *remanded*, 60 L.R.R.M. 2283 (D.C. Cir. 1965), *supplemented*, 158 N.L.R.B. No. 24 (1966), *enforcement denied*, —— F.2d ——, (D.C. Cir. 1967) (subcontracting); Kennecott Copper Co., 148 N.L.R.B. 1653 (1964) (subcontracting).

[96] See Westinghouse Elec. Corp. (Bettis), 153 N.L.R.B. 443, 447 n.11 (1965).

[97] The opportunity to bargain must be distinguished from a waiver of the right to discuss the subcontracting. Waiver is a valid defense to a charge by the union of an 8(a)(5) violation when: (1) notice of the planned decision to subcontract is given to the union before implementation and with sufficient time for bargaining, Transmarine Nav. Corp., 152 N.L.R.B. 998 (1965) (notice given after relocation decision final, so no union duty to request bargaining); Shell Oil Co. (Detroit), 149 N.L.R.B. 305 (1965) (notice given when employer could still reverse relocation decision); or (2) the employer is ready to bargain but no request is made by the union, Humble Oil & Ref. Co., 161 N.L.R.B. No. 64 (1966) (benefit-program change); Union Screw Prods., 78 N.L.R.B. 1107 (1948) (wage increase).

[98] See Westinghouse Elec. Corp. (Mansfield), 150 N.L.R.B. 1574 (1965); *cf.* Southern Cal. Stationers, 162 N.L.R.B. No. 146 (1967) (opportunity to bargain made available during collective-bargaining negotiations). In *Westinghouse* the subcontracts in question (7,650) had customarily been entered into by Westinghouse. The fact that an established practice existed and that an excessive burden would be imposed upon the employer if he had to bargain about every subcontract were additional reasons that prompted the Board to dismiss the complaint.

[99] The Board has asserted unqualifiedly that "in the absence of a specific contract clause

consultation with the union, the employer can still subcontract work and his failure to agree with the union respecting alternate proposals will not be a basis for an 8(a)(5) violation.[100] By establishing that an entrepreneur must bargain upon request about the decision to subcontract, the Board is attempting to secure industrial tranquility by removing a sudden unilateral change in the terms of employment.[101]

The existence of an established practice of subcontracting is the final element considered in the diminution cases.[102] Where an employer has consistently engaged in subcontracting activities, this practice effectively becomes a condition of employment. Subsequent unilateral subcontracting which does not vary in degree or kind from prior contracting out will not be a change in conditions of employment and thus not violative of 8(a)(5).[103] Such past practices put the union on notice, obviating any argument of surprise.[104]

THE COURT CASES

Since the Supreme Court's decision in *Fibreboard*, courts of appeals have had an opportunity to consider Board orders relating to subcontracting and have sought to define the limits of an employer's bargaining

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[in the collective-bargaining agreement] . . . an employer is under a *continuing duty* to bargain on request with respect to subcontracting affecting unit work . . . even during the term of an existing agreement." American Oil Co. (Petroleum Workers), 151 N.L.R.B. 421, 422 (1965). (Emphasis added.) In another case it was held that there was no forfeiture of a right to bargain concerning a decision to subcontract merely because the union was unsuccessful in its attempt to restrict management's right to contract out in the previous collective-bargaining agreement. Adams Dairy Co., Cloverleaf Div., 147 N.L.R.B. 1410, 1413 (1964). Under certain circumstances, for example where the subcontract was executory and the union had an opportunity to bargain, the NLRB has refused to enforce this "continuing duty." Hartmann Luggage Co., 145 N.L.R.B. 1572 (1964).

[100] Allied Chem. Corp., 151 N.L.R.B. 718 (1965), *enforced sub nom.* District 50, UMW v. NLRB, 358 F.2d 234 (4th Cir. 1966); see Administrative Decision of NLRB Gen. Counsel, Case No. SR-1848, 49 L.R.R.M. 1900 (1962).

[101] See Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1412 (1958).

[102] See Shurtenda Steaks, Inc., 161 N.L.R.B. No. 88 (1966) (no established policy); Cities Serv. Oil Co., 158 N.L.R.B. No. 120 (1966) (no past practices); American Oil Co. (Teamsters), 155 N.L.R.B. 639 (1965) (past practices known to union); American Oil Co. (Oil Workers), 152 N.L.R.B. 56 (1965) (established practice and no detriment); Socony Mobil Oil Co., 59 L.R.R.M. 1032 (NLRB 1965) (no variation from prior practices); Central Soya Co., 151 N.L.R.B. 1691 (1965) (no departure from past practices); Allied Chem. Corp., 151 N.L.R.B. 718 (1965), *enforced sub nom.* District 50, UMW v. NLRB, 358 F.2d 234 (4th Cir. 1966) (established practices followed); Fafnir Bearing Co., 151 N.L.R.B. 332 (1965) (occasional subcontracting in past); Superior Coach Corp., 151 N.L.R.B. 188 (1965) (long-standing practice); Motorresearch Co., 138 N.L.R.B. 1490 (1963) (prior practices known).

[103] See, *e.g.*, Allied Chem. Corp., *supra* note 102; Westinghouse Elec. Corp. (Mansfield), 150 N.L.R.B. 1574 (1965).

[104] See American Oil Co. (Teamsters), 155 N.L.R.B. 639 (1965) (practices known to union); Westinghouse Elec. Corp. (Bettis), 150 N.L.R.B. 443, 447 n.11 (1965) (discussion of surprise).

duty. Two distinct lines of cases exist: Replacement subcontracting and diminution subcontracting. In *NLRB v. American Mfg. Co.*,[105] a replacement case, the Fifth Circuit found sufficient evidence to support violations of sections 8(a)(3) and 8(a)(5).[106] Noting that the subcontracting was motivated by a desire both to alleviate problems with ICC regulations and to eliminate the union, the court in affirming the 8(a)(3) violation, asserted that the law will not allow the prevention of employee unionization.[107] The court further stated that antiunion animus was not a necessary element for an 8(a)(5) violation.[108]

In *NLRB v. Winn-Dixie Stores, Inc.*,[109] the same Fifth Circuit enforced the Board's finding of an 8(a)(5) violation but on different grounds.[110] The NLRB had found the violation to be "in Respondent's failure to notify, consult with, or bargain with Union about the *elimination* of the cheese packaging operation . . . ,"[111] which was a finding of a partial termination. The court, however, characterized this action as unilateral subcontracting and approved its earlier dictum in *American Mfg. Co.*: " 'Of course it is now clear that the Board was correct in finding that the Employer must negotiate the decision to subcontract. Quite apart from anti-union conduct, or here the claim of economic justification, the decision to subcontract work is a subject for mandatory bargaining.' "[112]

In *NLRB v. Adams Dairy, Inc.*,[113] the Eighth Circuit had initially denied enforcement[114] of a Board order which found Adams guilty of violating 8(a)(5) by subcontracting and discharging certain employees

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[105] 351 F.2d 74 (5th Cir. 1965), *enforcing in part and remanding in part* 139 N.L.R.B. 815 (1962).

[106] For many years prior to 1960, American had maintained its own motortruck transportation department. Two months after the Teamsters became the bargaining representative of its drivers, the company unilaterally discontinued this department and subcontracted the work —a decision resulting from alleged inability to conform with ICC regulations. *Id.* at 76-77.

[107] *Id.* at 79.

[108] *Id.* at 80. The court held that *Fibreboard* settled the question since that case made the decision to subcontract work a mandatory bargaining subject. *Ibid.*

[109] 361 F.2d 512 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966). Winn-Dixie, for business reasons, discontinued its warehouse and cheese-packaging operations. Thereafter it procured prepackaged cheese bearing the Winn-Dixie label from Kraft and other cheese processors. The employer laid off six employees without advising the union that it was about to discontinue these operations. *Id.* at 513-14. The Board found the employer guilty of an 8(a)(5) violation for failure to bargain but made no finding with regard to 8(a)(3). Winn-Dixie Stores, Inc., 147 N.L.R.B. 788, 791, 799 (1964).

[110] See text accompanying notes 283-85 *infra.*

[111] 147 N.L.R.B. at 790. (Emphasis in original.)

[112] 361 F.2d at 516, quoting NLRB v. American Mfg. Co., 351 F.2d 74, 80 (5th Cir. 1965). *Contra*, NLRB v. Robert S. Abbott Publishing Co., 331 F.2d 209 (7th Cir. 1964); Hawaii Meat Co. v. NLRB, 321 F.2d 397 (9th Cir. 1963).

[113] 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

[114] NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963).

without notifying the union. Upon remand from the Supreme Court,[115] the court reiterated its former decision that there was no 8(a)(5) violation and attempted to distinguish the *Fibreboard* decision. Whereas in *Fibreboard* the employer substituted the employees of an independent contractor for his own, Adams effected, according to the court, a "basic" rather than a "nonbasic" change in the operation of his business for which he had no duty to decision-bargain.[116] "[T]he dairy liquidated . . . part of its business . . . which resulted . . . in a recoup of capital investment."[117] By viewing the liquidation as a basic change of conditions rather than merely as a replacement of employees, the court failed to recognize the scope of replacement subcontracts, which necessarily involve a liquidation by management of part of its operations. The *Adams* rationale would eliminate any duty to effect- or decision-bargain in replacement-subcontracting cases.

American Mfg. Co., on one hand, is in line with those pre-*Fibreboard II* cases which found a violation of 8(a)(5) as an outgrowth of an 8(a)(3) violation,[118] but is distinguishable since the 8(a)(5) violation was not dependent upon antiunion animus.[119] Following its dictum in *American Mfg. Co.*, the *Winn-Dixie* court[120] reasserted the position of the District of Columbia Circuit in *Fibreboard II*.[121] Unlike *Adams Dairy*, no attempt was made to restrict the *Fibreboard* doctrine, and the *Winn-Dixie* court concurred, in effect, with the Supreme Court's dictum that the "objectives of national policy . . . require that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."[122]

A second discernible group of courts of appeals cases involves dimi-

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[115] NLRB v. Adams Dairy, Inc., 379 U.S. 644 (1965).

[116] 350 F.2d at 110-11; Comment, 46 B.U.L. REV. 127 (1966).

[117] 350 F.2d at 111; see note 88 *supra* regarding the basic/nonbasic business change dichotomy.

[118] Jays Foods, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961), *denying enforcement of* 129 N.L.R.B. 690 (1960); NLRB v. Brown-Dunkin Co., 287 F.2d 17 (10th Cir. 1961), *enforcing* 125 N.L.R.B. 1379 (1959); NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961), *denying enforcement of* 126 N.L.R.B. 1041 (1960); NLRB v. Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954), *denying enforcement of* 101 N.L.R.B. 1208 (1952).

[119] *Accord*, NLRB v. Northwestern Publishing Co., 343 F.2d 521 (7th Cir. 1965).

[120] NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512, 516-17 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966), citing NLRB v. American Mfg. Co., 351 F.2d 74, 80-81 (5th Cir. 1965).

[121] East Bay Union of Machinists v. NLRB, 116 U.S. App. D.C. 198, 322 F.2d 411 (1963), *aff'd sub nom.* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964), *enforcing* 138 N.L.R.B. 550 (1962).

[122] John Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964).

nution subcontracts. Asked to review a Board order[123] dismissing a charge of an 8(a)(5) violation in *District 50, UMW v. NLRB*,[124] the Fourth Circuit found substantial evidence for the Board's conclusion that there was no adverse impact upon the bargaining unit.[125] The court recognized that *both* labor and management have legitimate interests in need of protection, but that full-scale decision-bargaining should not be required since it would be too burdensome on management.[126] More importantly, the court was willing to give the *Fibreboard* decision a wider reading than some other circuits,[127] and recognized that the type of subcontract in question is of the utmost importance to a determination of detriment to the bargaining unit.[128]

In *Puerto Rico Tel. Co. v. NLRB*,[129] the employer subcontracted work during an expansion of its telephone service which resulted in a layoff of members of the bargaining unit. Applying the principle that the subcontracting must have an adverse effect upon the bargaining unit,[130] the court found that it was designed to meet a transient need[131] and caused no adverse impact on the unit and, therefore, denied enforcement of that

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[123] Allied Chem. Corp., 151 N.L.R.B. 718 (1965).

[124] 358 F.2d 234 (4th Cir. 1966).

[125] The employer unilaterally contracted out certain maintenance work without notifying or consulting with the union. There was an established practice of subcontracting and no employees were laid off or discharged because of it, which discredited the testimony of the union's representative that there was significant impact on the unit. *Id.* at 236-37.

[126] *Id.* at 238. The court suggested that some form of discussion is necessary and that labor and management should establish procedures for such negotiation. *Ibid.* See generally Comment, 54 CALIF. L. REV. 1749 (1966). The court further noted that in certain cases where management customarily makes subcontracting decisions without delay, its prerogative to subcontract should be respected. 358 F.2d at 238.

[127] *E.g.*, NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

[128] 358 F.2d at 238.

[129] 359 F.2d 983 (1st Cir. 1966).

[130] *Id.* at 987.

[131] The court noted that the *Fibreboard* doctrine is not without limitation and contended that an employer need not bargain where subcontracting occurs to meet a transient need. *Ibid.*

The NLRB likewise has recognized that there are situations where there will be no duty to bargain although subcontracting occurs. See Central Ruffina, 161 N.L.R.B. No. 59 (1966). In *Ruffina*, the Board dismissed the complaint because the employer did not attempt to undermine the unit by subcontracting when it became uneconomical for him to continue to refine sugar. The sugar had to be milled before it began to decay, but the employer's machinery, bought on credit with payment to be made from the proceeds from sale of the sugar, was defective. To avoid losing his machinery, he subcontracted to raise money to pay for the equipment. The Board noted that a "force majeure" prompted the subcontracting and that there was nothing the employer could do to prevent it. The Board found that he had no duty to bargain about the decision to subcontract since the *Fibreboard* doctrine was only applicable to those decisions "peculiarly suitable for resolution within the collective bargaining framework." The Board also found that the employer had satisfied his duty to effect-bargain. *Id.* at ——; *cf.* A. C. Rochat, 163 N.L.R.B. No. 49 (1967) (partial termination due to religious convictions not apt subject for bargaining).

part of the Board's order which found an 8(a)(5) violation for failure to bargain.[132] The importance of this case lies in its recognition that diminution subcontracting *might* have an adverse impact on the unit and therefore require decision-bargaining.

In a recent case[133] the Court of Appeals for the District of Columbia Circuit denied enforcement of an order[134] which had exonerated General Motors from decision-bargaining about a change in operation. Conceding that greater efficiency was a valid reason for the change, the court found that the alteration amounted to subcontracting rather than a mere change in methods, and therefore was not within the management-rights clause of the collective-bargaining contract.[135] The court adopted the NLRB's "significant detriment" test, but its application was less flexible than the Board's. The subcontracting did not undermine the union; only six employees were affected and they were reassigned within the unit. Even so, the court found that the subcontracting produced significant detriment to the unit[136] giving the union a statutory right to demand decision-bargaining.[137]

Although it is difficult to state categorically that there exists a definite trend in the courts in cases involving diminution subconracts, it does appear that the *Fibreboard* decision will not be limited to its particular facts. Some courts now recognize that labor, as well as management, has certain protectable interests. To insure a balancing of those interests, the significant-detriment test developed by the NLRB in diminution cases will most likely be applied. Recognizing the traditional conservatism of the courts in such matters, it is likely that the Supreme Court's

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[132] The court enforced a Board finding that the company had violated 8(a)(5) by not supplying pertinent financial data to the union in an arbitration proceeding. 359 F.2d at 988.

[133] International Union, UAW v. NLRB (General Motors), —— F.2d —— (D.C. Cir. 1967).

[134] General Motors Corp., 149 N.L.R.B. 396 (1964), *remanded*, 60 L.R.R.M. 2283 (D.C. Cir. 1965), *supplemented*, 158 N.L.R.B. No. 24 (1966). The NLRB found no contracting out of unit work but only a change in methods. Such changes were not, in its judgment, within the *Town & Country* and *Fibreboard II* rationale of decision-bargaining. The Board considered the employer's action sanctioned by the management-rights clause and found that no significant detriment accrued to the union. It further noted that the union had advance notice of the change and had adequate opportunity to discuss with and make counterproposals to the employer. *Id.* at 400.

[135] —— F.2d at ——. The management-rights clause permitted a change in the methods of manufacturing and the court did not consider "parking manufactured cars" such a change. *Id.* at ——.

[136] *Id.* at ——. The court said that the subcontracting "diminished by six the whole number of jobs performed" and such impact was not *de minimis*. The court distinguished *District 50* and *Puerto Rico Tel.* since the subcontracts in those cases "did not reduce the whole number of jobs in the bargaining unit." *Ibid.*; see notes 125-34 *supra* and accompanying text.

[137] —— F.2d at ——. Judge Edgerton, for the court, noted, by narrowly construing the management-rights clause, that there was no forfeiture of the right to demand decision-bargaining. See notes 89-96 *supra* and accompanying text.

cautionary words in *Fibreboard*[138] will be given weight and the quantum of detriment will, indeed, have to be substantial to justify intrusion into the management prerogative.

RELOCATION

THE BOARD CASES

The duty of an employer to bargain with the union about a decision to relocate his enterprise has received a mixed reception from the National Labor Relations Board.[139] Although the duty has been generally accepted after the Supreme Court's *Fibreboard* decision,[140] it would be a misstatement to say that it did not exist before the 1962 Board decisions of *Town & Country* or *Fibreboard II*.

Prior to 1941 the employer's motivation was the key to whether relocation was an unfair labor practice.[141] But until *Gerity Whitaker Co.*,[142] the right of management to relocate *unilaterally* had never been challenged. In *Gerity Whitaker*, the employer attempted to avoid collective bargaining with the union by setting up a purportedly independent plant, free from union influence, which would eventually absorb the contracts of the unionized plant. The NLRB concluded that the employer had relocated rather than terminated his operations[143] and that the failure

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138 "We are . . . not expanding the scope of mandatory bargaining to hold . . . that the type of 'contracting out' involved in this case [replacement subcontracting] . . . is a statutory subject of collective bargaining . . . . Our decision need not and does not encompass other forms of 'contracting out' . . . ." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 215 (1964).

139 *Compare* Rapid Bindery, Inc., 127 N.L.R.B. 212 (1960), *enforced as modified*, 293 F.2d 170 (2d Cir. 1961), *and* Brown-McLaren Mfg. Co., 34 N.L.R.B. 984 (1941), *with* R. C. Can Co., 144 N.L.R.B. 210 (1963), *enforced as modified*, 340 F.2d 433 (5th Cir. 1965), *and* Brown Truck & Trailer Mfg. Co., 106 N.L.R.B. 999 (1953).

140 Prior to the Supreme Court ruling, the *Fibreboard II* decision had been applied by the Board to relocation cases. See R.C. Can Co., 144 N.L.R.B. 210 (1963), *enforced as modified*, 340 F.2d 433 (5th Cir. 1965).

141 Since its inception the Board has held relocation *to avoid* collective-bargaining to be violative of 8(a)(5). See Tennessee-Carolina Transp., Inc., 108 N.L.R.B. 1369, 1370 (1954), *enforcement denied*, 226 F.2d 743 (6th Cir. 1955); Hopwood Retinning Co., 4 N.L.R.B. 922 (1938); Omaha Hat Co., 4 N.L.R.B. 828, *enforced as modified*, 98 F.2d 97 (2d Cir. 1938); note 8 *supra* and accompanying text. At times a relocation motivated by antiunion feeling has been called a "lockout," Isaac Scheiber (Scheiber Millinery Co.), 26 N.L.R.B. 437, *enforced as modified*, 116 F.2d 281 (8th Cir. 1940), or a "'runaway shop," Garwin Corp., 153 N.L.R.B. 664 (1965), *enforced in part, remanded in part sub nom.* Local 57, ILGWU v. NLRB, —— F.2d —— (D.C. Cir. 1967). The NLRB on numerous occasions has found that a relocation violated either 8(a)(1) or 8(a)(3) as either coercive or discriminatory. *E.g.*, Industrial Fabricating, Inc., 119 N.L.R.B. 162 (1957), *enforced sub nom.* NLRB v. MacKneish, 272 F.2d 184 (6th Cir. 1959). See generally Annot., 152 A.L.R. 155 (1944).

142 33 N.L.R.B. 393 (1941), *enforced as modified*, 137 F.2d 198 (6th Cir. 1942), *cert. denied*, 318 U.S. 763 (1943).

143 *Id.* at 404 & n.8. The Board also determined, by virtue of the policy underlying the National Labor Relations Act, that in spite of an existing contract there is a continuing duty to bargain triggered by any change in the conditions of employment. *Id.* at 407; see NLRB v. Sands Mfg. Co., 306 U.S. 332, 342-44 (1939). Compare note 99 *supra* and accompanying text.

to bargain about this *decision* violated section 8(5), the predecessor of 8(a)(5). Although there was some attempt to bargain about the effects of the decision to relocate, the Board rejected any possibility that such effect-bargaining could substitute for good-faith bargaining over the decision to relocate.[144] While *Gerity Whitaker* was influenced by a markedly antiunion environment, the duty to decision-bargain was reaffirmed in *Brown-McLaren Mfg. Co.*,[145] in which there was an economically motivated decision to relocate devoid of antiunion animus.[146] The basis for both the *Brown-McLaren* and *Gerity Whitaker* decisions was the NLRB's concern for the stability of the workers' employment conditions,[147] a concern that continues to manifest itself in Board decisions.[148]

Between 1941 and 1953, the NLRB considered two relocation cases and reached somewhat inconsistent results. In *Howard Rome (Rome Prods. Co.)*,[149] the Board found that the employer violated sections 8(3) and 8(5) when it unilaterally incorporated in another city to avoid collective bargaining.[150] The Board held that the duty to bargain with regard to relocation was a duty to effect-bargain, with no mention of a duty to decision-bargain.[151] In a second case, *California Portland Cement Co.*,[152] the Board found that although the duty to effect-bargain had been

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144 33 N.L.R.B. at 407. The Board gave emphasis to the effect such a decision would have on the employer-union relationship. Such unilateral undermining of the union's status as the exclusive bargaining representative of the workers, combined with the "drastic and crucial change in Gerity Whitaker's [original plant] employment conditions . . ." created in effect, an incurable refusal to bargain. *Ibid.* Compare Hartmann Luggage Co., 145 N.L.R.B. 1572 (1964) (technical 8(a)(5) violation cured by overall conduct of employer).

Although the 8(5) violation was set in an antiunion framework, it appears that it would have been found even without the existence of antiunion animus. See 33 N.L.R.B. at 407. This differs from the early subcontracting cases where an 8(a)(5) violation was dependent upon a preliminary finding of an 8(a)(3) violation. See notes 20-34 *supra* and accompanying text.

145 34 N.L.R.B. 984 (1941). In an attempt to reduce production costs, the employer moved his manufacturing operations from Detroit to another locality where workers could be hired at lower wages. *Id.* at 1000.

146 *Id.* at 1006. While holding that there was no 8(5) violation in the relocation because the employer, prior to executing his decision, had fulfilled his bargaining duty in former contract negotiations, the Board, in effect, reiterated that such a duty did exist even when the action was motivated by economic necessity. *Ibid.*

147 *Brown-McLaren* assumes a duty on the part of an employer to bargain with the union to avoid the necessity to relocate. *Id.* at 1006.

148 See, *e.g.*, Ozark Trailers, Inc., 161 N.L.R.B. No. 48 (1966); *cf.* John Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964).

149 77 N.L.R.B. 1217 (1948).

150 The NLRB found that Rome and the new corporation were in essence the same company. *Id.* at 1220. It should be noted that two 8(5) violations were found: One in the act of relocating to avoid bargaining and another in the failure to bargain about the decision to relocate. See note 8 *supra.*

151 See 77 N.L.R.B. at 1220.

152 101 N.L.R.B. 1436 (1952), *supplemented*, 103 N.L.R.B. 1375 (1953).

satisfied,[153] there was a duty to bargain over the decision to relocate, which, as in the earlier *Brown-McLaren* and *Gerity Whitaker* decisions, the employer had not fulfilled.[154]

Within a one-month period late in 1953, the NLRB handed down two inconsistent decisions. Although demanding effect-bargaining in its holding, *Mount Hope Finishing Co.*[155] indicated in dictum the existence of a duty to bargain as well about the decision to relocate which results in a change in the conditions of employment.[156] While this dictum conformed with prior NLRB decisions, the Board did not find an 8(a)(5) violation for failure to decision-bargain even though it indicated that Mount Hope had changed the conditions of employment.[157] In *Brown Truck & Trailer Mfg. Co.*,[158] the landmark case enunciating the principle that the employer's duty in relocating is limited to effect-bargaining,[159] the employer created a subsidiary to perform part of his manufacturing operation. The subsequent transfer of operations was economically motivated, but the union was not notified of the impending relocation nor given an opportunity to bargain about the decision or its effects.[160] The trial examiner found an 8(a)(5) violation because the employer had not disclosed the intended move to the union nor negotiated about it.[161] In adopting the trial examiner's Intermediate Report, the NLRB held the employer to a duty to bargain with the union *at least* about the effects of the relocation.[162] This limited bargaining duty was not destined to find easy acceptance in subsequent Board opinions.

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153 *Id.* at 1440. The employer transferred part of its payroll work to its Los Angeles office. There was no indication of any antiunion animus.

154 *Ibid.*

155 106 N.L.R.B. 480, 497 (1953), *enforcement denied*, 211 F.2d 365 (4th Cir. 1954). The employer moved his operations to North Carolina for allegedly economic reasons. The NLRB, however, found that he unilaterally moved to avoid collective bargaining and thereby violated 8(a)(3) and 8(a)(5). *Id.* at 492. The decision seems to indicate that the 8(a)(5) violation was found independently of the 8(a)(3) violation. See *id.* at 495.

156 It is settled law that an employer is obligated to notify the collective-bargaining representative of any contemplated changes in the wages or the terms or conditions of employment of his employees *before* putting the changes into effect, in order to afford the bargaining representative an opportunity to discuss with the employer such questions, e.g., *whether or not the changes can be avoided* . . . .
Ibid. (Emphasis added.)

157 *Id.* at 497.

158 106 N.L.R.B. 999 (1953).

159 See Cooper Thermometer, 160 N.L.R.B. No. 150 (1966), *enforced in pertinent part*, —— F.2d —— (2d Cir. 1967) (*Brown Truck* cited for affirmative, not exclusive, duty to effect-bargain).

160 106 N.L.R.B. at 1000-02.

161 It is not clear whether the examiner was creating a duty to negotiate about the decision or its effects on the unit. The content of his remarks seems to indicate that he was referring to a duty to effect-bargain. It can be argued, however, that any mutual discussion broad enough to produce "solutions impelling the Company to abandon or to delay the move," *id.* at 1016, must also encompass discussion about the decision to relocate.

162 The Board held that the good-faith discharge of the employer's statutory bargaining

Industrial Fabricating, Inc.[163] was the first Board decision to question the *Brown Truck* doctrine. Disturbed by union activity at one of his factories, the employer temporarily closed it and transferred an order customarily executed at the closed plant to another of his plants.[164] The trial examiner found that this temporary relocation violated section 8(a)(5) and intimated that there was a duty to decision-bargain.[165] The Intermediate Report defined the duty broadly, describing it as but "an extension to the field of labor relations of the principle in our jurisprudence, which makes all-important the right to be heard. Basically it is that an action adverse to a given interest should be withheld until that interest is heard."[166] It is curious, however, that the cases which the examiner cited to sustain this proposition[167] are basically cases which limited bargaining to the effects. Without comment on the extent of the duty,

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duty demanded that he offer the union an opportunity to bargain about the move insofar as it affected the employees. The trial examiner's use of precedent is indecisive for *Brown-McLaren* encompassed a duty to bargain over the decision *and* its effect. While *Brown Truck* limits the statutory duty to effect-bargaining, its rationale was followed in two subsequent cases. See Bickford Shoes, Inc., 109 N.L.R.B. 1346 (1954); T. A. Tredway (Diaper Jean Mfg. Co.), 109 N.L.R.B. 1045 (1954), *enforced sub nom.* NLRB v. Tredway, 222 F.2d 719 (5th Cir. 1955). In an atmosphere of antiunion feeling Diaper Jean relocated without notifying or bargaining with the union. The Board held that two operational relocations, one economically motivated and one to avoid the union, were a violation of 8(a)(5) because the union was not notified about the moves nor given an opportunity "to bargain with respect to the tenure of the employees affected thereby." *Id.* at 1048. In the Intermediate Report, which the Board adopted, the trial examiner cited *Brown Truck* in condemning as an 8(a)(5) violation the refusal of the employer to negotiate "these legitimate problems incident to the contemplated move," *i.e.*, the economic dislocation of the workers at the plant which was relocated. *Id.* at 1065. The fact that one of the moves was legitimately motivated and not a violation of 8(a)(3) did not affect the duty to bargain. *Ibid.*

In *Bickford Shoes*, the employer, a shoe manufacturer, moved his operation for economic reasons from one city to another without bargaining with the union. The union had never requested negotiation concerning the decision to move, but had requested bargaining about its effects. The Board decided that the "crux of the 8(a)(5) issue is whether Bickford had a duty to bargain concerning the *effect* of moving." 109 N.L.R.B. at 1350. (Emphasis added.) The Board cited *Brown Truck* as precedent for the statement that the minimum duty of the employer is to effect-bargain. While the Board did not refer to the possible effect of a union request to bargain over the decision, the exclusion of the "decision-bargaining question" from the 8(a)(5) issue and reliance on *Brown Truck* concerning the duty to effect-bargain indicates that the decision-bargaining duty would not have been accepted. *Ibid.*

[163] 119 N.L.R.B. 162 (1957), *enforced sub nom.* NLRB v. MacKneish, 272 F.2d 184 (6th Cir. 1959).

[164] *Id.* at 164-65.

[165] *Id.* at 189-90.

[166] *Ibid.* The trial examiner's footnote to his report distinguished NLRB v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955) (only 8(a)(3) violation for termination of sales department considered). On the basis of factual differences, the trial examiner rejected the employer's use of *Adkins* as authority and restated the idea of a "reciprocal bargaining obligation, the mutual exploration of more moderate alternatives before resort to the drastic ultimate." 119 N.L.R.B. at 190.

[167] Bickford Shoes, Inc., 109 N.L.R.B. 1346 (1954); T. A. Tredway (Diaper Jean Mfg. Co.), 109 N.L.R.B. 1045 (1954), *enforced sub nom.* NLRB v. Tredway, 222 F.2d 719 (5th Cir. 1955); Brown Truck & Trailer Mfg. Co., 106 N.L.R.B. 999 (1953).

the NLRB adopted the trial examiner's report, but unlike the trial examiner, found an 8(a)(3) violation.[168] *Rapid Bindery, Inc.*[169] was a second decision which rejected the limited bargaining duty of *Brown Truck.* The employer had unilaterally transferred his operations to another plant in an atmosphere redolent with antiunion animus. The Board based its finding of an 8(a)(5) violation on the absence of bargaining with respect to the consequent effects on employment and, more importantly, on the failure to bargain with the union about the decision to relocate.[170]

In *Sidele Fashions, Inc.*[171] the Board seemed to retreat from its previous decisions. The union had complained that the relocation had taken place without effect-bargaining and therefore was an 8(a)(5) violation. The NLRB adopted the Intermediate Report which it interpreted to hold that the employer had violated 8(a)(5), "but only by failing to give the Union *notice* . . . of the decision to move."[172] The Board implied that the employer's refusal to negotiate about the decision and its effects did not in itself constitute a violation of the act. In the light of the trial examiner's statement demanding effect-bargaining,[173] this decision is, indeed, questionable. *International Powder Metallurgy*[174] did very little to clarify the issue of decision- versus effect-bargaining. The Board held that the transfer of shop employees without notice to the union or consultation with them is an indication of the employer's disregard of his bargaining obligation with respect to the bargaining unit.[175] The NLRB's holding gives no clear indication whether this duty extends to the decision,

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[168] 119 N.L.R.B. at 168-69. In its decision the Board made the observation that economic motivation did not excuse conduct which had the necessary effect of interfering with the employees' statutory rights. *Id.* at 172 n.7; see Warehouse Workers (Waterways Terminals Corp.), 118 N.L.R.B. 342 (1957). Compare note 85 *supra.*

[169] 127 N.L.R.B. 212 (1960), *enforced as modified*, 293 F.2d 170 (2d Cir. 1961).

[170] *Id.* at 220 (adopting Intermediate Report). In an action for enforcement the court refused to hold the employer to a duty to bargain about the decision to relocate, "as it was clearly within the realm of managerial discretion." NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 176 (2d Cir. 1961). The court further refused to find an 8(a)(3) violation. *Id.* at 175. Compare note 36 *supra* and accompanying text.

[171] 133 N.L.R.B. 547 (1961), *enforced sub nom.* Philadelphia Dress Joint Bd. (ILGUW) v. NLRB, 305 F.2d 825 (3d Cir. 1962).

[172] *Id.* at 552-53. (Emphasis added.)

[173] It is my opinion that the Union at that time, before the matter was a complete fait accompli, was entitled to a full disclosure of the combined facts in order that it might have the opportunity to bargain concerning possible termination pay or transfer of the Philadelphia employees and related matters. . . . Under my recommended finding that there has been a refusal to bargain, the Respondents' obligation is limited to bargaining upon request of the union . . . .

Id. at 578.

[174] 134 N.L.R.B. 1605 (1961).

[175] *Id.* at 1608.

the effects, or both.[176] The decisions of the Board in 1961 and 1962 and the administrative decisions of the General Counsel underscore that there was no established delineation of the scope of the duty to bargain over relocation[177] and typify the ambivalence of the Board during this period.

The marked emphasis on *Town & Country* and *Fibreboard II* in subsequent relocation decisions[178] gives the impression that decision-bargaining originated in these landmark decisions. While this may be true in subcontracting,[179] the impact in relocation is one of clarification rather than initiation.[180] *Town & Country* and *Fibreboard II* stand merely as

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[176] The trial examiner in his explication of the 8(a)(5) violation rather definitively stated:

> It has been generally held that the *impact* of curtailment of employment due to discontinuance of a part of the bargaining unit, whether by shutdown, sale, contracting out of work, or consolidation, is a bargainable issue. The decision of the Supreme Court in the *Telegraphers* case fully supports that proposition as do the decisions of the Board itself.

Id. at 1614. (Emphasis added.) The examiner cited Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960); Shamrock Dairy, Inc., 124 N.L.R.B. 494 (1959), *enforced*, 108 U.S. App. D.C. 117, 280 F.2d 665, *cert. denied*, 364 U.S. 892 (1960); Timken Roller Bearing Co., 70 N.L.R.B. 500 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947). The statement of the examiner seems to indicate a duty to bargain limited to the impact of the decision. Yet, of the cases cited, only *Shamrock Dairy* asserts such a limited duty. *Timken* contains no effect-bargaining issue although it has been argued that it demands decision-bargaining. See Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 213 (1964). *Telegraphers*, relied upon by the Supreme Court's *Fibreboard* decision and in *Fibreboard II* and *Town & Country*, called for decision-bargaining. It can be said that because of his choice of support, the examiner in *International Powder Metallurgy* did not really mean effect-bargaining, but was opting for a broader decision-effect duty. Further support for this theory is found in the fact that the examiner found himself in conflict with *Fibreboard I*, which repudiated the obligation to decision-bargain in favor of a limited effect-bargaining duty. 134 N.L.R.B. at 1615.

[177] In one relocation case the General Counsel held that the relocating employer's bargaining duty was satisfied by bargaining to cushion the effects of the shutdown. Administrative Decision of the NLRB Gen. Counsel, Case No. SR-1605, 49 L.R.R.M. 1252 (1961).

The Board has argued that the unilateral relocation violates 8(a)(5) because the union had no chance to bargain about the impact, implying that the duty would be satisfied by merely effect-bargaining as opposed to decision-bargaining. See Royal Optical Mfg. Co., 135 N.L.R.B. 64 (1962). In another case the Board found a violation in the employer's failure to bargain about the relocation itself. W. L. Rives Co., 136 N.L.R.B. 1050 (1962), *enforced as modified*, 328 F.2d 464 (5th Cir. 1964); see Montgomery Ward & Co., 137 N.L.R.B. 418 (1962) (union waived right to decision-bargain).

[178] *E.g.*, International Shoe Co., 151 N.L.R.B. 693 (1965); Shell Oil Co. (Detroit), 149 N.L.R.B. 305 (1964); R. C. Can Co., 144 N.L.R.B. 210 (1963), *enforced as modified*, 340 F.2d 433 (5th Cir. 1965).

[179] See notes 42-58 *supra* and accompanying text.

[180] It must be remembered that the Supreme Court's *Fibreboard* decision was not concerned with relocation, but with the duty to bargain about a proposed subcontracting decision. Its impact, however, has been felt whenever the employer has unilaterally changed the conditions of employment. The Board has noted that the foundation cases establishing the duty of decision-bargaining involved subcontracting. In International Shoe Co., 151 N.L.R.B. 693 (1965), the NLRB explicitly asserted that "the principles . . . established [in *Fibreboard*] apply with equal force to the moving of unit work or a portion thereof." *Id.* at 699 n.19; see Royal Plating & Polishing Co., 148 N.L.R.B. 545, 558 n.16 (1964) (trial examiner's decision), *supplemented*, 152 N.L.R.B. 619 (1965), *enforcement denied and remanded in part*, 350 F.2d 191 (3d Cir. 1965), *aff'd on remand*, 160 N.L.R.B. No. 72 (1966) (partial termination); New York Mirror, 151 N.L.R.B. 834 (1965) (complete termination); Standard Hand-

the unequivocal resolution of a disputed doctrine which finds its roots as far back as 1941.[181] The Board's decision in *R. C. Can Co.*[182] is illustrative of the impact of the Board's *Fibreboard II* decision.[183] The trial examiner had found the decision to relocate a production line to be economically motivated and within the area of management's prerogative. Stating the issue to be whether there was a duty to bargain about the effects, he found an 8(a)(5) violation for a failure to effect-bargain.[184] The NLRB, however, found a second 8(a)(5) violation in the employer's failure to bargain about the *decision* to move a segment of his enterprise.[185]

The implications of the *Town & Country* decision were more specifically defined in *Edward Axel Roffman Associates*,[186] in which the trial examiner had limited that earlier decision to those cases in which the employer sought to be rid of the union. In cases of pure economic necessity, he contended that effect-bargaining without discussion of the decision itself was sufficient in light of management's prerogative.[187] This decision would have reinstated the dichotomy between effect- and decision-bargaining and, furthermore, would have subverted the philosophy of wide-ranging collective bargaining as an affirmative means to keep industrial peace,[188] relegating it to the limited role of punishing em-

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kerchief Co., 151 N.L.R.B. 15 (1965) (relocation); Renton News Record, 137 N.L.R.B. 1294 (1962) (automation; O'Connell, *The Implications of "Decision Bargaining,"* 16 N.Y.U. CONFERENCE ON LABOR 99 (1963); Sheinkman, *Plant Removal Under the National Labor Relations Act: Can Bargaining Be Avoided and Should Bargaining Be Avoided*, 16 N.Y.U. CONFERENCE ON LABOR 81 (1963).

[181] See Brown-McLaren Mfg. Co., 34 N.L.R.B. 984 (1941); Gerity Whitaker Co., 33 N.L.R.B. 393 (1941), *enforced as modified*, 137 F.2d 198 (6th Cir. 1942), *cert. denied*, 318 U.S. 763 (1943); notes 139-48 *supra* and accompanying text.

[182] 144 N.L.R.B. 210 (1963). The employer unilaterally relocated a production line to suit the needs of one of his customers.

[183] At the present time, the Supreme Court's *Fibreboard* decision is the precedential authority for a duty to bargain in relocation cases. See Spun-Jee Corp., 152 N.L.R.B. 943 (1965); International Shoe Co., 151 N.L.R.B. 693 (1965).

[184] 144 N.L.R.B. at 225, citing Bickford Shoes, Inc., 109 N.L.R.B. 1346 (1954); see note 162 *supra.*

[185] 144 N.L.R.B. at 211. The Board found "the removal of a segment of the production process involves a matter pertaining to 'terms and conditions of employment' and is a mandatory subject of collective bargaining concerning which Respondent could not, with impunity, act unilaterally." *Id.* at 211 n.3.

[186] 147 N.L.R.B. 717 (1964). Finding a technical violation in the failure to notify the union about the proposed move as soon as practicable, the Board dismissed an 8(a)(5) charge because the employer had subsequently offered to negotiate about the move which was not yet definite. The union had not tested his good faith. *Accord*, Hartmann Luggage Co., 145 N.L.R.B. 1572 (1964) (subcontracting).

[187] 147 N.L.R.B. at 722-23, citing Adams Dairy, Inc. v. NLRB, 322 F.2d 553 (8th Cir. 1963), *vacated and remanded*, 379 U.S. 644, *modified*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

[188] See generally Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

ployers for having naughty motives. The Board rejected the trial examiner's interpretation and found an 8(a)(5) violation.[189]

The difficulties that the NLRB faced between *Brown Truck* and *Town & Country*[190] in defining the bargaining duty of the relocating employer have been resolved, for the present at least, in favor of the duty to bargain about the decision as well as its effects. These difficulties arose from the NLRB's respect for management's prerogative to make unilateral business changes without decision-bargaining. This respect manifested itself in subcontracting decisions of that era and carried over into relocation cases. This favoring management in the relocation situation was dissipated in subsequent subcontracting cases which stressed the duty to decision-bargain about all unilateral changes. In fact, the duty to decision-bargain which emerged from these decisions has been applied more strictly in relocation situations than in the subcontracting cases which first set forth the principle. The reason is simply that, while the impact on the bargaining unit in subcontracting decisions depends on the type of contract involved,[191] the impact of a decision to relocate is universally adverse to the unit.[192] Hence, the latter's detriment merits the NLRB's requirement that the employer bargain over that decision. The current philosophy of the Board is that the employer, when he makes a decision to relocate, naturally affects the bargaining unit and must therefore bargain in good faith about this decision. The notice and the discussion must manifest a good-faith intent to utilize the potential of collective bargaining to reconcile the adverse interests.[193]

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189 147 N.L.R.B. at 722-23. This position was reaffirmed in dictum in Purolator Prods. Co., 160 N.L.R.B. No. 9 (1966). The Board noted that a duty to decision-bargain exists whether the relocation was motivated by antiunion animus or by economic necessity. *Id.* at —— n.2; see Winn-Dixie Stores, Inc., 147 N.L.R.B. 788 (1964), *enforced as modified*, 361 F.2d 512 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966) (absence of collective-bargaining agreement does not create management prerogative).

190 See notes 163-77 *supra* and accompanying text.

191 A replacement subcontract will destroy the unit with obvious adverse impact; the effect of a diminution subcontract may vary from no adverse impact to significant detriment to the bargaining unit. See text accompanying notes 81-88 *supra.*

192 While no case has limited this duty to bargain about the decision to relocate, it can be postulated that where the relocation is minor in distance and does not have the effect of depriving workers of job opportunities, the employer may be allowed to proceed unilaterally. The rationale would be that while there is a relocation there is no substantial impact on the bargaining unit.

193 Cooper Thermometer, 160 N.L.R.B. No. 150 (1966), *enforced in pertinent part*, —— F.2d —— (2d Cir. 1967); Die Supply Corp., 160 N.L.R.B. No. 99 (1966); Standard Handkerchief Co., 151 N.L.R.B. 15, 18-19 (1965). Despite the current emphasis on decision-bargaining, the duty to bargain about the effects of the move should not be overlooked.

THE COURT CASES

In *NLRB v. Gerity Whitaker Co.*,[194] the first relocation case considered by the courts, the Sixth Circuit enforced a finding of an 8(5) violation which was based on a failure to bargain about a discriminatory relocation decision. The court upheld the NLRB's conclusion that the "removal of business is a . . . fundamental question concerning terms and conditions of employment"[195] and, thus, susceptible to decision-bargaining. In a more recent case,[196] the First Circuit, leaning heavily on the employer's lack of good-faith bargaining, and his intention "to undermine and destroy the [union] . . . as collective bargaining representative,"[197] enforced a finding of an 8(a)(5) violation for a refusal to bargain about a decision to relocate part of a shipping operation. In relocation cases, like subcontracting decisions, courts have been amenable to enforcing Board orders when antiunion animus is present.[198]

The impact in the courts of appeals of *Fibreboard II* and *Town & Country* on economically motivated decisions to relocate is questionable. In *Rapid Bindery, Inc. v. NLRB*,[199] the Second Circuit affirmed that an employer had no duty to bargain about the decision to relocate, stating: "The decision to move was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion."[200] In *Teamsters Local 175 v. NLRB*,[201] the court enforced a Board decision which recognized an 8(a)(5) violation where an employer unilaterally decided to relocate delivery operations.[202] Because of the economic character of the action, however, the Board had given only a limited remedial order[203] which the court left undisturbed. In *NLRB v. W. L. Rives*

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[194] 137 F.2d 198 (6th Cir. 1942), *cert. denied*, 318 U.S. 763 (1943); see text accompanying notes 142-44 *supra*.

[195] Gerity Whitaker Co., 33 N.L.R.B. 393, 406 (1941), *enforced as modified*, 137 F.2d 198 (6th Cir. 1942), *cert. denied*, 318 U.S. 763 (1943).

[196] NLRB v. Sea Land Serv., Inc., 356 F.2d 955 (1st Cir. 1966), *enforcing* 146 N.L.R.B. 931 (1964).

[197] *Id.* at 967-68.

[198] NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957), *enforcing in pertinent part and remanding* California Footwear, 114 N.L.R.B. 764 (1955); NLRB v. MacKneish, 272 F.2d 184 (6th Cir. 1959), *enforcing* Industrial Fabricating, Inc., 119 N.L.R.B. 162 (1957); NLRB v. Tredway, 222 F.2d 719 (5th Cir. 1955), *enforcing* T. A. Tredway (Diaper Jean Mfg. Co.), 109 N.L.R.B. 1045 (1954).

[199] 293 F.2d 170 (2d Cir. 1961), *enforcing as modified* 127 N.L.R.B. 212 (1960); see text accompanying notes 169-70 *supra*.

[200] 293 F.2d at 176.

[201] 50 CCH Lab. Cas. ¶ 19388 (D.C. Cir. 1964), *enforcing* Pepsi-Cola Bottling Co. (Beckley), 145 N.L.R.B. 785 (1964).

[202] 145 N.L.R.B. at 786 n.1.

[203] *Id.* at 786-87.

Co.,[204] the Fifth Circuit, when faced with an economically motivated decision to relocate, expressly avoided a holding on the duty to bargain over the decision,[205] denying enforcement on the ground that the employer's act did not affect the conditions of employment.[206] Generally, however, the courts have accepted the thesis that an employer has the duty to bargain with the union about the effects of his decision to relocate whether it is prompted by economic[207] or antiunion motives.[208]

PARTIAL TERMINATION

Since the NLRB has traditionally used "shutdown" as a term of art to describe partial as well as complete termination,[209] it was not until 1965 that partial termination cases became a separate category.[210] The discussion herein will be limited to those cases in which the facts indicate a true partial termination—the cessation of a portion of an enterprise with no immediate intention of reconstituting it.[211]

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[204] 328 F.2d 464 (5th Cir. 1964), *enforcing as modified* 136 N.L.R.B. 1050 (1962).

[205] *Id.* at 470 n.15.

[206] While not deciding in what circumstances an actual transfer of work changes conditions of employment the court held that a mere deprivation of an increase in work, *i.e.*, additional contracts, was not such a circumstance. "In each of the cases where a change in the conditions of employment was found, there was a change in either the wages or benefits given the employees, the length or term of employment or the type of work performed." *Id.* at 470.

[207] See NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961), *enforcing as modified* 127 N.L.R.B. 212 (1960).

[208] See Philadelphia Dress Joint Bd. (ILGWU) v. NLRB, 305 F.2d 825 (3d Cir. 1962), *enforcing* Sidele Fashions, Inc., 133 N.L.R.B. 547 (1961); NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957), *enforcing in pertinent part and remanding* California Footwear Co., 114 N.L.R.B. 764 (1955); NLRB v. Tredway, 222 F.2d 719 (5th Cir. 1955), *enforcing* T. A. Tredway (Diaper Jean Mfg. Co.), 109 N.L.R.B. 1045 (1954).

[209] The term "shutdown" is also used to describe the *temporary* closing of operations by an employer in whole or in part for any reason, *e.g.*, strike, lockout, inventory purposes. Occasionally it has been limited to production stoppages due to repair of machinery, lack of orders, installation of new equipment, or want of sufficient material for production. See ROBERTS, DICTIONARY OF INDUSTRIAL RELATIONS 396 (1966).

Application of the duty to decision-bargain in complete termination cases is unsettled. The Board has required an employer to decision-bargain when he decides to forego operations completely. Esti Neiderman (Star Baby Co.), 140 N.L.R.B. 678 (1963), *enforced as modified*, 334 F.2d 601 (2d Cir. 1964). Supreme Court dictum in Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 268 (1965), however, gives an employer the right to terminate for any reason, be it economic or antiunion. In a recent case the Board specifically avoided ruling on the applicability of the *Darlington* dictum to an employer who unilaterally terminates his operations in toto. Ozark Trailers, Inc., 161 N.L.R.B. No. 48 (1966).

[210] See Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965).

[211] In some cases the termination of work performed by the unit results in the elimination of part of the business, but is not preliminary to the employer's decision to subcontract or to relocate. In this instance, the termination itself is the subject of the bargaining duty. See Ozark Trailers, Inc., 161 N.L.R.B. No. 48 (1966). In other cases involving not only the unilateral act of termination but also relocation and subcontracting, the NLRB has two alternative grounds for finding an 8(a)(5) violation. It can call for bargaining about the decision to terminate, Winn-Dixie Stores, Inc., 147 N.L.R.B. 788 (1964), *enforced as modified*, 361

THE BOARD CASES

As early as 1944 in *Fred Kaiser (Nat'l Hardware Co.)*,[212] the Board indicated that it was settled law that the employer "was under no obligation to notify its employees through the Union of its decision to dismiss them because of economic reasons."[213] If there is no duty to notify the union of the decision, a fortiori there is no duty to bargain about it. While the language of *National Hardware* was broad enough to encompass every managerial decision which resulted in dismissal, the facts of the case involved only the partial termination of an enterprise. Apparently the only limiting factor was whether there was economic motivation. During this period, if economic motivation was wanting and the partial termination was prompted by antiunion animus, the Board found an 8(5) violation because it viewed unilateral termination as an evasion of the bargaining duty;[214] the unilateral termination itself apparently did not violate 8(5).[215]

Pepsi-Cola Bottling Co. (Montgomery)[216] reaffirmed management's prerogative to terminate unilaterally for economic reasons.[217] The Board based its finding of an 8(5) violation on the unilateral termination of part of the enterprise in an atmosphere of antiunion animus rather than on termination to avoid bargaining.[218] It was the first partial-termina-

F.2d 512 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966), or demand bargaining over the decision to subcontract or to relocate, Rapid Bindery, Inc., 127 N.L.R.B. 212, 214 (1960), *enforced as modified*, 293 F.2d 170 (2d Cir. 1961). When the employer and the union bargain, this dichotomy between the decision to terminate and the decision to subcontract or relocate will disappear because actual bargaining will encompass both. *Compare* Winn-Dixie Stores, Inc., 147 N.L.R.B. 788 (1964), *with* Winn-Dixie Stores, Inc. v. NLRB, 361 F.2d 512 (5th Cir. 1966).

212 55 N.L.R.B. 71 (1944). The employer closed down the hardware department of his plant because of wartime shortage of material and price ceilings. The Board held that a shutdown for economic reasons was not an attempt to evade bargaining and therefore did not violate 8(5). *Id.* at 85-86.

213 *Id.* at 85. Although the issue was whether the act of closing was to avoid bargaining with the union, this dictum indicated that it was lawful for an employer to unilaterally close a part of his operations.

214 Hays Corp., 64 N.L.R.B. 406 (1945). Finding the employer did not close his foundry division in order to escape collective bargaining, the Board concluded that the employer did not violate sections 8(3) or (5) of the act. *Id.* at 411.

215 The Board quoted with approval the dictum from Mahoning Mining Co., 61 N.L.R.B. 792, 803 (1945), allowing an economically motivated unilateral decision to terminate. Walter Holm & Co., 87 N.L.R.B. 1169, 1172 (1949).

216 72 N.L.R.B. 601 (1947).

217 The employer shut down a large portion of his plant because of an alleged wartime sugar shortage. The Board rejected this explanation and, finding section 8(3) and (5) violations, attributed the closing to an attempt to dissipate the union majority. *Id.* at 603. The Board recognized "that an employer may lawfully discontinue or reduce operations for any reason whatsoever, good or bad, sound or unsound, *in its sole discretion, and without censorship from this Board*," with the one qualification that the partial termination must be done without antiunion animus. *Id.* at 602. (Emphasis added.)

218 *Ibid.*

tion decision which held that management's duty to bargain is contingent on a preliminary finding of antiunion animus.[219] When there is discriminatory motivation, there is an 8(5) violation unless the employer first notifies the union and bargains concerning the decision to partially terminate. Instead of using the employer's antiunion motivation as a condition precedent to a duty to decision-bargain, a better approach would be to balance the inconvenience of decision-bargaining to the employer against the interests and benefits derived by the workers from such discussion.[220] Such a formulation would leave to case-by-case development within the ambit of section 8(a)(3) those employer acts which are designed to interfere with the rights of the workers. Antiunion animus is only relevant to determine whether the decision or its implementation is violative of the act insofar as it is an attempt to evade bargaining; it has no place in determining whether a decision to terminate can be made unilaterally. When there is impact on the unit and there are no circumstances precluding fruitful discussion, the duty to bargain should not depend on the employer's attitude toward unions.

In *Walter Holm & Co.*[221] the restricted duty to decision-bargain, enunciated in the dictum of *Mahoning Mining Co.*,[222] was applied to the discontinuance of the trucking portion of Holm's tomato-processing operations. The Board held that the employer did not have to bargain because the termination was economically motivated.[223] The authority of the *Mahoning* dictum is suspect because it involved an act of complete termination, which, being closer to the core of the managerial prerogative, is easier to justify than a partial termination.[224]

Eva-Ray Dress Mfg. Co.[225] confused the traditional delimitation of the employer's duty to bargain about a contemplated partial termination. The employer's decision to close down his women's dress division was motivated by economic reasons but his method of executing the decision

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219 Some courts have adopted this rationale. See, *e.g.*, NLRB v. William J. Burns Int'l Detective Agency, 346 F.2d 897 (8th Cir. 1965).

220 See Ozark Trailers, Inc., 161 N.L.R.B. No. 48 (1966).

221 87 N.L.R.B. 1169 (1949).

222 61 N.L.R.B. 792 (1945). "[T]he Board has never held that . . . an employer may not in good faith . . . sell or contract out a portion of his operations, or make any like change . . . without first consulting the bargaining representative of the employees affected by the proposed business change." *Id.* at 803.

223 The NLRB asserted that "section 8(a)(5) does not require an employer to consult with its employees' representative as a prerequisite to going out of business for nondiscriminatory reasons." 87 N.L.R.B. at 1172.

224 In *Darlington* the Supreme Court allowed management the unimpeded right to withdraw completely from the marketplace without violating 8(a)(3). 380 U.S. at 268.

225 88 N.L.R.B. 361 (1950), *enforced*, 191 F.2d 850 (5th Cir. 1951).

manifested antiunion animus.[226] The Board found an 8(a)(5) violation in his refusal to notify or consult with the union about the shutdown and mass layoff, in effect bringing a unilateral decision to terminate within the section's duty to bargain.[227] This decision, standing alone, would appear to be a definite break from the traditional management prerogative to partially terminate. Since the Board admitted that the decision was not prompted by antiunion motives, it should not have required bargaining. The *Eva-Ray* Board interpreted the sole discretion to terminate which *Pepsi-Cola* would grant the economically motivated employer as relevant only to an 8(a)(3) violation;[228] the 8(5) violation in *Pepsi-Cola* was presumed to be based on the impact of the management decision on the bargaining unit rather than on the presence or absence of antiunion animus. There was no indication in *Pepsi-Cola* that the 8(5) violation arising from the failure to bargain was in any way independent of a preliminary finding of antiunion animus.[229] This, combined with the express language of *Pepsi-Cola* which left the determination of the economically motivated partial shutdown to the sole discretion of the employer,[230] would indicate that *Eva-Ray*, though prophetic, was erroneously grounded.

Any implication in *Pepsi-Cola* of a policy to decision-bargain about an economically motivated decision was dispelled in *Larkin Coils, Inc.*[231] There the Board avoided defining the duty to bargain by finding that the employer had fulfilled the notice and willingness-to-bargain requirements. The NLRB, however, based the legal necessity of such satisfaction on the *assumption*, rather than the finding, that there existed a duty to bargain about the termination of the department.[232]

In 1960 the Supreme Court decided *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*,[233] interpreting Sections 4 and 13(c) of the Norris-LaGuardia Act[234] and Section 2 of the Railway Labor Act,[235] which great-

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[226] The employer laid off his workers pursuant to a definite plan to reduce the proportion of union members in his work force.

[227] *Id.* at 362, 382.

[228] *Id.* at 376, citing Pepsi-Cola Bottling Co. (Montgomery), 72 N.L.R.B. 601, 602 (1947).

[229] The Board found Pepsi-Cola's refusal to decision-bargain to be an 8(5) violation in addition to being prohibited by 8(3). 72 N.L.R.B. at 602.

[230] *Ibid.*; see note 217 *supra.*

[231] 127 N.L.R.B. 1606 (1960). The employer for admittedly economic reasons shut down his machine-shop and small-parts departments. The trial examiner found the union had waived the right to be consulted about the change through its inaction when notified about the change.

[232] *Id.* at 1606.

[233] 362 U.S. 330 (1960).

[234] 47 Stat. 70, 73 (1932), 29 U.S.C. §§ 104, 113(c) (1964).

[235] 44 Stat. 577 (1926), 45 U.S.C. § 152 (1964).

ly influenced judicial construction of the National Labor Relations Act. Attempting to reduce its operating costs, the Northwestern decided to consolidate a number of its depots and offered to bargain with the union about the implementation of this decision, but refused to discuss the decision itself.[236] In reaction to this refusal, the union threatened to strike and the employer sought an injunction under the Norris-LaGuardia Act to prohibit the strike because it did not involve or grow out of a labor dispute.[237] The term "labor dispute" is defined in Section 13(c) of the Norris-LaGuardia Act[238] as "any controversy concerning the terms or conditions of employment." The Court rejected the railroad's contention and brought the duty to bargain about a decision to partially terminate specifically within the ambit of "terms and conditions of employment."[239] The Court also rejected the employer's contention that the union violated the Railway Labor Act by demanding that the employer bargain collectively about the closing of the stations.[240]

Although *Telegraphers* was not direct authority for Supreme Court approval of a duty to decision-bargain about a partial termination under the National Labor Relations Act, it lent tremendous impetus to the Board's drive to expand the terminating employer's bargaining duty. In understanding the use of *Telegraphers* as authority in cases arising under the National Labor Relations Act, two points should be emphasized. First, the case involved the Railway Labor Act and was decided by construing the scope of the term "labor dispute" in the Norris-LaGuardia Act. Since all three statutes relate to the same general area, it is not surprising that their words are similar,[241] and it can be presumed that the scope of "terms and conditions of employment" is the same under each.[242]

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236 The union wanted to negotiate with the railroad to amend the current bargaining agreement under § 6 of the Railway Labor Act, 44 Stat. 582 (1926), 45 U.S.C. § 156 (1964), to include the provision "no position in existence on December 3, 1956, will be abolished or discontinued except by agreement between the carrier and the organization." 362 U.S. at 332.

237 Section 4 of the Norris-LaGuardia Act provides: "No court . . . shall have jurisdiction to issue any . . . injunctions in any case involving or growing out of any labor dispute . . . ." 47 Stat. 70 (1932), 29 U.S.C. § 104 (1964).

238 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1964).

239 Writing for the majority, Mr. Justice Black noted: "Unless the literal language of this definition is to be ignored, it squarely covers the controversy." 362 U.S. at 335.

240 "Here, far from violating the Railway Labor Act the union's effort to negotiate its controversies with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes 'concerning rates of pay, rules and working conditions.'" *Id.* at 339, citing 44 Stat. 577 (1926), 45 U.S.C. § 152 (1964).

241 See note 4 *supra*, text accompanying note 238 *supra*, and § 2 of the Railway Labor Act, 44 Stat. 577 (1926), 45 U.S.C. § 152 (1964).

242 Brief for Petitioner, p. 56, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964). Decisions and interpretations under the Railway Labor Act are often used as authority in National Labor Relations Act decisions. See, *e.g.*, NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 n.8 (1952); Elgin, J. & E. Ry. v. Brotherhood of R.R. Trainmen, 302 F.2d 540 (7th Cir.), *cert. denied*, 371 U.S. 823 (1962).

Second, the issue was whether there was a duty to decision-bargain in contract negotiations. In subsequent Board cases, however, the issue was whether, apart from its inclusion in a contract, there was a duty to bargain about a decision to partially terminate. While *Telegraphers* on its face presented a distinguishable issue from the NLRB cases and placed a lesser burden on management's traditional autonomy by imposing a lighter bargaining duty, the definitional problem in both situations was identical.[243] In the absence of a clear manifestation of congressional intent, the ambit of three similar terms in three statutes should not be significantly different.[244]

Two cases subsequent to *Telegraphers* made the duty to bargain about partial terminations explicit. In *Kipbea Baking Co.*,[245] the employer discontinued his baking operations and relocated as a distributor. The Board held that the employer was under a duty to bargain with the union concerning its intention to cease baking operations.[246] In *International Powder Metallurgy Co.*[247] the Board adopted the Intermediate Report which cited *Telegraphers* as precedent for imposing a duty to bargain under the National Labor Relations Act. Although *International Powder* involved a unilateral relocation,[248] the trial examiner made the more general statement that "it has been generally held that the impact of curtailment of employment due to discontinuance of a part of the bargaining unit by *shutdown*, sale, contracting out of work or consolidation is a bargainable issue."[249] The Board's adoption of this use of *Telegraphers* and the examiner's disavowal of *Fibreboard I* indicate that the employer was bound to decision-bargain about these questions and was not limited to effect-bargaining.[250] Thus even before the *Fibreboard II*

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243 Cases under these statutes involved the determination of the ambit of terms and conditions of employment. *Telegraphers*, by virtue of § 13(c) of the Norris-LaGuardia Act and § 2 of the Railway Labor Act, and the § 8(d) cases under the National Labor Relations Act hinge on the definition of "terms and conditions of employment."

244 Subsequent to the *Telegraphers* decision, Senator Dirksen introduced a bill to amend all three statutes. S. 3548, 86th Cong., 2d Sess. (1960). The purpose of the bill was to provide "that the phrase 'terms and conditions of employment' and related language in various acts do not include the creation or discontinuance of jobs." 106 CONG. REC. 10255-56 (1960) (remarks of Senator Dirksen).

245 131 N.L.R.B. 411 (1961).

246 *Id.* at 412 n.1. The trial examiner chose to focus on the cessation rather than on the relocation. He found that the union had waived its right to bargain about the termination and removal. *Id.* at 419-20; see note 97 *supra.*

247 134 N.L.R.B. 1605 (1961).

248 In 1960 the employer, without notifying or consulting the union, transferred part of his tool and die operations to another plant under his control. The NLRB found this unilateral relocation a violation of 8(a)(5). *Id.* at 1607-08.

249 *Id.* at 1614. (Emphasis added.) See note 176 *supra.*

250 Since *Fibreboard I* conflicted with *Telegraphers*, the trial examiner repudiated it and adopted the latter case as his authority for this decision. *Id.* at 1615 n.27. *Fibreboard I* re-

and *Town & Country* decisions, the NLRB seemed to recognize a duty to decision-bargain; those landmark cases merely solidified that principle.[251] Thereafter the Board used these decisions as precedent to establish the principle that the partially terminating employer has a prima facie duty to notify and bargain with the union whenever his decision substantially affects the bargaining unit irrespective of his economic motivation.[252]

In *Textile Workers v. Darlington Mfg. Co.*,[253] the Supreme Court averred in dictum that "when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice."[254] The unfair labor practice considered by the Court was an 8(a)(3) violation; the Board's finding of an 8(a)(5) violation for the partial termination was not argued before the Court.[255] The words of this decision have been implied by the courts[256] to exempt the completely terminating employer from both 8(a)(3) and 8(a)(5) violations. The Board has not accepted *Darlington* as controlling in a complete termination 8(a)(5) charge[257] and has

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quired effect-bargaining but relieved the employer of a duty to decision-bargain. Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558, 1560 (1961). In *Telegraphers* the employer was willing to bargain about the effects but had repudiated his duty to decision-bargain. 362 U.S. at 334.

251 See note 180 *supra.*

252 See Royal Plating & Polishing Co., 148 N.L.R.B. 545 (1964), *supplemented*, 152 N.L.R.B. 619, *enforcement denied and remanded in part*, 350 F.2d 191 (3d Cir. 1965), *aff'd on remand*, 160 N.L.R.B. No. 72 (1966); Weingarten Food Center, 140 N.L.R.B. 256 (1962); American Mfg. Co., 139 N.L.R.B. 815 (1962), *modified*, 351 F.2d 74 (5th Cir. 1965).

253 380 U.S. 263 (1965).

254 *Id.* at 273-74. The Board had found the employer guilty of 8(a)(1), (3), and (5) violations in the unilateral closing of the plant which was controlled by a single, integrated employer group. Darlington Mfg. Co., 139 N.L.R.B. 241 (1962), *enforcement denied*, 325 F.2d 682 (4th Cir. 1963), *remanded sub nom.* Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965). The court of appeals denied enforcement on the ground that Darlington was independent of the parent corporation, Deering Milliken & Co., and could therefore go out of business in any way it chose. 325 F.2d at 685-87. The Supreme Court, like the NLRB, found that Darlington was part of Deering Milliken & Co. and that the closing of Darlington was consequently a partial termination. It remanded the case to the Board to determine whether the purpose of the closing was to chill unionism in the other plants and thereby violated 8(a)(3).

255 380 U.S. at 267 n.5.

256 See NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965), *aff'd on remand*, 160 N.L.R.B. No. 72 (1966); NLRB v. William J. Burns Int'l Detective Agency, 346 F.2d 897, 902 (8th Cir. 1965).

257 Prior to *Darlington* the Board had applied the duty to decision-bargain as developed in *Fibreboard II* and *Town & Country* to an employer who had completely terminated his business. Esti Neiderman (Star Baby Co.), 140 N.L.R.B. 678, 681 (1963), *enforced as modified*, 334 F.2d 601 (2d Cir. 1964). In *Star Baby Co.* the unilateral closing also resulted in an 8(a)(3) violation; there is no indication, however, that the 8(a)(5) charge was made dependent upon the 8(a)(3) violation. Subsequent to *Darlington* the Board has noted that the impact of *Darlington* on the duty to decision-bargain about complete termination has not been decided. Ozark Trailers, Inc., 161 N.L.R.B. No. 48 n.5 (1966).

rejected its application in partial termination cases. In *Royal Plating & Polishing Co. II*,[258] the NLRB asserted that *Fibreboard*, rather than *Darlington*, controls in the area of partial termination,[259] a view reaffirmed in several recent cases.[260] The Board's most significant apologia for this approach appeared in *Ozark Trailers, Inc.*[261] The Board distinguished the *Darlington* dictum[262] and rejected the rationale of the Eighth and Third Circuits which had refused to enforce a duty to bargain about the decision to partially terminate.[263] In *Ozark Trailers* the employer shut down a division of his operations which manufactured refrigerated truck bodies without notifying or bargaining with the union. The Board found one 8(a)(5) violation for failure to bargain about the effects of that decision and a further violation for failing to decision-bargain.[264] The Board's basis was that the ambit of "terms and conditions of employment," as set forth in *Telegraphers*, encompasses partial termination more readily than the *Fibreboard* subcontracting decision. Rejecting a capital investment argument and the basic-nonbasic business change dichotomy as means of determining when a decision is amenable to bargaining, the Board balanced the employer's interests in a unilateral partial termination against the interest of the employee "in the protection of his liveli-

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[258] 152 N.L.R.B. 619, *enforcement denied and remanded in part*, 350 F.2d 191 (3d Cir. 1965), *aff'd on remand*, 160 N.L.R.B. No. 72 (1966). Having suffered severe losses and faced with the prospect of the Housing Authority's condemnation of his factory site, the employer decided to sell one of his plants to the city. He failed to consult with the union until the termination was *fait accompli*. The Board found this unilateral partial termination to be an 8(a)(5) violation. *Id.* at 620.

[259] Upon remand from the appellate court to determine to what extent *Darlington* affected this case, the Board noted:

> We perceive nothing in that portion of the Darlington decision dealing with the discriminatory partial closing of a business which warrants withholding application of the Act's collective-bargaining provisions to Respondent's decision to close down the . . . plant. . . . [W]e perceive no reasonable basis on which it can be said that the Court's decision requires a holding that a partial closing is not a subject of scrutiny under Section 8(a)(5).

Id. at 622.

[260] See Young Motor Truck Serv., Inc., 156 N.L.R.B. 661 (1966) (union waived statutory right to decision-bargain about partial termination); M & A Elec. Power Cooperative, 154 N.L.R.B. 540 (1965) (*Fibreboard* requires decision-bargaining about partial termination).

[261] 161 N.L.R.B. No. 48 (1966).

[262] The Board held that *Darlington* cannot be relevant to an issue which involves respondent's duty to bargain about a *partial* closing. *Id.* at ——, *citing* Royal Plating & Polishing Co. II, 152 N.L.R.B. 619, 622, *enforcement denied and remanded in part*, 350 F.2d 191 (3d Cir. 1965), *aff'd on remand*, 160 N.L.R.B. No. 72 (1966).

[263] The courts of appeals cases had turned on whether the decision involved commitment of investment capital or a basic change. 161 N.L.R.B. at ——; see NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 195-96 (3d Cir. 1965), *aff'd on remand*, 160 N.L.R.B. No. 72 (1966); NLRB v. William J. Burns Int'l Detective Agency, 346 F.2d 897, 901-02 (8th Cir. 1965).

[264] 161 N.L.R.B. at ——.

hood."[265] While partial termination is a significant decision for management, the NLRB decided that this does not preclude bargaining about it because of the decision's profound impact on the bargaining unit. The Board correctly believed that such a vital problem to both management and labor should be placed within the bargaining framework of the act designed to provide industrial peace.[266]

THE COURT CASES

The duty to bargain about a decision to partially terminate is based on *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*[267] where the Supreme Court rejected the argument that the union's request for negotiation represented an attempt to usurp managerial prerogative.[268] Courts of appeals, however, have been reluctant to follow the Supreme Court in this area of traditional management prerogative and have not demanded that the employer be willing to bargain in good faith about an economically motivated decision to shut down a phase of his operation.[269] The appellate courts have indicated that a duty to decision-bargain exists when an employer's decision is to subcontract rather than partially terminate, or when the decision is precipitated by antiunion animus.[270]

In *NLRB v. William J. Burns Int'l Detective Agency*,[271] the Eighth Circuit denied enforcement to a Board finding of an 8(a)(5) violation where the employer had unilaterally terminated a division of the agency for economic reasons. The court limited *Fibreboard* to its facts—replacement subcontracting—and concluded that Burns had no duty to bargain since the agency had not subcontracted.[272] Interpreting the Supreme Court's *Darlington* decision,[273] the court held that the lack of antiunion

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[265] *Id.* at ——, quoting at length John Wiley & Son v. Livingston, 376 U.S. 543, 549 (1964).

[266] 161 N.L.R.B. at ——; see McGregor Printing Corp., 163 N.L.R.B. No. 113 (1967); Royal Plating & Polishing Co. I, 148 N.L.R.B. 545, 547-48 & n.4 (1964), *supplemented*, 152 N.L.R.B. 619, *enforcement denied and remanded in part*, 350 F.2d 191 (3d Cir. 1965), *aff'd on remand*, 160 N.L.R.B. No. 72 (1966).

[267] 362 U.S. 330 (1960); see text accompanying notes 233-44 *supra.*

[268] 362 U.S. at 336.

[269] NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965), *aff'd on remand*, 160 N.L.R.B. No. 72 (1966); NLRB v. William J. Burns Int'l Detective Agency, 346 F.2d 897 (8th Cir. 1965), *modifying* 148 N.L.R.B. 1267 (1964); Darlington Mfg. Co. v. NLRB, 325 F.2d 682 (4th Cir. 1963), *remanded sub nom.* Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965).

[270] NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966) (subcontracting); NLRB v. William J. Burns Int'l Detective Agency, 346 F.2d 897 (8th Cir. 1965) (antiunion animus required for 8(a)(5) violation).

[271] 346 F.2d 897 (8th Cir. 1965).

[272] The court observed that "no one is performing for Burns by subcontract or otherwise the services formerly rendered by its Omaha guards." *Id.* at 901.

[273] In *Darlington*, the Supreme Court determined that Darlington was not a single, inde-

animus precluded a finding of an 8(a)(5) violation.[274] The court misconstrued the *Darlington* decision, because, in that case, the Supreme Court was considering an 8(a)(3) violation when it asserted that antiunion animus was a necessary factor in finding this unfair labor practice.[275] The Supreme Court specifically precluded any consideration of an 8(a)(5)[276] violation and did not speak in the general terms ascribed to it by the *Burns* court.[277]

In another case, *Royal Plating & Polishing Co. I*,[278] the NLRB found an 8(a)(5) violation when an employer had unilaterally shut down, but the Third Circuit refused enforcement because an employer, faced with the economic necessity of either moving or consolidating his enterprise, had no duty to bargain with the union about this partial termination.[279] Quoting with approval the limitations of the *Fibreboard* case, the court asserted that that decision imposed a duty to bargain only with respect to those decisions which do not "lie at the heart of entrepreneurial control";[280] the court considered the termination a significant change in the economic direction of the company and held the decision to be within the ambit of management prerogative.[281]

Before the courts will enforce findings of 8(a)(5) violation against an employer who partially terminated for economic reasons, they must find justification in more traditional areas. In *Burns*, for example, the court demanded a finding of antiunion animus.[282] In effect, this policy precludes 8(a)(5) from having independent viability and reduces it to an alternative form of the 8(a)(3) violation. In *Fibreboard* the Su-

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pendent enterprise but rather part of Deering Milliken & Co. It directed the NLRB to reconsider its decision and decide whether the partial termination was intended to chill unionism. Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965).

274 The court explicitly asserted: "Under Darlington the finding of lack of antiunion motivation in closing the Omaha division for economic reasons precludes a finding of unfair labor practice in refusing to bargain with the Union . . . ." 346 F.2d at 902. The court cited no precedent for this holding. While this decision seems to be an unwarranted extension of the *Darlington* rationale, it illustrates that the courts, absent bad faith by the employer, will not require him to bargain about a legitimate economic decision to partially terminate his enterprise.

275 See note 255 *supra* and accompanying text.

276 380 U.S. at 267.

277 346 F.2d at 902.

278 148 N.L.R.B. 545 (1964), *supplemented*, 152 N.L.R.B. 619 (1965), *enforcement denied and remanded in part*, 350 F.2d 191 (3d Cir. 1965), *aff'd on remand*, 160 N.L.R.B. No. 72 (1966).

279 NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965), *aff'd on remand*, 160 N.L.R.B. No. 72 (1966).

280 *Id.* at 196, quoting Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 217 (Stewart, J., concurring).

281 350 F.2d at 196. This did not prevent, however, a duty to effect-bargain and the employer's obligation was limited to this aspect of management's decision.

282 See text accompanying notes 271-77 *supra*. For a discussion of this philosophy as it pertains to subcontracting, see notes 36-41 *supra* and accompanying text.

preme Court recognized adverse impact on the bargaining unit as an important factor in imposing a duty to decision-bargain. Under the *Fibreboard* doctrine, however, antiunion animus is irrelevant in balancing management prerogative and the union's interests. To require antiunion animus in an 8(a)(5) violation would vitiate the thrust of the doctrine as it relates to partial termination.

NLRB v. Winn-Dixie Stores, Inc.,[283] underscores the attempt of courts to justify the imposition of the duty to bargain by bringing the case within traditional areas where the employer has had the duty to decision-bargain. The court enforced a Board order which involved a unilateral partial termination. It chose, however, to interpret the action not as partial termination but as subcontracting,[284] thereby bringing it under the authority of a prior decision.[285]

In partial termination the courts have applied the *Darlington* limitation[286] to 8(a)(5) partial termination cases. They have singularly refused to enforce a finding of 8(a)(5) violation stemming from an economically motivated employer's unilateral decision to partially terminate his enterprise absent antiunion animus. The decision to partially terminate, like complete termination of an enterprise, has been designated as within management prerogative which is protected from participation by the worker, the union, the NLRB, and the courts.

CONCLUSION

Whenever subcontracting, relocation, or partial termination occurs, management and union interests clash. Traditionally the law has recognized that an employer *qua* employer possesses an inherent right to control and manage his business for his own benefit. This right conflicts with the workers' right to be heard whenever a managerial decision affects the terms and conditions of employment. To mitigate industrial disruption the NLRB has imposed upon management a duty to bargain about such decisions. Although this would appear to restrict managerial prerogative, it really only *restrains* the employer from acting unilaterally.

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283 361 F.2d 512 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966).

284 See text accompanying notes 109-12 *supra.*

285 361 F.2d at 517, citing NLRB v. American Mfg. Co., 351 F.2d 74 (5th Cir. 1965) (duty to decision-bargain about subcontracting); see text accompanying notes 105-08 *supra.*

286 Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965). The pertinent words are:

> [W]e are constrained to hold . . . that a partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such a closing would likely have that effect.

Id. at 275.

The imposition of a duty to decision-bargain forces the employer to discuss his decision; once the employer has done so he can, in general, subcontract, relocate, or partially terminate despite union objection. This incursion or restraint on managerial prerogative has resulted from the gradual recognition that management has the right to make a decision but not necessarily the right to choose the procedure by which it is made, that is it may not act *unilaterally.*

Relocation was the first area in which the duty to decision-bargain developed. Relocation is a transfer rather than an elimination of the corporate enterprise. But its effect is to shift work out of the bargaining unit. Because the effect on the terms and conditions of employment is apparent, it is easy to understand why a duty to decision-bargain has been traditionally imposed upon the employer by the NLRB in relocation cases.

Partial termination, however, is closer to the core of managerial prerogative because it represents the partial withdrawal of the employer from the marketplace. The decision is not *where* a particular business will be conducted but whether part of an enterprise will be conducted at all. The NLRB was given the impetus to make such a decision a mandatory subject of bargaining by the Supreme Court when it included job elimination within the ambit of terms and conditions of employment.[287]

Replacement subcontracting represents an employer's withdrawal from a certain phase of his operations by substitution of an independent contractor, resulting in job elimination and, concomitantly, destruction of the bargaining unit. It is therefore understandable that the NLRB would impose a duty to decision-bargain where replacement subcontracting based upon economic reasons occurs. On the other hand, diminution subcontracting does not destroy the bargaining unit; it merely reduces the quantity of work performed by the unit. Two alternatives are possible. Either the union will be adversly affected or it will not suffer any substantial detriment. The NLRB has realized that flexibility in the imposition of the duty to decision-bargain is essential and, in diminution subcontracting, has not sought to severely constrict an employer's prerogative to manage his business. Rather, it has sought to harmonize the two competing interests.

The NLRB has imposed one limitation on the duty to decision-bargain in these three areas. Where the employer's need to subcontract, relocate, or partially terminate precludes fruitful negotiations with the union, no duty to decision-bargain will be imposed. The National Labor

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[287] Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960).

Relations Act[288] requires collective bargaining about decisions where it will promote harmonious resolution of conflicting interests. Where the circumstances have predetermined the result of any good-faith negotiations the futile act of bargaining will not be required.

The courts, in contrast to the Board, have limited the scope of the bargaining duty. They have shown a deference to the unilateral right of the employer to relocate or partially terminate when done for business, rather than antiunion, reasons. Some courts, however, have accepted, at least in subcontracting cases, the NLRB's view that substantial impact on the unit and potentiality for fruitful discussion create a duty to decision-bargain. Extension of this view to relocation and partial-termination cases is likely. A consequence will be that antiunion animus will no longer be a precondition to a duty to decision-bargain.

It will be some time, however, before the courts, like the Board, admit the dichotomy between the managerial prerogative to make a decision and the prerogative to make it unilaterally. The former represents the traditional notion of managerial prerogative and motive is relevant in a determination of the legality of the decision. The right to make the decision unilaterally is not a justifiable incident of managerial prerogative. It must be balanced against the impact on the bargaining unit and the benefits to be derived from frank, open discussion.

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[288] Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified in scattered sections of 29 U.S.C.).

IMPLIED-CONTRACT SUBSTITUTES FOR FAIR TRADE ACT NONSIGNER PROVISIONS

Fair trade laws are legislative exceptions to the general rule that an agreement to fix prices is a per se violation of the antitrust laws.[1] Their purpose is to safeguard the goodwill embodied in a trademark and to protect independent retailers from the competition of large chain and discount stores in the sale of brand-name goods.[2] Fair trade acts permit sellers who are trademark proprietors to contract with their buyers that their trademarked goods will not be resold at less than a minimum price. In addition, if the buyer is also a dealer he frequently must agree not to sell to a subvendee unless the latter assents to a similar restriction.[3] A more far-reaching provision of many fair trade laws is that buyers not party to such contracts are bound by law to refrain from knowingly and willfully advertising, offering for sale, or selling goods subject to such an agreement at a price below that set in any fair trade contract in force within that state. These provisions, known as "nonsigner laws," make possible state-wide price schedules without individual consent.

Historically, despite common-law antitrust provisions,[4] it was lawful for a manufacturer to refuse to sell his goods to a buyer unless the buyer would agree to resell the goods only at a stipulated price.[5] The Sherman Anti-Trust Act,[6] however, precipitated the end of price-fixing contracts in interstate commerce. In *Dr. Miles Medical Co. v. John D. Parks & Sons*,[7] the Supreme Court held that such anticompetitive devices were

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[1] The general rule was applied in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), and United States v. Trenton Potteries Co., 273 U.S. 392 (1927). *But see* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Board of Trade v. United States, 246 U.S. 231 (1918).

[2] See OHIO REV. CODE ANN. § 1333.27 (Page 1962); Adams, *Resale Price Maintenance: Fact and Fancy*, 64 YALE L.J. 967, 973-74 (1955). Opponents claim that in practice fair trade nullifies antitrust prohibitions against horizontal price fixing and promotes an atmosphere conducive to other antitrust violations. Fair trade is charged with unjustly exploiting the consumer and damaging the independent retailer by encouraging chainstores to introduce low-priced private brands. See H.R. REP. NO. 1292, 82d Cong., 2d Sess. (1952); Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175, 182-84 (1954).

[3] This type of price fixing is known as vertical price fixing because it occurs between businesses on *different* levels of the distributive chain. Horizontal price fixing occurs between businesses on the same level, as where a combination of retailers fixes prices among themselves. Fair trade laws may validate vertical price fixing, but not horizontal price fixing. Sherman Act § 1, as amended, 50 Stat. 693 (1937), as amended, 15 U.S.C. § 1 (1964).

[4] *E.g.*, Statute Against Monopolies, 1623, 21 Jac. 1, c. 3; see 1 ROBINSON, PATENTS §§ 1-10 (1890).

[5] See Garst v. Harris, 177 Mass. 72, 58 N.E. 174 (1900); Bates, *Constitutionality of State Fair Trade Acts*, 32 IND. L.J. 127 (1957).

[6] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

[7] 220 U.S. 373 (1911).

unlawful.[8] In contrast to this federal condemnation, a readily discernible state policy favoring vertical price fixing emerged during the depression years. In 1931 California enacted a law validating intrastate fair trade contracts.[9] Upon the assumption that its policy favoring resale price maintenance could only be effectuated by universal adherence to preset prices, California abandoned voluntary contractual relationships in favor of nonsigner provisions in 1933.[10] By 1936, fifteen states had enacted fair trade laws,[11] and that year the Supreme Court held that such laws were lawful in intrastate trade.[12] By the end of 1937, twenty-seven additional states had passed fair trade legislation.[13]

There was a concurrent weakening of the federal prohibition against fair trade. In 1937 Congress passed the Miller-Tydings Act[14] which provided that contracts or agreements for nonhorizontal price fixing involving trademarked goods sold in interstate commerce in free and open competition with goods of the same general class were not violative of Section 2 of the Sherman Act[15] or Section 5 of the Federal Trade Commission Act,[16] as long as such contracts were lawful in the state where the goods were to be resold. Although seemingly designed to validate all provisions of state fair trade laws as applied to goods in interstate commerce, the act did not expressly exempt nonsigner provisions from the antitrust laws.[17] Consequently, in *Schwegmann Bros. v. Calvert Distillers Corp.*,[18] the Supreme Court held that the act did not immunize nonsigner provisions from the strictures of the antitrust statutes, since

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[8] The Supreme Court has held that a manufacturer engaged in an unfair method of competition, contrary to the prohibitions of Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1964), when he attempted to control resale prices by refusing to sell to noncomplying dealers. His scheme, however, did not involve any agreement violating the Sherman Act. FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); see United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

[9] CAL. BUS. & PROF. CODE § 16902.

[10] CAL. BUS. & PROF. CODE § 16904.

[11] Note, *The Constitutionality of the Virginia Fair Trade Act*, 47 VA. L. REV. 626, 631 (1961).

[12] Pep Boys, Manny, Moe & Jack v. Puroil Sales Co., 299 U.S. 198 (1936); Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936).

[13] A list of the forty-two states enacting fair trade laws by the end of 1937 appears in Note, *The Constitutionality of the Virginia Fair Trade Act*, 47 VA. L. REV. 626, 631 (1961).

[14] 50 Stat. 693 (1937), as amended, 15 U.S.C. § 1 (1964).

[15] 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1964).

[16] 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1964).

[17] The act was also unclear whether a contract could fix prices or only set minimum prices, and whether a trademark owner could require his buyer to sell to a subvendee only if the subvendee agreed to sell the goods at fair trade prices. The McGuire Act, 66 Stat. 631 (1952), as amended, 15 U.S.C. § 45(a) (1964), answered these questions, specifically allowing the seller to establish a fixed fair trade price and so control resale by his vendee. See text accompanying notes 21-22 *infra*.

[18] 341 U.S. 384 (1951).

no *agreement* existed between the parties as that term was used in the Miller-Tydings Act.[19] This case renewed the fair trade controversy on the federal level[20] and resulted in the McGuire Act,[21] which specifically validated nonsigner provisions of state fair trade laws.[22]

The passage of the McGuire Act enabled the states to establish fair trade systems, including nonsigner provisions, without fear of federal sanction.[23] Yet, since 1950, state courts have increasingly invalidated their own fair trade laws, particularly the vital nonsigner provisions, as violative of their state constitutions.[24] Such decisions are frequently grounded on denial of due process[25] and unlawful delegation of legislative power.[26] These courts have evinced a willingness to pass upon matters of substantive economic policy[27] and have held that the law operated not to protect the trademark owner's goodwill but to benefit the retail merchant by protecting him from the rigors of price competition. Finding no substantial basis for the latter, they have invalidated the law as an unreasonable deprivation of the buyer's property right to sell his goods at whatever price he desires and as an unlawful delegation to private

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[19] "Contracts or agreements convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing." *Id.* at 390.

[20] See OPPENHEIM, FEDERAL ANTITRUST LAWS 183 (1954).

[21] 66 Stat. 631 (1952), as amended, 15 U.S.C. § 45(a) (1964).

[22] 66 Stat. 632 (1952), 15 U.S.C. § 45(a)(3) (1964).

[23] Certain requirements, however, had to be met to qualify for this federal exemption. For example, the goods had to be in free and open competition with goods of the same general class. In one case it was held that color camera film and black and white camera film were not goods of the same general class, and exemption from the antitrust laws was denied. Eastman Kodak Co. v. FTC, 158 F.2d 592 (2d Cir. 1946), *cert. denied*, 330 U.S. 828 (1947). Where a manufacturer sells to independent distributors on a fair trade basis and maintains his own distribution system in competition with his customer-distributors, he may violate the antitrust prohibitions against horizontal price fixing. See United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956). Also, mail-order sale of goods from a free trade state to a fair trade jurisdiction may create problems of a federal character. See General Elec. Co. v. Masters Mail Order Co., 244 F.2d 681 (2d Cir.), *cert. denied*, 355 U.S. 824 (1957).

[24] *E.g.*, Union Carbide & Carbon Corp. v. White River Distribs., Inc., 224 Ark. 558, 275 S.W.2d 455 (1955); Cox v. General Elec. Co., 211 Ga. 286, 85 S.E.2d 514 (1955); General Elec. Co. v. American Buyers Co-op., 316 S.W.2d 354 (Ky. 1958); General Elec. Co. v. Thrifty Sales, Inc., 5 Utah 2d 326, 301 P.2d 741 (1956); Bulova Watch Co. v. Zale Jewelry Co., 371 P.2d 409 (Wyo. 1962).

[25] *E.g.*, Shakespeare Co. v. Lippmann's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952); see Miles Labs., Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954). See generally Conant, *Resale Price Maintenance: Constitutionality of Nonsigner Clauses*, 109 U. PA. L. REV. 539, 541-45 (1961).

[26] *E.g.*, Quality Oil Co. v. E. I. Dupont de Nemours & Co., 182 Kan. 488, 322 P.2d 731 (1958). The Colorado court held that since the legislature itself could not fix prices of goods sold on the open market, it could not delegate this function to private parties. Olin Mathieson Chem. Corp. v. Francis, 134 Colo. 160, 172-73, 301 P.2d 139, 145 (1956).

[27] *E.g.*, Miles Labs., Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954); Cox v. General Elec. Co., 211 Ga. 286, 85 S.E.2d 514 (1955); see Note, *Fair Trade and the State Constitutions—A New Trial*, 10 VAND. L. REV. 415, 424-25 (1957).

parties of the legislature's power to fix prices. On the other hand, those courts upholding the constitutionality of their fair trade laws have expressed reluctance to review or interfere with a matter of state substantive economic policy and have deferred to their legislatures.[28] Reliance is often placed on the reasoning of the United States Supreme Court in *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*,[29] in which the Court noted that the fair trade law discriminated reasonably between trademarked and nontrademarked goods, with the nonsigner provision's primary purpose to protect the goodwill embodied in the trademark. That the provisions had ancillary price-fixing effects did not invalidate them as means to attain this lawful purpose.[30]

Because nonsigner provisions have been the particular target of current attacks, proponents of fair trade have offered another mechanism to validate their price-fixing effect. The statutory scheme implementing this alternative does not use an express nonsigner clause; rather it provides that whenever a vendee of trademarked goods knows that the trademark owner has established a fair trade price in the particular state, the buyer is presumed to have agreed to the fair trade condition as a term of his purchase contract.[31] As a result there is no fixed resale price binding upon the buyer by mere arbitrary fiat, for he has willingly agreed to observe the fair trade price and is not forced to enter the contract; he may, if he wishes, not buy the goods at all. There is no unlawful delegation of legislative power to fix prices for prices are set according to the contract between the parties.

The statutory implementation of this contractual approach to fair trade has been sustained in the highest courts of two states. Both the Virginia Supreme Court of Appeals[32] and the Ohio Supreme Court[33] have validated the practice of finding, as a matter of law, an agreement to abide by the seller's fair trade policy, which vitiates any objection to fair trade laws based on the presence of a nonsigner provision.[34] In *Hud-*

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[28] See, *e.g.*, Corning Glass Works v. Max Dichter Co., 102 N.H. 505, 161 A.2d 569 (1960); McKesson & Robbins, Inc. v. Government Employees Dep't Store, Inc., 211 Tenn. 494, 365 S.W.2d 890 (1963).

[29] 299 U.S. 183 (1936).

[30] See *id.* at 193.

[31] See N.D. CENT. CODE § 51-11-02.1 (Supp. 1965); OHIO REV. CODE ANN. § 1333.28(I) (Page 1962); VA. CODE ANN. § 59-8.2 (1964).

[32] Standard Drug Co. v. General Elec. Co., 202 Va. 367, 117 S.E.2d 289 (1960).

[33] Hudson Distribs., Inc. v. The Upjohn Co., 174 Ohio St. 497, 190 N.E.2d 460 (1963), *aff'd*, 377 U.S. 386 (1964).

[34] "The General Assembly has re-enacted fair-trade laws in Ohio. In so doing it met constitutional objections to the former act . . . . The nonsigner provision of the old law was eliminated. A retailer will be bound to fair-trade a product only by his own contract . . . ." *Id.* at 497, 190 N.E.2d at 465-66.

[B]y elimination of the "non-signer" provision and substitution of the provision

son Distribs., Inc. v. The Upjohn Co.,[35] the United States Supreme Court held that the Ohio "contract" statute did not contravene federal antitrust law. The Court did not reach the issue whether the contract-constructed-in-law device produced the kind of "contract or agreement" saved from the prohibitions of the Sherman Act by the McGuire Act.[36] Instead, the Court found that appellee and others had entered many express fair trade contracts and at least in these, appellant was a nonsigner. Since federal policy clearly is to uphold any state statute which in substance allows enforcement of fair trade prices stated in the contract against nonsigners as well as signers,[37] the Court held that the McGuire Act was intended to and did protect the Ohio law. The result of this decision is that the implied contract provision is beyond federal prohibition, at least where express contracts between the seller and some buyers can be found.

The validity of the implied-contract theory in other states is less certain. The argument has been raised with respect to state laws that it is invalid because there is no common-law contract.[38] This argument is based on the theory that a valid contract necessitates a true agreement between the parties.[39] If a vendee's actions in buying fair trade goods manifests that he does not plan to abide by the seller's fair trade policy, he has in fact not accepted the seller's original terms.[40] Upon such sale of the goods, it is unclear whether any agreement at all was reached, whether the buyer can nevertheless be held to have "accepted" the seller's original offer, or whether the seller assented to the buyer's counteroffer. These ambiguities prevent formation of a common-law contract between the fair trading seller and his buyer, resulting in the buyer being liable only for the value of the goods in quasi-contract;[41] he is not bound by the seller's fair trade price.

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that permits the voluntary contractual restriction on minimum resale price to be agreed upon by the manufacturer or distributor and retailer, it has removed the chief ground and reason relied upon by courts that have held Fair Trade Acts to be unconstitutional.

Standard Drug Co. v. General Elec. Co., 202 Va. 367, 375, 117 S.E.2d 289, 295 (1960).

[35] 377 U.S. 386 (1964).

[36] *Id.* at 393; *cf.* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

[37] "Congress plainly intended 'to let state fair-trade laws apply . . . with respect to nonsigners as well as signers.'" 377 U.S. at 394, quoting H.R. REP. NO. 1437, 82d Cong., 2d Sess. 2 (1952).

[38] Note, *The Constitutionality of the Virginia Fair Trade Act*, 47 VA. L. REV. 626, 636-37 (1961).

[39] 1 CORBIN, CONTRACTS §§ 55, 107 (1963); 1 WILLISTON, CONTRACTS § 18 (Jaeger ed. 1957). On the other hand, formal contracts derive their binding effect, not from mutual assent, but from the form in which they are executed. 1 CORBIN, CONTRACTS § 5 (1963).

[40] 1 *id.* § 82; 1 WILLISTON, CONTRACTS § 77 (Jaeger ed. 1957).

[41] Without an agreement, no contract is made. If an agreement was reached, but an essential term is unascertainable, the agreement is not enforceable. 1 CORBIN, CONTRACTS § 95 (1963). The most appropriate remedy would be restitution. See 1 *id.* §§ 99, 102; RESTATE-

While this theoretical attack correctly states basic contract law, it must fail where the contract theory has received legislative sanction, as in Virginia. The precise purpose and effect of a Virginia-type statute is to clarify the ambiguity by establishing as a matter of law that the acceptance of goods by a buyer acts as an agreement to the seller's original offer.[42] The result is a valid contract with a fair trade provision.

Even though under the contract scheme a fair trade contract has been formed, a strong argument against this legislative program can be made. In a state where nonsigner provisions have been held repugnant to the state constitution, the contract-statute approach must be equally unconstitutional. The usual grounds upon which the nonsigner provisions have been stricken are that they are violative of due process and are an unlawful delegation of legislative authority. The rationale behind these decisions is that the buyer is deprived, by a law which has an insufficient basis in policy,[43] of his right to resell purchased goods at a price selected by him. Moreover, the price at which he is forced to sell is determined not by the legislature, but arbitrarily by the trademark owner. The change in approach from a nonsigner scheme to an implied contract scheme does not significantly meet the basis of these objections. Under the alternate mechanism, sovereign coercion by statute of the buyer to resell at a predetermined price, although exercised in a different manner, is equally repugnant. And quite clearly, the contract theory embodies no greater policy basis justifying the coercion and the seller is still free to arbitrarily "legislate" the price at which his goods must be resold. Thus, while the implied-contract approach affords a different legal the-

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MENT, RESTITUTION § 47 (1937). Recovery would be for the market value of the goods. See *id.* § 155. Alternatively, repossession of the goods may also be available to the seller. *Id.* § 4.

[42] A buyer's acceptance of trademarked goods acts as an unconditional acceptance of the seller's terms with a request for waiver of the fair trade provision. See 1 CORBIN, CONTRACTS § 84 (1963). Various analogies have been offered to support this kind of legislation. Professor Corbin asserts that a legislature may enact a rule that certain words used in a contract are to have a fixed legal meaning, although he has been unable to uncover such a law. See 3 CORBIN, CONTRACTS § 554, at 218 & n. 59 (1960). Other analogous precedent may be found in statutory short-form warranty deeds, deemed to include several specific covenants whether stated in the deed or not. The Statute De Donis, 1285, 13 Edw. 1, c. 1, seems to have created a rule of law designating the meaning of the phrase "and the heirs of his body." See CHALLIS, REAL PROPERTY * 230-43; PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 521-22 (4th ed. 1948). Professor Corbin presents the additional analogy of the operation of the Rule in Shelley's Case. 3 CORBIN, CONTRACTS § 554, at 218 n.59 (1960); see MOYNIHAN, REAL PROPERTY 138-49 (1962).

[43] If a sound basis in policy can be shown, the legislature may set minimum prices. *Compare* General Elec. Co. v. A. Dandy Appliance Co., 143 W. Va. 491, 103 S.E.2d 310 (1958), *with* W. VA. CODE ANN. §§ 47-11A-1 to -14 (1966). *Compare* Rogers-Kent, Inc. v. General Elec. Co., 231 S.C. 636, 99 S.E.2d 665 (1957), *with* S.C. CODE ANN. §§ 66-65, -82, -83 (1962).

ory,[44] the changed form trammels the same constitutional principles as the nonsigner provision.

The future of the contract approach to fair trade is uncertain. Because it is *pari materia* with the nonsigner provision vis-à-vis the constitutional objections, state legislatures should be most reluctant merely to substitute it where the state's highest court has already invalidated a nonsigner provision.[45] Should, however, the legislature judge that due process is satisfied because the public interest in a fair trade system featuring universal adherence to uniform prices outweighs the retailer's property interest in setting his own prices, then the implied-contract scheme provides a vehicle to embody such legislative considerations. This might be a particularly appropriate device to forestall judicial invalidation of the nonsigner method where the legislature feels it may come under attack.[46] Except in such unusual circumstances, however, the use of this method is limited. Quite correctly there appears to be no discernable trend toward its increased use.

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[44] Professor Williston asserts that this is a mere fiction. 3 WILLISTON, SALES § 672d (Supp. 1966); *accord*, Note, *The Constitutionality of the Virginia Fair Trade Act*, 47 VA. L. REV. 626 (1961).

[45] But in Ohio a nonsigner provision was held unconstitutional as a violation of due process in Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958). The Ohio legislature, undaunted, enacted a contract scheme to achieve the same end. OHIO REV. CODE ANN. §§ 1333.28-.30 (Page 1966).

[46] The Virginia Fair Trade Act, Va. Acts, 1936, ch. 321, which included a nonsigner provision, was regarded by the Supreme Court of Appeals of Virginia as impliedly repealed by a subsequent antimonopoly statute. Benrus Watch Co. v. Kirsch, 198 Va. 94, 92 S.E.2d 384 (1956). Although not reaching the question of the constitutionality of the fair trade provisions, the court characterized the question as "very serious." The subsequent enactment of a new fair trade law, using the contract theory, may be seen as a forceful declaration by the legislature of its concept of public policy. North Dakota has also strengthened the basis of its fair trade law by repealing its nonsigner provision and replacing it with a contract scheme. N.D. CENT. CODE § 51-11-2.1 (Supp. 1965).

RECENT DECISIONS

ANTITRUST—LIMITATION OF ACTION—TOLLING—SECTION 5(B) OF CLAYTON ACT TOLLS STATUTE OF LIMITATIONS IN PRIVATE ANTITRUST TREBLE-DAMAGE ACTIONS EVEN AGAINST PARTIES NOT NAMED AS DEFENDANTS OR COCONSPIRATORS IN PRIOR GOVERNMENT ANTITRUST LITIGATION. *Michigan v. Morton Salt Co.*, 259 F. Supp. 35 (D. Minn. 1966), *argument heard sub nom. Hardy Salt Co. v. Illinois*, Nos. 18702, 18703, 8th Cir., March 16, 1967.

A number of midwestern states and smaller governmental units brought private antitrust treble-damage actions under Section 4 of the Clayton Act[1] against defendant companies allegedly engaged in a conspiracy to fix the price of rock salt sold for de-icing purposes. The suit was partially based on an earlier judgment against two of the defendants resulting from a civil action instituted by the United States.[2] Several private-defendants[3] who had not been named as coconspirators or defendants in the earlier government case asserted the statute of limitations in their defense. They argued that the tolling provision of section 5(b) of the act[4] was applicable only to Government-defendants.[5] *Held*, Section 5(b) of the Clayton Act tolls the statute of limitations in private anti-

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[1] 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964). Section 4 permits a suit by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ."

[2] After a criminal prosecution alleging a conspiracy to fix prices ended in a jury verdict for acquittal, the Government revived a previously filed civil suit. The civil case was tried to a judge by stipulating the record in the criminal prosecution. The trial court, in a Memorandum decision of August 6, 1964, concluded that there had been an illegal conspiracy, and the Supreme Court affirmed. Morton Salt Co. v. United States, 382 U.S. 44 (1965). See generally Michigan v. Morton Salt Co., 259 F. Supp. 35, 42-45 (D. Minn. 1966), *argument heard sub nom.* Hardy Salt Co. v. Illinois, Nos. 18702, 18703, 8th Cir., March 16, 1967; United States v. Morton Salt Co., 216 F. Supp. 250, 252-53 (D. Minn. 1962).

[3] The term "private-defendants" here refers to defendants named in a case brought under the antitrust laws by a private party rather than the United States or an agency thereof. Private-defendants are subdivided into Government- and non-Government-defendants. "Government-defendants" are those named as defendants in a suit instituted by the United States or an agency thereof. "Non-Government-defendants" are those parties named as defendants in the private litigation but not in the earlier litigation in which the United States was the plaintiff.

[4] Section 5(b) of the Clayton Act provides in part:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . 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 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

69 Stat. 283 (1955), 15 U.S.C. § 16(b) (1964).

[5] See note 3 *supra*.

trust treble-damage actions even against parties not named as defendants or co-conspirators in prior government antitrust litigation.[6]

Private individuals were first granted the right to sue for treble damages arising from a violation of the antitrust laws by the Sherman Act of 1890.[7] Congress, seeking to expand this right,[8] and at the same time enlist the aid of private litigants in its antimonopoly efforts,[9] enacted Section 5 of the Clayton Act of 1914[10] which enabled private parties to use prior government-procured antitrust judgments as prima facie evidence of conspiracy.[11] In addition, statutes of limitations were to be tolled during the pendency of the relevant governmental proceedings.[12]

Although Congress had seemingly intended a greater easing[13] of the private plaintiff's onerous burden[14] in an antitrust suit, subsequent judicial interpretations of section 5 narrowed the effect of the tolling provision to the limits of the prima facie clause.[15] Courts reasoned that, since the benefit of the prima facie clause

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[6] Michigan v. Morton Salt Co., 259 F. Supp. 35 (D. Minn. 1966) (Larson, J.).

[7] Ch. 647, 26 Stat. 210.

[8] "The entire provision [present §§ 5(a) & (b)] is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws." H.R. REP. NO. 627, 63d Cong., 2d Sess. 14 (1914). See also Address by William Howard Taft, S. DOC. NO. 614, 63d Cong., 2d Sess. 6 (1914).

[9] "It is clear [that] Congress intended to use private self-interest as a means of enforcement of the antitrust laws." Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947); see 51 CONG. REC. 16319 (1914); S. REP. NO. 698, 63d Cong., 2d Sess. 16 (1914); H.R. REP. NO. 627, 63d Cong., 2d Sess. 14 (1914).

[10] Ch. 323, 38 Stat. 731.

[11] The express language of the statute limits the prima facie clause "to questions 'distinctly put in issue and directly determined' [in the earlier proceeding] . . . . [P]laintiffs are entitled to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based." Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951), quoting Frank v. Mangum, 237 U.S. 309, 334 (1915).

[12] Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof. Clayton Act, ch. 323, § 5, 38 Stat. 731 (1914).

[13] President Woodrow Wilson, in an address to a joint session of Congress on January 20, 1914, stated: "It is not fair that the private litigant should be obliged to set up and establish again 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." 51 CONG. REC. 1979 (1914). The act was said to be "in keeping with the recommendation made by the President." H.R. REP. NO. 627, 63d Cong., 2d Sess. 14 (1914). Although this general purpose was clearly stated, Congress did not elaborate on the role the tolling provision would play; rather, attention was directed to § 5 as a whole. See Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 320 (1965).

[14] "[F]ew private litigants [have] . . . the resources or staying power to conduct a protracted and difficult antitrust case. And those who [are] . . . able and willing to assume the staggering cost of litigation [are] . . . frequently worn out by their opponents by sheer attrition." United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 171 (S.D.N.Y. 1955).

[15] *E.g.*, Grengs v. Twentieth Century Fox Film Corp., 232 F.2d 325 (7th Cir.), *cert. denied*, 352 U.S. 871 (1956); Manny v. Warner Bros. Pictures, Inc., 116 F. Supp. 807 (S.D. Cal. 1953); Electric Theatre Co. v. Twentieth Century-Fox Film Corp., 113 F. Supp. 937 (W.D. Mo. 1953).

was expressly limited to facts constituting an estoppel, tolling should occur only in those restricted circumstances; no public policy considerations required that the tolling provisions be more extensive than the evidentiary provisions they were designed to protect.[16]

In 1955, responding to the need for nationwide antitrust uniformity due to the irregularities of then-applicable state statutes of limitations,[17] Congress amended the Clayton Act to include a four-year statute.[18] At the same time, section 5 was reorganized, separating the provision for prima facie evidence into subsection (a) and the tolling provision into subsection (b).[19] Congress added that the private suit must be brought within the tolling period or, if four years had elapsed since the cause of action accrued, then within one year after the end of the government suit.[20] It appears that neither Congress[21] nor the lower fed-

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[16] Sun Theatre Corp. v. RKO Radio Pictures Corp., 213 F.2d 284, 292 (7th Cir. 1954). The statute enables the private plaintiff to use as prima facie evidence of the antitrust violation only those facts which would constitute an estoppel between the Government and the defendant if they were involved in subsequent suit. As there was not the requisite identity of parties, it was held that the statute of limitations had continued to run against non-Government-defendants.

This doctrine was developed in a long line of antitrust cases directed at the movie industry. The Government filed suit in 1938 and the litigation did not come to an end until 1950. United States v. Paramount Pictures, Inc., 66 F. Supp. 323, *modified*, 70 F. Supp. 53 (S.D.N.Y. 1946), *aff'd in part, rev'd in part, and remanded*, 334 U.S. 131 (1948), *on remand*, 85 F. Supp. 881 (S.D.N.Y. 1949), *aff'd*, 339 U.S. 974 (1950). Large numbers of private treble-damage suits followed where the question of when the government proceedings terminated was often at issue. Courts generally resolved the question on a defendant-by-defendant basis. See, *e.g.*, Momand v. Universal Film Exchs., Inc., 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); Christensen v. Paramount Pictures, Inc., 95 F. Supp. 446 (D. Utah 1951).

[17] A "significant problem is . . . the issue of what law shall determine [the statute of limitations]. . . . Confusion arises . . . as to which state's law governs [and] . . . which statute within a given state controls . . . and the circumstances under which its running will be tolled." ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 380-82 (1955). "None challenge the need for a federal statute of limitations. . . . [V]arying periods encourage 'forum shopping' and seem ill-suited for enforcement of a uniform federal policy." *Id.* at 383 & n.78; see H.R. REP. NO. 422, 84th Cong., 1st Sess. 1 (1955).

[18] 69 Stat. 283 (1955), 15 U.S.C. § 15b (1964).

[19] Act of July 7, 1955, 69 Stat. 283, 15 U.S.C. §§ 16(a), (b) (1964). The only change in the language of the statute was the substitution of the words "in any civil or criminal proceeding" for "in any criminal prosecution or in any suit or proceeding in equity." This rephrasing was necessary to bring the statute in line with the Federal Rules of Civil Procedure. FED. R. CIV. P. 1.

[20] 69 Stat. 283 (1955), 15 U.S.C. § 16 (1964). Subsection (b) was substituted for the second paragraph of the original enactment. Congress substituted "civil" for "equity" proceeding as it did in subsection (a). The more important change was the addition that extended the suspension period of the statute of limitations for one year after the termination of the government proceedings. This was considered necessary if private plaintiffs were to fully evaluate their case in the light of the evidence produced at the government trial. S. REP. NO. 619, 84th Cong., 1st Sess. 3 (1955); H.R. REP. NO. 422, 84th Cong., 1st Sess. 2 (1955).

[21] The House Committee on the Judiciary which reported the bill seemed to be concerned only with establishing a reasonable, uniform statute of limitations. 101 CONG. REC. 5130 (1955) (remarks of Rep. Quigley). At an earlier committee hearing considering substantially the same legislation, Representative Keating assured questioners that the change in phraseology did not affect any individual substantive rights. *Hearings on H.R. 3408 Before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary*, 82d Cong., 1st Sess., pt. 3, at 98-100 (1951).

eral courts[22] attached great significance to the division of section 5. In 1961, however, *Union Carbide & Carbon Corp. v. Nisley*[23] held that section 5(b) was not limited by the evidentiary rules of estoppel which restrict section 5(a); rather, Congress intended section 5(b) "to suspend the running of the statute . . . during the pendency of a government-instituted suit which complained of all or a part of the means relied upon by the private plaintiff to effectuate the same general combination and conspiracy."[24]

Three years later the Supreme Court in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co. (3M)*[25] faced this issue of whether section 5(b) was subject to the limitations of section 5(a). Focusing on the difference between the express language of the two subsections[26] and the congressional policy to be effectuated,[27] the Court held that a Federal Trade Commission proceeding operated to suspend the statute of limitations. The Court reasoned that even though the FTC findings might not be used as prima facie evidence in a government suit, the only restriction of 5(b) was that the Government and private suits "set up substantially the same claims."[28] Having established the general policy that sections 5(a) and 5(b) were to be read independently, the Supreme Court, in *Leh v. General Petroleum Corp.*,[29] proceeded that same year to define the new scope *3M* afforded section 5(b). Explicitly rejecting the earlier restrictive view,[30] the Court broadened its "substantial identity" requirement. The stat-

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[22] The Ninth Circuit strictly limited the tolling provision by requiring that the "same means must be used to achieve the same objectives of the same conspiracies by the same defendants." Steiner v. Twentieth Century Fox Film Corp., 232 F.2d 190, 196 (9th Cir. 1956). The *Steiner* court reasoned that this restrictive reading was necessary because private civil antitrust actions are founded not upon the conspiracy itself but rather upon the overt acts done in furtherance of the consequent injury. Any other reading would extend the scope of the tolling provision beyond the collateral estoppel area for which it is the protection. *Ibid.*; *accord*, Leh v. General Petroleum Corp., 330 F.2d 288 (9th Cir. 1964), *rev'd*, 382 U.S. 54 (1965); Cardinal Films, Inc. v. Republic Pictures Corp., 148 F. Supp. 156 (S.D.N.Y. 1957).

[23] 300 F.2d 561 (10th Cir. 1961).

[24] *Id.* at 570.

[25] 381 U.S. 311 (1965); see Note, 53 GEO. L.J. 481 (1965).

[26] "Several distinctions between these sections are apparent and suggest that they are not wholly interdependent." 381 U.S. at 316. The Court noted that § 5(a) refers to a "final judgment or decree," whereas § 5(b) on its face applies regardless of the entering of final judgment. Furthermore, § 5(a) is limited by the bounds of estoppel, but § 5(b) does not operate under these restrictions. *Id.* at 316-17. The Court supplemented its opinion by referring to the reasoning of Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961). See generally Comment, *Pendency and the Tolling Provision of the Clayton Act*, 9 STAN. L. REV. 552 (1957).

[27] The purpose of Congress "in adopting § 5(b) was not so limited [as to 5(a)] . . . for it was not then dealing with the delicate area in which a judgment secured in an action between two parties may be used by a third. . . . [I]t is plain that in § 5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions." 381 U.S. at 317. See S. REP. NO. 619, 84th Cong., 1st Sess. 6 (1955).

[28] 381 U.S. at 323. "Even if we assumed *arguendo* that § 5(a) is inapplicable to Commission proceedings—a question upon which we venture no opinion—that conclusion would be immaterial in our consideration of § 5(b) . . . ." *Id.* at 318.

[29] 382 U.S. 54 (1965), 41 NOTRE DAME LAW. 811 (1966).

[30] "Minnesota Mining sweeps away much of the foundation for the [restrictive] *Steiner* view of the scope of § 5(b). The private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants." 382 U.S. at 59.

ute of limitations would toll against those private-defendants who had earlier been Government-defendants even though the allegations in the private suit contained differences in parties, geography, and time from the conspiracy alleged in the earlier government suit.[31]

In the instant case, *Michigan v. Morton Salt Co.*,[32] several of the defendants were not named as coconspirators or defendants in the prior government civil action.[33] These defendants, asserting the statute of limitations as a defense, based their case mainly upon a coextensive reading of sections 5(a) and (b) and the hardships which tolling would incur.[34] Plaintiffs countered that the coextensive view had been rendered obsolete by *3M* and *Leh* and that the policy embraced by the statute outweighed any hardship to defendants.[35] The district court, conceding that the Supreme Court had never faced the issue of tolling with respect to non-Government-defendants,[36] noted that since the private-defendants in *Leh* did not include all the defendants in the government suit,[37] the Supreme Court at least held that 5(b) applied to any Government-defendant without regard to the *absence* of other Government-defendants. Then, relying on the Court's statement in *Leh* that *3M* swept away the requirement that a private plaintiff "allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants,"[38] the *Morton Salt* court read *Leh* to infer that section 5(b) may be applied to a Government-defendant in a private action despite the *presence* of a non-Government-defendant. From this, the court concluded that complete identity of parties was not a requisite for "substantial identity" and that section 5(b) could be applied to a defendant "notwithstanding the fact that he was neither a party to, nor a named coconspirator in the Government action."[39] In this manner, the *Morton Salt* court drew from the Supreme Court's broad interpretation of section 5(b) that the statute of limitations should be tolled against even those defendants not named in the government action.

It would seem that *Morton Salt* reads more into *Leh* than the Supreme Court intended. Granted that the Court in *3M* has foreclosed the use of section 5(b) as merely a backstop for the prima facie provision of section 5(a), the inference that the "substantial identity" test is met by non-Government-defendants appears to be unsupportable. The Court in *Leh* considered only whether the private plaintiff could use the tolling provision against Government-defendants despite the lack of complete identity between the parties in the two actions and provides little justification for any extension to defendants not previously named by the Government. The district court attempted to buttress its decision by drawing

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[31] *Id.* at 63-64.

[32] 259 F. Supp. 35 (D. Minn. 1966), *argument heard sub nom.* Hardy Salt Co. v. Illinois, Nos. 18702, 18703, 8th Cir., March 16, 1967. For the related history of the case, see note 2 *supra.*

[33] The various parties involved are listed by the court. 259 F. Supp. at 53, n.16.

[34] *Id.* at 53, 56; see notes 15-16 *supra* and accompanying text.

[35] 259 F. Supp. at 53, 56.

[36] *Id.* at 53-55.

[37] "The treble damage action in *Leh* was brought against six of eight Government defendants, as well as a party not named in the Government litigation. . . . [T]he non-Government defendant was no longer in the case when it reached the Supreme Court." *Id.* at 54.

[38] *Ibid.*

[39] *Id.* at 54-55.

congressional intent from the words of the statute itself, noting that section 5(b) was directed at potential plaintiffs rather than at defendants against whom the statute may be tolled. Therefore the statute of limitations should be tolled regarding a potential plaintiff's every cause of action. Whatever may be said of such statutory implications, there is no indication in any of the legislative history that Congress foresaw such subtle complications.[40] Certainly it provided little guidance for the construction to be afforded 5(b).

Although the court could rely on neither the logic of *Leh*, nor a finding of congressional purpose, the decision is supported in its implicit reliance on the public policy underlying section 5(b).[41] The concern of any statute of limitations is to protect a defendant from stale claims, brought after evidence and witnesses have dispersed and disappeared,[42] and to assure finality of disputes.[43] On the other hand, the major policy of section 5(b) is to strengthen the enforcement of the antitrust laws[44] by ensuring to the private victim the full fruits of the Government's litigation until one year after its termination.[45] Any balancing of

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[40] Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 320 (1965); see Michigan v. Morton Salt Co., 259 F. Supp. 35, 49 (D. Minn. 1966), *argument heard sub nom.* Hardy Salt Co. v. Illinois, Nos. 18702, 18703, 8th Cir., March 16, 1967.

[41] In the *3M* case, the Court quoted Mr. Justice Holmes:

> The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

381 U.S. at 321, citing Johnson v. United States, 163 Fed. 30, 32 (1908) (Holmes, J., Circuit Justice). See also Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951) (Frankfurter, J.).

[42] "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944); *accord*, Missouri, K. & T. Ry. v. Harriman, 227 U.S. 657, 672 (1913).

[43] "Statutes of limitations . . . are regarded as statutes of repose . . . and they . . . proceed upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period." Levy v. Stewart, 78 U.S. (11 Wall.) 244, 249 (1870).

[44] Several commentators believe that the private action is the best means of effecting a forceful antitrust policy. Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958); MacIntyre, *The Role of the Private Litigant in Antitrust Enforcement*, 7 ANTITRUST BULL. 113 (1962). See also Maltz v. Sax, 134 F.2d 2, 4 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943).

[45] Major assistance is given the plaintiff by § 5(a) allowing him to introduce the Government's judgment as prima facie proof. See note 11 *supra*. This benefit of prima facie proof may be illusory since it merely shifts the initial burden of going forward with the evidence to the Government-defendants. See Emich Motors Corp. v. General Motors Corp., 181 F.2d 70, 76 (7th Cir. 1950), *rev'd on other grounds*, 340 U.S. 558 (1951); Theatre Enterprise, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954). The defendant is usually able to present evidence in rebuttal, shifting the burden of going forward back to the plaintiff. *Hearings Before the Subcommittee on Study of Monopoly Power of the House Judiciary Committee on H.R. 7905*, 81st Cong., 2d Sess. 12 (1950). Evidence indicating a prior conviction, however, should have a great impact on the jury. *Id.* at 52; see Hardy, *The Evisceration of Section 5 of the Clayton Act*, 49 GEO. L.J. 44 (1960); Note, 61 YALE L.J. 1010, 1040 n.201 (1952). In addition, "the pleadings, transcripts of testimony, exhibits and documents are available to [the private plaintiff] . . . in most instances." Minnesota Mining & Mfg. Co. v. New Jersey Wood

these two policies should lean toward promoting the enforcement of the antitrust laws since there is no significant need to provide safeguards to protect tangentially related parties: The burdens[46] of maintaining an antitrust suit are powerful deterrents to sham actions.[47] Furthermore, it is unlikely that more closely related private-defendants will suffer greatly by the tolling—their proximity should warn them of potential involvement in subsequent private antitrust suits[48] and provide adequate opportunity to build a case for their nonimplication. Even in the unlikely instance where the non-Government-defendants are not on notice, the tendency of modern firms toward record-keeping[49] and the availability through discovery[50] of the evidence from the government proceedings further weakens the case for stale claims. While non-Government-defendants could persuasively argue that the resulting lack of finality due to the extension of their potential liability would hinder their commercial relations,[51] the need for effective antitrust enforcement appears to outweigh these potential inequities.[52] Only in this way can the congressional conviction that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws"[53] be realized.

Finishing Co., 381 U.S. 311, 319 (1965). Finally, important questions of law might be resolved in the government suit, potentially aiding the private plaintiff's case. Michigan v. Morton Salt Co., 259 F. Supp. 35, 48 (D. Minn. 1966), *argument heard sub nom.* Hardy Salt Co. v. Illinois, Nos. 18702, 18703, 8th Cir., March 16, 1967.

[46] See note 14 *supra.*

[47] The Supreme Court has warned: "Doubtlessly, care must be exercised to insure that reliance upon the government proceeding is not mere sham and that the matters complained of in the government suit bear a real relation to the private plaintiff's claim for relief." Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965).

[48] The *Morton Salt* court reflected that "certainly a defendant would have enough familiarity with its own affairs to ascertain whether the potential exists that a treble damage claim will be asserted." 259 F. Supp. at 56.

[49] See Affidavit of Richard W. Johnson, Att'y for International Salt Co., in Support of Objections Made to Plaintiffs' Interrogatories Dated March 11, 1963, United States v. Morton Salt Co., Civ. No. 4-61 Civ. 162, on file, Appellate Section, Antitrust Div., Dep't of Justice. Mr. Johnson's client maintained an extensive filing system containing lists of bids made, responses, pricing charts, and other matters arising in the ordinary course of business.

[50] See FED. R. CIV. P. 26-34.

[51] The *Morton Salt* court dismissed this complaint, asserting that "this situation is not unique in the antitrust area and certainly it is not uncommon to arrange for assumptions and disclaimers of pre-existing liabilities in the sale of a business." 259 F. Supp. at 56.

[52] *Morton Salt* concluded: "None of these arguments suggest that tolling the statute for non-Government defendants will result in hardships of such magnitude that it is unreasonable to think that Congress intended this result." *Ibid.*

It has been noted that statutes of limitations "are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected," and any delay indicates the lack of a valid cause of action. Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390 (1868); see Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965). It is clear that the plaintiffs should not suffer from a strict view of the statute due to such reasons—their delay was open and based on the suggestion of Congress. Furthermore, statutes of limitations should be fairly and liberally construed in order to accomplish their legislative purpose. Buzzn v. Muncey Cartage Co., 248 Mich. 64, 67, 226 N.W. 836, 837-38 (1929); *In re* Goldsworthy's Estate, 45 N.M. 406, 412, 115 P.2d 627, 631 (1941).

[53] Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965).

APPELLATE PROCEDURE—INJUNCTIONS—INTERLOCUTORY ORDERS—IN SUIT FOR PERMANENT INJUNCTION, DENIAL OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT BECAUSE OF UNRESOLVED ISSUES OF MATERIAL FACT IS NOT APPEALABLE UNDER 28 U.S.C. § 1292(a)(1). *Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc.*, 385 U.S. 23 (1966); *Chappell & Co. v. Frankel*, 367 F.2d 197 (2d Cir. 1966).

In two similar cases different petitioners brought suit seeking temporary and permanent injunctive relief. Upon denial of their motion for summary judgment in a suit for copyright infringement,[1] plaintiff Chappell and Company appealed to the United States Court of Appeals for the Second Circuit, which upheld the denial.[2] Likewise, plaintiff's motion for summary judgment was denied in a trademark infringement suit[3] brought by Switzerland Cheese Association, and, after the United States Court of Appeals for the First Circuit ruled it had no jurisdiction to hear the appeal,[4] certiorari was granted by the Supreme Court.[5] *Held*, in a suit for permanent injunction, denial of a plaintiff's motion for summary judgment because of unresolved issues of material fact is not appealable under 28 U.S.C. § 1292(a)(1).[6]

Appeal under federal law generally lies only from final judgments and orders.[7] There are, however, statutory exceptions permitting appeal from certain interlocutory[8] dispositions.[9] Section 1292(a)(1) confers jurisdiction on the

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[1] 17 U.S.C. §§ 101(a), 112 (1964).

[2] Chappell & Co. v. Frankel, 367 F.2d 197 (2d Cir. 1966).

[3] 60 Stat. 427, 437 (1946), as amended, 15 U.S.C. §§ 1051, 1114 (1964).

[4] Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc., 351 F.2d 552, 553 (1st Cir. 1965). The First Circuit found it had no jurisdiction because of the general policy against piecemeal appeals.

[5] 382 U.S. 1025 (1966). It would seem that certiorari was granted because of a split in the circuits concerning the correctness of a case which held such orders appealable. Federal Glass Co. v. Loshin, 217 F.2d 936 (2d Cir. 1954). The division was not yet resolved at the time the Court granted certiorari.

[6] Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc., 385 U.S. 23 (1966) (Douglas, J.; Stewart, J., concurring; Harlan, J., concurring); Chappell & Co. v. Frankel, 367 F.2d 197 (2d Cir. 1966) (en banc) (Waterman, J.).

[7] The "final judgment" rule derives from Section 22 of the Judiciary Act of 1789, ch. 20, 1 Stat. 84. The fundamental rationale of the rule is judicial economy: the conservation of judicial resources by eliminating time-consuming and costly appeals which delay and fragment litigation. See Catlin v. United States, 324 U.S. 229, 233-34 (1945); McLish v. Roff, 141 U.S. 661, 665-66 (1891). For a thorough examination of the rule see 6 MOORE, FEDERAL PRACTICE ¶ 54.04 (2d ed. 1965); Crick, *The Final Judgment As a Basis for Appeal*, 41 YALE L.J. 539 (1932); Note, *The Final Judgment Rule in the Federal Courts*, 47 COLUM. L. REV. 239 (1947).

[8] " 'Interlocutory,' in law, means not that which decides the cause, but that which settles some intervening matter relating to the cause." Taylor v. Breese, 163 Fed. 678, 684 (4th Cir. 1908).

[9] 28 U.S.C. § 1651(a) (1964) permits review of interlocutory orders by means of the "extraordinary writs" of mandamus and prohibition, but there is a strong judicial policy favoring limited availability of such writs. See A. Olinick & Sons v. Dempster Bros., 365 F.2d 439 (2d Cir. 1966) (Friendly, J., concurring); Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199, 201 (1959); Comment, *The Writ of Mandamus—Obtaining Judicial Review*

courts of appeals to review "interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions . . . ."[10] The federal appellate courts have espoused conflicting views regarding the appealability of the denial of a motion for summary judgment in suits for permanent injunctive relief under section 1292(a)(1). In *Federal Glass Co. v. Loshin*,[11] the Second Circuit reasoned that a literal reading of this section allowed review of such denial as an "interlocutory" order "refusing" an injunction. Moreover, such appeal was considered desirable to determine whether the trial judge, whose ruling would bind the parties for the pendency of the litigation, had properly decided issues of fact when passing upon the pleadings, depositions, admissions, and affidavits.[12]

Criticized by other courts of appeals[13] and by commentators,[14] the *Federal*

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of the "Non-Appealable" Interlocutory Order, 6 KAN. L. REV. 78 (1957).

The Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b) (1964) confers discretionary jurisdiction on the courts of appeals to review orders which, as certified in writing by the trial judge, involve "a controlling question of law as to which there is substantial ground for difference of opinion and . . . immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." See SEC v. Wong, 254 F. Supp. 66 (D.P.R. 1966).

Jurisdiction to review an interlocutory order falling outside these statutory provisions may be founded upon the judicially created "collateral order" exception to the final-judgment rule if the order is "a final disposition of a claimed right which is not an ingredient in the cause of action and does not require consideration with it . . . ." Wright, *supra* at 200. Appellate review of collateral orders is analyzed in 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1193.3 (rules ed. 1958); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 364-67 (1961).

[10] 28 U.S.C. § 1292(a)(1) (1964). The section is derived from the Act of March 3, 1891, ch. 517, § 7, 26 Stat. 828, which exempted from the finality rule interlocutory orders granting or continuing injunctions in equity proceedings. The scope of review was later broadened to encompass orders refusing and dissolving injunctions, Act of Feb. 18, 1895, ch. 96, 28 Stat. 666; Congress then restricted appellate jurisdiction to orders granting and continuing injunctions, Act of June 6, 1900, ch. 803, 31 Stat. 660, but the wider scope was restored in 1911, Judicial Code of 1911, ch. 23, § 129, 36 Stat. 1134, and carries over to the present. It can be argued that these 1911 amendments evince a congressional policy favoring appealability of all interlocutory orders refusing injunctions, especially since the language of § 1292(a)(1) does not distinguish between preliminary and permanent injunctions. See Brief for Petitioner, p. 9, Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc., 385 U.S. 23 (1966).

[11] 217 F.2d 936 (2d Cir. 1954) (L. Hand, J.; Frank, J., concurring; Clark, C.J., dissenting). This decision was followed in later Second Circuit cases. Peter Pan Fabrics, Inc. v. Dixon Textile Corp., 280 F.2d 800 (2d Cir. 1960); United States v. New York, N.H. & H.R.R., 276 F.2d 525, 545-46 (2d Cir.), *cert. denied*, 362 U.S. 961, 964 (1960).

[12] 217 F.2d at 937. The Fifth Circuit has also allowed appeal of such an interlocutory order. International Forwarding Co. v. Brewer, 181 F.2d 49 (5th Cir. 1950). However, the court's jurisdiction to entertain the appeal was not a contested issue and review was permitted without analysis of the problem. *Accord*, Raylite Elec. Corp. v. Noma Elec. Corp., 170 F.2d 914 (2d Cir. 1948). Apparently *International Forwarding* was overlooked by the *Chappell* court. The *Raylite* case was commented on by the Third Circuit. Morgenstern Chem. Co. v. Schering Corp., 181 F.2d 160, 161 (3d Cir. 1950).

[13] See, *e.g.*, Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc., 351 F.2d 552 (1st Cir. 1965), *aff'd*, 385 U.S. 23 (1966); Division 689, Amalgamated Ass'n of Street Employees v. Capital Transit Co., 97 U.S. App. D.C. 4, 227 F.2d 19 (1955). Other cases are collected in United States v. New York, N.H. & H.R.R., 276 F.2d 525, 552 (2d Cir. 1960) (Clark, C.J., dissenting), *cert. denied*, 362 U.S. 961, 964 (1960).

The court's reasoning was also subjected to attack from within the Second Circuit. See *id.* at 547-49 (Waterman, J., dissenting in part); *id.* at 549-53 (Clark, C.J., dissenting); Federal Glass Co. v. Loshin, 217 F.2d 936, 938-40 (2d Cir. 1954) (Clark, C.J., dissenting).

[14] See 6 MOORE, FEDERAL PRACTICE ¶ 56.21[2], at 2791-92 (2d ed. 1965); WRIGHT,

Glass rationale was unanimously rejected, first by the Second Circuit and then by the Supreme Court. In *Chappell & Co. v. Frankel*,[15] the Second Circuit reconsidered[16] its prior reasoning and held that the denial of plaintiff's motion for summary judgment because of unresolved issues of material fact[17] was not an order refusing an injunction.[18] The court limited appeal under section 1292 (a)(1) to interlocutory refusals of injunctions which might cause "serious, perhaps irreparable consequence."[19] In the court's view, denials of plaintiffs' motions for summary judgment in a suit for permanent injunction would not, "as a class,"[20] result in irreparable harm because the possibility of obtaining the relief sought at final judgment would still exist, and the petitioners could yet move for a preliminary injunction, the denial of which would be appealable.[21]

In *Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc.*,[22] the Supreme Court never reached the question whether the denial of plaintiff's motion for summary judgment because of unresolved issues of fact was a refusal of a permanent injunction within section 1292(a)(1). The Court, instead, directly refuted the rationale of *Federal Glass* by ruling that such orders do "not settle or even tentatively decide anything about the merits of the claim" but only determine that there is a material issue of fact which should go to trial.[23] The Court reasoned that "merely pretrial" orders are not "interlocutory" within section 1292(a)(1),

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FEDERAL COURTS § 102, at 401 (1963); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 369-70 (1961); 103 U. PA. L. REV. 816 (1955).

[15] 367 F.2d 197 (2d Cir. 1966) (en banc).

[16] The court was clearly troubled by the doctrine of stare decisis but found adequate reason to overturn its past decisions. Notice was taken that no other circuit court had adopted its rule. *Id.* at 200-01. *But see* note 12 *supra*. Further, the court opined that this rule encouraged superfluous interlocutory appeals, thereby wasting judicial resources. 367 F.2d at 201; see note 7 *supra*. Moreover, the enactment of the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b) (1964), was the kind of development in the law "that frequently justifies a court's reconsideration of its prior rulings . . . ." 367 F.2d at 201.

[17] FED. R. CIV. P. 56. The trial court had found there was a material issue of fact whether appellee's alleged unlawful manufacture and sale of phonograph records had been conducted under license from appellant. 367 F.2d at 199.

[18] *Id.* at 205.

[19] *Id.* at 203, quoting Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955). In *Baltimore Contractors*, the Supreme Court, construing § 1292(a)(1), determined that no unnecessary appeals should be approved. Although unable to ascertain any express reason for Congress's modification of the final-judgment rule, the Court noted that the exception was the product of allowing relief to litigants who would be irreconcilably affected if review was denied and of the strong federal policy against piecemeal appeals. See Cobbledick v. United States, 309 U.S. 323 (1940); Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc., 351 F.2d 552, 553 (1st Cir. 1965), *aff'd*, 385 U.S. 23 (1966).

[20] Although apparently closing the issue when speaking of the nonappealability of these orders "as a class," the court leaves open an argument that a particular case might be considered for review: "We hardly deny that in some cases the denial of a plaintiff's motion for summary judgment conjoined to a request for a permanent injunction may present an especially convincing case for immediate interlocutory review." 367 F.2d at 203.

[21] *Id.* at 202. A motion for preliminary injunction can be made alternatively with a motion for summary judgment. See Holt Howard Associates, Inc. v. Goldman, 177 F. Supp. 611 (S.D.N.Y. 1959); note 25 *infra* and accompanying text.

[22] 385 U.S. 23 (1966) (Douglas, J.). Plaintiff moved for summary judgment to enjoin defendant's alleged trademark infringement and unfair competition.

[23] 385 U.S. at 25.

a conclusion it felt was necessary to protect the federal policy against piecemeal appeals.[24]

Formerly, two kinds of section 1292(a)(1) orders denying injunctions were reviewable by federal courts of appeals: Those denying plaintiffs' motions for summary judgment in suits for permanent injunctions and those denying motions for preliminary injunctions. The decisions in *Chappell* and *Switzerland Cheese* hold nonappealable the denial of plaintiffs' motions for summary judgment and permanent injunctions because of unresolved issues of fact. Both cases, however, leave unaffected the well-settled rule that an order denying a preliminary injunction is appealable under section 1292(a)(1).[25] *Chappell* would not prevent the appeal since such denial could cause petitioner to suffer irreparable harm. Under *Switzerland Cheese*, the order would be appealable because it would "touch on the merits of the claim" since the likelihood of petitioner's ultimate success on the merits is an element the trial judge must consider in ruling on the motion for preliminary relief.[26]

It must be noted that these cases distill two separate and independent requirements from the language of 1292(a)(1). *Switzerland Cheese* highlights the need for showing that the order is *interlocutory* rather than merely pretrial—that it decides something about the merits of the claim. *Chappell* stresses that the order must refuse needed injunctive relief—that it creates a real possibility of irreparable harm. The concurrent application of these requirements is best demonstrated when a section 1292(a)(1) appeal is sought from a denial, based on the *substantive law in the case*, of a motion for summary judgment where the facts are uncontroverted. Assuming such denial does not result in the grant of summary judgment to the opponent,[27] the order would be interlocutory under

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[24] *Ibid.*; see note 7 *supra* and accompanying text. In his concurrence, however, Mr. Justice Harlan stated that the Court should adopt, as the basis for its holding, the reasoning of *Chappell*. 385 U.S. at 25.

[25] If preliminary injunctions were reviewable only after final judgment "it would frequently be too late for the courts of appeals to undo the harm caused by an erroneous ruling below and recreate a state of affairs in which meaningful relief could be granted to the party entitled to prevail." Chappell & Co. v. Frankel, 367 F.2d 197, 202 (2d Cir. 1966). The *Chappell* court determined that this was a "good reason" to review "as a class" orders granting or denying preliminary injunctions. *Ibid.*; see Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); United States v. Platt Contracting Co., 324 F.2d 95 (1st Cir. 1963); Harris v. Gibson, 322 F.2d 780 (5th Cir. 1963).

In contrast, temporary restraining orders have been held nonappealable under § 1292(a)(1). See Connell v. Dulien Steel Prods., Inc., 240 F.2d 414 (5th Cir. 1957). *But see* Woods v. Wright, 334 F.2d 369 (5th Cir. 1964). Review of these orders has been held unfeasible because they expire no more than twenty days from their issuance. FED. R. CIV. P. 65(b). Appeal during this time is impractical. Since a temporary-restraining-order hearing usually does not adequately discuss the facts, no orders would be properly appealable. Dilworth v. Riner, 343 F.2d 226, 229 (5th Cir. 1965). If the restraining order is extended beyond the usual period, however, it will be treated as a preliminary injunction and appeal will be allowed. National Mediation Bd. v. Air Line Pilots Ass'n, Int'l, 116 U.S. App. D.C. 300, 323 F.2d 305 (1963). Similarly, where adequate hearing is had by the trial judge, review will be permitted. Dilworth v. Riner, 343 F.2d 226 (5th Cir. 1965).

[26] Bernstein v. Herren, 136 F. Supp. 493, 499 (S.D.N.Y. 1955).

[27] Where there is no genuine issue of material fact and a motion for summary judgment is denied on the substantive law of the case, the court will usually grant judgment for the opposing party, even though he has not so moved. Hennessey v. Federal Security Adm'r, 88 F. Supp. 664, 668 (D. Conn. 1949). This is supported by the great weight of authority. 6 MOORE, FEDERAL PRACTICE ¶ 56.12, at 2242 (2d ed. 1965). In the case where a judge did

Switzerland Cheese, since an order based on substantive law involved in a case necessarily touches the merits of the claim. Nevertheless, even if the petitioner satisfied *Switzerland Cheese*, there is some doubt that he could qualify for a section 1292(a)(1) appeal under the test of *Chappell.* In dicta, the Second Circuit indicated that, where denial of a motion for summary judgment is based on a question of law, there has been no refusal of injunctive relief.[28] The underlying reasoning seems to have been that the petitioner would not be in any real danger of suffering irreparable harm since he could either seek certification under section 1292(b)[29] or move for preliminary relief. Both these alternatives, however, are of questionable practical value. Certification is limited because courts have narrowly restricted the scope of section 1292(b).[30] Moreover, since the trial judge's consideration of the likelihood of plaintiff's success on the merits necessarily encompasses an examination of plaintiff's legal theory of the case, denial of the motion touches on the merits of plaintiff's suit for permanent injunctive relief, and may effectually preclude him from obtaining a preliminary injunction since issuance of that order would also require a showing of probable success in the pending litigation.[31]

Switzerland Cheese and *Chappell* make clear the problem of nonappealability which arises when plaintiff relies solely on a motion for summary judgment to secure injunctive relief. To assure his right to a section 1292(a)(1) appeal a plaintiff who seeks injunctive protection from irreparable injury pending suit for a permanent injunction should adhere strictly to the procedural steps set forth in Rule 65 of the Federal Rules of Civil Procedure. He should first secure a temporary restraining order, which will maintain the status quo for not more than

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not entertain a cross motion sua sponte upon the denial on the law of a petitioner's summary judgment motion, a grant to the opposing party would not result. 6 *id.* ¶ 56.21[2], at 2792 n.18.

[28] 367 F.2d at 204.

[29] 28 U.S.C. § 1292(b) (1964). The basic purpose of this legislation, in keeping with the goal of judicial economy, was to dispose of such issues which might render further litigation unnecessary. Holtzoff, *Interlocutory Appeals in the Federal Courts*, 47 GEO. L.J. 474, 475 (1959). There were four kinds of cases that were originally considered to be within this category: (1) cases where liability under a contract has been decided and an accounting is necessary; (2) cases where a decision on a controlling issue, such as statute of limitations or jurisdiction, may obviate the need to continue the trial; (3) cases where third-party defendants might be excused; and (4) cases in which a transfer of venue is claimed to be unauthorized by law. *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Cong., 2d Sess., ser. 11, at 7-9 (1958); see United States v. Woodbury, 263 F.2d 784 (9th Cir. 1959). The courts of appeals do not have to accept the opinion of the certifying district court that appeal is required. In the Matter of Heddendorf, 263 F.2d 887 (1st Cir. 1959).

[30] In fact the appellate courts have strictly limited the scope of the act. Gottesman v. General Motors Corp., 268 F.2d 194 (2d Cir. 1959); Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199, 204 (1959). Hence, a denial of a government claim of privilege has been held a collateral issue and not appealable. United States v. Woodbury, *supra* note 29, at 787-88; see In the Matter of Heddendorf, *supra* note 29 (adequacy of fee allowances in minority stockholder suit not controlling question). District courts have also been prudent in certifying these cases for appeal. Barrett v. Burt, 250 F. Supp. 904, 906-07 (S.D. Iowa 1966) (insufficient for certification that no cases had interpreted statute); Afran Transp. Co. v. National Maritime Union, 177 F. Supp. 610 (S.D.N.Y. 1959) (denial of summary judgment because material issue of fact existed not appealable); see note 9 *supra* and accompanying text.

[31] See text accompanying note 26 *supra.*

twenty days.[32] Protected by this order, the petitioner can commence his suit for a permanent injunction, moving for preliminary injunctive relief pendente lite, which will be heard during the life of the temporary restraining order. A denial of such preliminary injunction would be an appealable interlocutory order refusing an injunction within section 1292(a)(1).

[32] FED. R. CIV. P. 65(b).

CONSTITUTIONAL LAW—GRAND JURIES—RACIAL DISCRIMINATION—CONSCIOUS INCLUSION OF NEGROES ON GRAND JURY VENIRE IS NOT VIOLATIVE OF NEGRO DEFENDANT'S RIGHT TO EQUAL PROTECTION. *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966).

Brooks, a Negro, was indicted for the rape of a white woman by a Texas county grand jury. The trial judge, feeling that Negroes had been systematically excluded from the grand jury,[1] appointed five new jury commissioners—including one Negro—and directed them to select fairly a new grand jury venire. The commissioners submitted a new list of sixteen grand jurors,[2] including two Negroes, both of whom were chosen by the trial judge to be on the final grand jury of twelve. Thus reconstituted, the grand jury reindicted Brooks for the same offense and he was convicted. After an unsuccessful appeal to a state court,[3] Brooks sought federal habeas corpus on the ground that the second grand jury was improperly selected. He was again unsuccessful in both the district court,[4] and the Fifth Circuit Court of Appeals. *Held*, conscious inclusion of Negroes on a grand jury venire is not violative of a Negro defendant's right to equal protection.[5]

Many southern states permit jury commissioners broad administrative discretion in the selection of grand juries.[6] Social conditions in the South have influenced the exercise of this discretion to result in systematic exclusion of Negroes from grand jury lists.[7] Despite dissatisfaction with certain state practices, Con-

[1] The judge's decision was based on the fact that, historically, there had never been a Negro serving on either the grand or petit jury in that county despite the fact that ten per cent of the population was Negro. This factor, combined with the fact that there were no Negroes on this grand jury, would seem to establish a prima facie case of discriminatory selection of jurors. Brooks v. Beto, 366 F.2d 1, 5 (5th Cir. 1966); see note 11 *infra* and accompanying text.

[2] By present statute, Texas jury commissioners select a venire list of twenty names (sixteen at the time of the selection in the instant case) from which the court chooses the twelve who will constitute the grand jury. TEX. CODE CRIM. PROC. ANN. arts. 19.06, 19.22-.26 (1966).

[3] Brooks v. State, 170 Tex. Crim. 555, 342 S.W.2d 439 (1960), *rehearing denied*, 170 Tex. Crim. 560, 342 S.W.2d 442 (1961).

[4] Brooks v. Beto, 241 F. Supp. 743 (S.D. Tex. 1965).

[5] Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966) (Brown, J.; Tuttle, C.J., Thornberry, and Coleman, JJ.; Wisdom, Gewin, and Bell, JJ., each concurring separately).

[6] *E.g.*, ALA. CODE tit. 30, § 21 (1959); GA. CODE ANN. §§ 59-106 (1965); GA. CODE ANN. §§ 59-203 (Supp. 1966).

[7] "The Louisiana statutes relating to the jury system are not discriminatory on their face.

gress and the federal judiciary have refrained from implementing a uniform system of jury selection.[8] Although federal inaction has resulted in state predominance in this area, constitutional guidelines have provided federal courts a limited opportunity to supervise state action.

The equal protection clause has been a defendant's chief bulwark against discrimination in the selection of his jury.[9] Early cases established that a jury must represent a cross section of the community from which it is selected.[10] Discrimi-

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Discrimination against Negroes comes from the administration of the system." Labat v. Bennett, 365 F.2d 698, 715 (5th Cir. 1966). Courts, including the Supreme Court, although expressly recognizing the facility of future discrimination, have not invalidated this discretion. See, *e.g.*, Patton v. Mississippi, 332 U.S. 463 (1947); Hill v. Texas, 316 U.S. 400 (1942).

[8] Pursuant to the thirteenth and fourteenth amendments, Congress has enacted a statute penalizing those entrusted with jury selection for excluding jurors on account of race or color. 18 U.S.C. § 243 (1964). The Civil Rights Act of 1966, H.R. 14765, 89th Cong., 2d Sess. (1966), contained provisions banning discrimination in the selection of federal or state juries. The Senate's rejection of a limit on the civil rights debate, however, effectively foreclosed any possibility of its becoming law. 112 CONG. REC. 22114 (1966). On March 16, 1967, Senator Tydings (D. Md.) reintroduced bills which would regulate state, S. 1318, 90th Cong., 1st Sess. (1967), and federal, S. 1319, 90th Cong., 1st Sess. (1967), jury-selection procedures.

The courts have looked directly to the Constitution, rather than to federal legislation to secure equal protection. *E.g.*, Eubanks v. Louisiana, 356 U.S. 584 (1958); Carter v. Texas, 177 U.S. 442 (1900); Gibson v. Mississippi, 162 U.S. 565 (1896).

The Judicial Conference Committee has stated that "it still does not seem feasible or desirable to draft detailed regulations to cover the preparation of jury lists throughout the United States, considering the great diversity of local, economic and social conditions found in the several districts." Judicial Conference Comm. on the Operation of the Jury System, *The Jury System in the Federal Courts* (1958), quoted in United States v. Greenberg, 200 F. Supp. 382, 395 (S.D.N.Y. 1961). It is arguable whether the Supreme Court is constitutionally authorized to promulgate such a system. *Compare* Baker v. Carr, 369 U.S. 186 (1962) (imposing guidelines for state voting districts), *with* Fay v. New York, 332 U.S. 261 (1947) (requiring fundamental fairness in lieu of prescribing jury-selection procedures). See generally Note, *The Congress, the Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 VA. L. REV. 1069, 1114 n.237 (1966).

[9] *E.g.*, Pierre v. Louisiana, 306 U.S. 354 (1939) (race); Mamaux v. United States, 264 Fed. 816 (6th Cir. 1920) (wage earners); Kentucky v. Powers, 139 Fed. 452 (C.C.E.D. Ky. 1905), *rev'd on other grounds*, 201 U.S. 1 (1906) (political beliefs); Juarez v. State, 102 Tex. Crim. 297, 277 S.W. 1091 (1925) (religious beliefs). While sixth amendment rights have been applied to state criminal proceedings through the due process clause of the fourteenth amendment, it seems that the due process clause cannot be relied upon to secure relief against discriminatory practices in jury selection. See Fay v. New York, 332 U.S. 261, 288 (1947); State v. Stewart, 2 N.J. Super. 15, 21, 64 A.2d 372, 374-75 (App. Div. 1949). *But cf.* Thiel v. Southern Pac. Co., 328 U.S. 217 (1946).

[10] Smith v. Texas, 311 U.S. 128 (1940).

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body *truly representative of the community*. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups . . . violates our Constitution and . . . is at war with our basic concepts of a democratic society and a representative government.

Id. at 130. (Emphasis added.) This language was subsequently interpreted to require the jury to reflect a cross section of the community. Although this standard has not been clearly defined, the courts have looked to the community to determine the extent to which identifiable groups must be represented on the jury. *E.g.*, Reece v. Georgia, 350 U.S. 85, 87-88 (1955); United States *ex rel.* Seals v. Wiman, 304 F.2d 53, 66-67 (5th Cir. 1962), *cert. denied*, 372 U.S. 915 (1963); Mitchell v. Johnson, 250 F. Supp. 117, 121-22 (M.D. Ala. 1966). At an early date, however, it was recognized that the fourteenth amendment right not to have jurors excluded because of race or color was distinct from the right "to a grand or a petit jury composed in whole or in part of persons of one's . . . own race or color . . . ." Strauder v. West

nation, usually exclusion on the basis of race, was shown where the defendant could prove that over a substantial period of time no members of his group, representing a substantial portion of the community, had been selected for jury duty.[11] The cross-section requirement, however, which had its origin as a standard for determining racial discrimination, was projected beyond its purpose and came to be viewed as a constitutional right.[12] As the criterion gradually replaced the end it was created to achieve, attitudes of those entrusted with the selection mechanism, *i.e.*, jury commissioners, came under closer scrutiny.[13] When jury commissioners protested that they lacked knowledge of qualified Negroes,[14] the Supreme Court, in *Cassell v. Texas*,[15] required jury commissioners to familiarize themselves with the qualifications of eligible jurors "without regard to race and color."[16] Jury commissioners, believing this line of cases required the conscious selection of Negroes in order to achieve a fair cross section, purposely included Negroes on grand jury venire lists. In *Collins v. Walker*,[17] however, the Fifth Circuit held that the purposeful inclusion of six Negroes on a Louisiana grand jury venire list, selected from a general venire list of 300, violated equal protection.[18] The *Collins* court reasoned that the Constitution, being "color-blind," sanctioned neither *ex*clusion nor *in*clusion on the basis of race.[19]

The question of the scope of equal protection in grand jury selection was brought before the Fifth Circuit again in *Brooks v. Beto*.[20] The court, reviewing

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Virginia, 100 U.S. 303, 305 (1879). The equal protection clause does not entitle a defendant to a "mixed jury." Virginia v. Rives, 100 U.S. 313, 323 (1880). *But see* note 34 *infra*.

[11] Norris v. Alabama, 294 U.S. 587 (1935). This has not been limited solely to racial discrimination. In Glasser v. United States, 315 U.S. 60 (1942), condemning the summoning of jurors from sources supplied by public organizations, the Court stated:

> [O]ur democracy . . . requires that the jury be a "*body truly representative of the community*," and not the organ of any special group or class [and] . . . the officials charged with choosing federal jurors . . . must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community.

Id. at 86. (Emphasis added.)

[12] See Fay v. New York, 332 U.S. 261, 299 (1947) (Murphy, J., dissenting) (5-to-4 decision); Mack v. Walker, 372 F.2d 170, 171 (5th Cir. 1966); *cf.* Ballard v. United States, 329 U.S. 187 (1946); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946).

[13] Mack v. Walker, 372 F.2d 170 (5th Cir. 1966); Davis v. Davis, 361 F.2d 770 (5th Cir. 1966); see Woods v. Munns, 347 F.2d 948 (10th Cir. 1965).

[14] *E.g.*, Akins v. Texas, 325 U.S. 398, 406 (1945); Hill v. Texas, 316 U.S. 400, 402 (1942).

[15] 339 U.S. 282 (1950).

[16] *Id.* at 289.

[17] 329 F.2d 100 (5th Cir.), *aff'd on rehearing*, 335 F.2d 417 (5th Cir.), *cert. denied*, 379 U.S. 901 (1964).

[18] 335 F.2d at 420. The grand jury which indicted Collins was composed of five Negroes and seven whites drawn from this list of twenty. The record discloses that this grand jury was selected specifically for the appellant's indictment since (1) there was another all-white grand jury operating in the county at the time of his arrest, and (2) no other case was scheduled at the time to be heard by the new grand jury. 329 F.2d at 104-05.

[19] The holding in *Collins* was predicated on the fact that the basis of selection was *race*, "the fatal defect" under *Cassell*. 335 F.2d at 420. Judge Dawkins, dissenting, felt the majority decision posed an insoluble dilemma, for jury commissioners would not be allowed to take race into consideration, but nevertheless had to achieve a cross section of the community. *Id.* at 425-26.

[20] 366 F.2d 1 (5th Cir. 1966).

the trial record, found Negroes had been purposely included on the Texas grand jury venire list.[21] The *Brooks* court construed *Collins* as a complete bar to inclusion on the basis of race,[22] but failed to consider the differences between the Texas and Louisiana jury selection statutes.[23] In disapproving its decision in *Collins*, the Fifth Circuit concluded that prior Supreme Court cases dealt with discrimination solely in terms of exclusion and that *Collins* had erroneously interpreted these decisions as prohibiting racial inclusion.[24] In fact, the *Brooks* court reasoned that these decisions, by imposing a "dual duty"[25] on jury commissioners to know all identifiable elements in the community and to select a jury that represents a fair cross section of that community, implied a contrary result.[26]

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[21] "[W]e must treat this case as one in which [jury commissioners] . . . purposely selected two members for the list for the reason, among others, that they were Negroes." *Id.* at 8-9.

[22] *Id.* at 15. The *Collins* decision limited itself to forbidding intentional inclusion of Negroes when drawing the grand jury venire list of twenty from the general venire list of 300. The *Collins* court indicated that if the list of 300 was a fair cross section, even if chosen with conscious consideration of race, there was no reason to take race into consideration in selecting the final twenty from which the trial judge chooses the panel. 335 F.2d at 420.

[23] LA. REV. STAT. §§ 15:179-:180 (1950); TEX. CODE CRIM. PROC. ANN. arts. 19.06, 19.22-.26 (1966). It was unnecessary for *Brooks* to disapprove *Collins*. In *Brooks* the commissioners handpicked the original venire list of sixteen—it was necessary that race be consciously considered in order to achieve the goal of a representative cross section of the community. In *Collins* the original venire list of 300 presumably reflected such a cross section. The difference is that in *Brooks* the commissioners set out to create an original list which was representative whereas in *Collins* the commissioners already had such a list, thereby removing the necessity of using racial considerations in choosing the final twenty.

A logical, but unrealistic, extension of *Brooks*' disapproval of *Collins* is that race should be taken into consideration in *every* step of the selection of the final grand jurors. In effect, this would impose a duty on the local judge to consider race in choosing the final panel.

[24] 366 F.2d at 14-21. The *Collins* court reasoned that its decision was required by Cassell v. Texas, 339 U.S. 282 (1950), particularly relying upon the phrase that "an accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race," *id.* at 287. *Brooks* pointed out that since the basis of the *Cassell* decision was the failure of the jury commissioners to discharge their duty as to the qualified jurors in the community, the language relied upon was merely dicta; the statement should be taken in context with the factual situation, wherein the appellant charged proportional limitation (a form of exclusion). *Id.* at 20-21. In this light, the "inclusion" referred to in the above quote should be read narrowly to mean only inclusion in a proportional limitation. The *Brooks* court also recognized the inherent difficulties of administering the *Collins* system, noting that the *Collins* court found it difficult to reconcile the dual duty with its decision prohibiting conscious consideration of race. *Id.* at 16. Prior to *Brooks* the United States Court of Military Appeals recognized the distinction between inclusion and exclusion. In disapproving *Collins* the court stated:

> We think it [the Fifth Circuit] misapprehended the fundamental difference between inclusion of a member of a particular group for the purpose of obtaining a fair representation of a substantial part of the community, and exclusion of members of that group so as to reduce the representational character of the jury.

United States v. Crawford, 15 U.S.C.M.A. 31, 41, 35 C.M.R. 3, 13 (1964).

[25] 366 F.2d at 22. The idea that jury commissioners have a duty to know their communities can be traced back to the Reconstruction days. See *Ex parte* Virginia, 100 U.S. 339 *passim* (1880) (Field, J., dissenting). It is firmly entrenched in contemporary judicial thinking as well. *E.g.*, Eubanks v. Louisiana, 356 U.S. 584 (1958); Hill v. Texas, 316 U.S. 400, 404 (1942); Davis v. Davis, 361 F.2d 770, 773 (5th Cir. 1966).

[26] 366 F.2d at 23. An analysis of the dual duty imposed by *Brooks* reveals that it is merely the bifurcation of the single duty not to discriminate against a racial group. The dual duties articulated by the court are only two *means* of fulfilling the single duty. Judge Bell felt that

Emphasizing the social context in which juror selection is made, the court concluded that the constitutional right to a fairly selected grand jury could not be effectuated unless jury commissioners were permitted to utilize their required knowledge of a community's racial composition by selecting jurors on the basis of race.[27]

The *Brooks* decision meets the issue of whether the consideration of race is unconstitutional per se. A system which includes jurors on the basis of race necessarily excludes other jurors on the basis of race.[28] Although such a procedure is expressly illegal under statute,[29] it would seem that the Constitution does not discountenance a consideration of race when used to secure, rather than prevent, equal protection under the fourteenth amendment.[30] The analytical tool used to determine whether cognizance of race has been used to assure or inhibit Negro representation on juries was the requirement that the jury reflect a cross section of the community.[31] The cross-section standard requires that the jury list reflect in a proportionate fashion all identifiable groups in the community.[32]

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there is but a single duty; however, he concluded that this duty is that of obtaining a cross section of the community. *Id.* at 31 (concurring in result). The *Brooks* court hypothesizes that under the dual-duty requirement a case could arise wherein the final panel consisted of a cross section of the community and yet would be invalid because the jury commissioners had failed in their duty to become aware of all significant elements of the community. Conversely, the court realized that a grand jury which on its face would be a prima facie case of exclusion might pass muster upon examination if the dual duty had been complied with. *Id.* at 22 n.40. This latter case would be possible because the Supreme Court has recognized that a fair cross section need not be a mirror-image of the community. Swain v. Alabama, 380 U.S. 202, 208 (1965).

[27] 366 F.2d at 23-24. By voicing its approval of the trial judge's appointment of a Negro jury commissioner, the court facilitated its adoption of a "practicality" theory. The court found that the naming of a Negro to the jury commission was a practicable means of solving the recurring problem of racial discrimination in the selection of grand juries. *Id.* at 9-11.

[28] Discrimination seems unavoidable under *Brooks*, for it demands a fair cross section of the community *and* a conscious consideration of race by the jury commissioners. *Id.* at 23. During the selection of a jury, the commissioners must decide the number of Negroes to be included on the particular list. It is this decision that is discriminatory, for by deciding upon a given number a corresponding number of individuals of other races and all other Negroes are automatically excluded because of race.

[29] See note 8 *supra.*

[30] See Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940); *cf.* Wanner v. County School Bd., 357 F.2d 452 (4th Cir. 1966); Dowell v. School Bd., 244 F. Supp. 971 (W.D. Okla. 1965). In *Wanner* and *Dowell*, consideration of race was sanctioned in public-school desegregation.

[31] See, *e.g.*, Reece v. Georgia, 350 U.S. 85 (1955); Norris v. Alabama, 294 U.S. 587 (1935).

[32] See, *e.g.*, United States *ex rel.* Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962), *cert. denied*, 372 U.S. 915 (1963); Mitchell v. Johnson, 250 F. Supp. 117 (M.D. Ala. 1966).

Moreover, by attempting to arrive at a fair cross section the jury commissioners must strive to have the number of Negroes on a jury panel approximate the percentage of Negroes in the community. The inevitable product of fulfilling the duties imposed in *Brooks* is proportional representation, which has been condemned by the Supreme Court. Cassell v. Texas, 339 U.S. 282 (1950). Judicial antipathy to the idea of proportional representation is based on fear that it focuses on the racial or economic class and not on the individual. See, *e.g.*, United States v. Curry, 358 F.2d 904, 917 (2d Cir. 1966); United States v. Foster, 83 F. Supp. 197, 208 (S.D.N.Y. 1949). It has been pointed out that the multiplicity of races and nationalities inhabiting our communities would render a requirement of proportional representation "impossible to meet." Cassell v. Texas, 339 U.S. 282, 286-87 (1950).

Implicit in many of the Supreme Court holdings is the improbability of repeated random

Because race is the predominant identifiable characteristic of a substantial part of the population in the South,[33] the fourteenth amendment guarantee of equal protection has become a right to have members of one's race included in the jury list.[34] Consequently, a consideration of race may be required when it is a consideration of race *qua* identifiable group in the community.[35]

The *Brooks* court recognized the futility of structuring a jury-selection system which disregarded this vital social fact. Thus, the court attempted to reconcile this social awareness of race with its judicial duty to secure equal protection for identifiable groups in the community. The court's conclusion that Negroes can be included on the basis of race becomes constitutionally palatable by equating race with significant identifiable groups in the community, who, like any other cognizable group, would be entitled to equal protection in the selection process.

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selection of all-white juries in areas of substantial Negro populations. *E.g.*, Eubanks v. Louisiana, 356 U.S. 584 (1958); Smith v. Texas, 311 U.S. 128 (1940). If the *Brooks* court hoped to achieve proportional representation, a method not constitutionally suspect would have been a random-selection system. Such a system would not be against the dictates of the Texas statute, which currently states in part: "The jury commissioners shall select twenty men from citizens of different portions of the county to be summoned as grand jurors . . . ." TEX. CODE CRIM. PROC. ANN. art. 19.06 (1966). In order to comply with this requirement the commissioners could divide the county geographically and randomly select from each geographic segment. It is doubtful that Texas or federal courts would construe a completely random system as violating the statute. Furthermore, it seems necessary and desirable that the racial outcome of jury selection be independent of the method of selection, in which those entrusted with the selection process would be incapable of controlling the result. The only foolproof method of jury selection which would eliminate any possible discrimination due to human efforts, must be a random system. *But see* Brooks v. Beto, 366 F.2d 1, 23 (5th Cir. 1966). See generally Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 349-53 (1966).

[33] See, *e.g.*, Arnold v. North Carolina, 376 U.S. 773 (1964); Hill v. Texas, 316 U.S. 400 (1942). *But see* Akins v. Texas, 325 U.S. 398 (1945).

[34] 366 F.2d at 24. The underlying purpose in including Negroes was that they were members of the defendant's racial class. Despite the fact that the decision is grounded in terms of assuring the defendant a cross section of the community, the result closely resembles that of the common-law concept that a man should be judged by a group of his peers. The reemergence of this idea can be seen elsewhere. In Labat v. Bennett, 365 F.2d 698, 711 (5th Cir. 1966), the court explicitly recognized the defendant's right to a jury of his peers. *But see* Allen v. State, 110 Ga. App. 56, 137 S.E.2d 711 (1964) (peer concept expressly rejected and white permitted to challenge Negro exclusion). Whereas this concept might have been an "integral part of the feudal ideal of society," KEENEY, JUDGMENT BY PEERS 110 (1949), the Supreme Court has noted its inapplicability to a democratic society, Glasser v. United States, 315 U.S. 60, 85 (1942).

[35] Consciousness of race seems unavoidable in a society wherein racial discrimination "has been imbedded into the . . . personality of practically every individual . . . ." Tucker, *Racial Discrimination in Jury Selection in Virginia*, 52 VA. L. REV. 736, 747 (1966).

INCOME TAX—REORGANIZATION—SPIN-OFFS—SPIN-OFF PURSUANT TO PLAN OF MERGER EXEMPT UNDER SECTION 355 WHEN COMPLETE TRANSACTION HAS BUSINESS PURPOSE OTHER THAN TAX AVOIDANCE. *Commissioner v. Morris Trust*, 367 F.2d 794 (4th Cir. 1966).

In 1960 the American Commercial Bank (American), a North Carolina state bank, agreed to merge with the Security National Bank of Greensboro (Security), a national bank, and operate as the North Carolina National Bank under Security's national charter. Before the merger could be legally consummated, the Comptroller of the Currency required American to divest itself of its insurance department.[1] American organized the American Commercial Agency, Inc. (Agency), transferred its insurance business assets to Agency in exchange for Agency's stock, and immediately distributed Agency's stock pro rata to American's shareholders, thereby "spinning off" its insurance department.[2] The Commissioner of Internal Revenue refused to allow nonrecognition of gain or loss to American's shareholders, and ruled that the receipt of stock was taxable as ordinary income. The Tax Court, however, held for the taxpayer,[3] and the United States Court of Appeals for the Fourth Circuit affirmed. *Held*, a spin-off pursuant to a plan of merger is exempt under section 355 when the complete transaction has a business purpose other than tax avoidance.[4]

The tax consequences of spin-off transactions have changed with successive internal revenue enactments. While a spin-off was originally a taxable event, the Revenue Acts of 1924 through 1932[5] extended nonrecognition to spin-offs in order to facilitate the separation of large businesses into smaller units while not eliminating the original corporation.[6] Literal compliance with nonrecognition provisions for spin-offs led to tax avoidance. A corporation would form a subsidiary whose sole function was to hold the parent's accumulated surplus or liquid assets, while distributing the subsidiary's stock to the parent's shareholders

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[1] Regulations of the Comptroller of the Currency, 12 C.F.R. §§ 2.1-.5 (1963); see Commissioner v. Morris Trust, 367 F.2d 794, 795 n.3 (4th Cir. 1966).

[2] A spin-off is a nonexchange form of corporate separation accomplished by transferring part of the existing corporation's—*A*'s—assets to a newly formed corporation—*B*—in return for all the stock of the new corporation. *A* then distributes all of the stock in *B* to *A*'s shareholders without the surrender by the shareholders of any of their stock in *A*. This differs from a split-off, an exchange transaction, only in that in a split-off the stockholders surrender part of their *A* stock in return for the *B* stock. 3 MERTENS, FEDERAL INCOME TAXATION § 20.100 (rev. ed. 1965). These two forms have identical economic results and are both treated for tax purposes by INT. REV. CODE OF 1954, § 355.

[3] Mary Archer W. Morris Trust, 42 T.C. 779 (1964).

[4] Commissioner v. Morris Trust, 367 F.2d 794 (4th Cir. 1966) (Haynsworth, C.J.; Bell, Stanley, JJ.).

[5] Revenue Act of 1924, ch. 234, § 203(c), 43 Stat. 256; Revenue Act of 1926, ch. 27, § 203(c), 44 Stat. 13; Revenue Act of 1928, ch. 852, § 112(g), 45 Stat. 818; Revenue Act of 1932, ch. 209, § 112(g), 47 Stat. 197. Prior to 1918, any stock distributed in a corporate separation was taxed as a dividend on the theory that the shareholder severed his original capital investment. Split-ups and split-offs were exempted by the Revenue Act of 1918, ch. 18, § 202(b), 40 Stat. 1060 (1919). Young, *Corporate Separations: Some Revenue Rulings Under Section 355*, 71 HARV. L. REV. 845 (1958).

[6] 3 MERTENS, *op. cit. supra* note 2, § 20.101, at 496 n.61; see S. REP. NO. 398, 68th Cong., 1st Sess., pt. 1, at 15 (1924).

on a pro rata basis. In this fashion, ordinary dividends were distributed through the corporate reorganization device at capital gains rates.[7] In *Gregory v. Helvering*,[8] the Supreme Court, in an effort to eliminate these abuses, rejected a literal reading of the statute, holding that Congress presupposed a continuation of both businesses under changed corporate form, rather than a temporary existence to avoid ordinary-income rates.[9] While *Gregory* was on appeal, and before the Supreme Court laid down the "business purpose" doctrine,[10] Congress, feeling a drastic remedy was necessary, omitted the nonrecognition treatment of spin-offs from the Revenue Act of 1934,[11] thus relegating spin-offs to ordinary-income treatment.

In 1951, Congress, reconsidering the treatment of spin-offs, realized that it was "economically unsound to impede spin-offs . . . undertaken for legitimate business purposes,"[12] and reinstated the nonrecognition provision relating to spin-offs by adding section 112(b)(11) to the 1939 Code.[13] This section partially codified the earlier "business purpose doctrine" of *Gregory*[14] and included a general prohibition against distribution of earnings and profits to shareholders by

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[7] See 3 MERTENS, *op. cit. supra* note 2, § 20.101; Young, *supra* note 5, at 845.

[8] 293 U.S. 465 (1935). The Board of Tax Appeals had held for Mrs. Gregory, not finding the fraud it thought necessary to invalidate a tax-avoidance device which had complied literally with the statute. Evelyn F. Gregory, 27 B.T.A. 223 (1932). The Second Circuit reversed in a memorable decision where Judge Learned Hand stated:

> The purpose of [§ 112(g)] . . . is plain enough; men engaged in enterprises . . . might wish to consolidate, or divide, to add to, or subtract from, their holdings. Such transactions were not to be considered as "realizing" any profit, because the collective interests still remain in solution. But the underlying presupposition is plain that the readjustment shall be undertaken for reasons germane to the conduct of the venture in hand . . . . To dodge the shareholders' taxes is not one of the transactions contemplated as corporate "reorganizations." . . . [The transactions] were a sham, though all the proceedings had their usual effect.

Helvering v. Gregory, 69 F.2d 809, 811 (2d Cir. 1934). For a comprehensive discussion of the case see BITTKER & EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS § 11.02 (2d ed. 1966); 3 MERTENS, *op. cit. supra* note 2, § 20.55.

[9] 293 U.S. at 469-70.

[10] *Ibid.* For a comprehensive discussion of the *Gregory* doctrine, see 3 MERTENS, *op. cit. supra* note 2, § 20.56. This doctrine has become ingrained in tax law. See, *e.g.*, Commissioner v. Court Holding Co., 324 U.S. 331 (1945); Commissioner v. Wilson, 353 F.2d 184 (9th Cir. 1965); Bondy v. Commissioner, 269 F.2d 463 (4th Cir. 1959); Electrical Sec. Corp. v. Commissioner, 92 F.2d 593 (2d Cir. 1937) (L. Hand, J.). See also SURREY & WARREN, FEDERAL INCOME TAXATION 1540-45 (1960 ed.); Michaelson, *"Business Purpose" and Tax-Free Reorganization*, 61 YALE L.J. 14, 25 (1952); Rice, *Judicial Techniques in Combating Tax Avoidance*, 51 MICH. L. REV. 1021, 1043 (1953).

[11] *Compare* Revenue Act of 1932, ch. 209, § 112(g), 47 Stat. 197, *with* Revenue Act of 1934, ch. 277, § 112(a)(2), 48 Stat. 704. Had the act been passed after the Supreme Court's decision in *Gregory*, it is unlikely that spin-offs would have been denied tax-free treatment since the business-purpose doctrine provided an adequate safeguard against tax-avoidance schemes. H.R. REP. NO. 704, 73d Cong., 2d Sess., pt. 1, at 13 (1934), stated that "corporations have found it possible to pay what would otherwise be taxable dividends, without any taxes upon their shareholders [and] . . . this means of avoidance should be ended." The congressional cure of 1934 was worse than the disease. Jacobs, *Spin-Offs: The Pre-Distribution Two Business Rule—Edmund P. Coady and Beyond*, 19 TAX L. REV. 155, 159 (1964).

[12] S. REP. NO. 781, 82d Cong., 1st Sess. 58 (1951).

[13] Int. Rev. Code of 1939, § 112(b)(11), added by ch. 521, § 317(a), 65 Stat. 493 (1951).

[14] Int. Rev. Code of 1939, § 112(b)(11)(A), added by ch. 521, § 317(a), 65 Stat. 493 (1951) (now INT. REV. CODE OF 1954, § 355(b)(1)(A)).

means of a reorganization.[15] Section 355 of the Internal Revenue Code of 1954 substantially continues these two basic requirements.[16]

In *Morris*, the Commissioner argued that American had not met the requirements of section 355 because it had not continued in the active conduct of the banking business after the spin-off and merger.[17] The Tax Court avoided the issue of American's existence after the spin-off, basing its decision on a technical provision of the National Banking Act[18] which deemed *each* party to a bank merger to continue in existence after merger.[19] The Fourth Circuit rejected this approach as artificial, looking instead to the actual economic effect of the spin-off and merger and finding that both the spin-off and the merger had been dictated by sound business judgment.[20] American's banking business was continued under the national charter,[21] and the interests of its shareholders were not substantially altered.[22] The court concluded that the active-business requirement had been met, and that, viewing the transaction as a whole, there were none of the abuses which judicial and statutory limitations were designed to exclude.[23]

The Sixth Circuit, in *Curtis v. United States*,[24] reached an opposite result in a similar case, holding that the parent corporation must *intend to remain* in unaltered form following the spin-off. While section 355 was clearly applicable,[25]

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[15] Int. Rev. Code of 1939, § 112(b)(11)(B), added by ch. 521, § 317(a), 65 Stat. 493 (1951) (now INT. REV. CODE OF 1954, § 355(a)(1)(B)).

[16] See S. REP. NO. 1622, 83d Cong., 2d Sess. 50-51 (1954); Cohen, *The Internal Revenue Code of 1954: Corporate Distributions, Organizations, and Reorganizations*, 68 HARV. L. REV. 393, 429 (1955). The requirement that the separation be pursuant to a plan of reorganization was eliminated as impractical. INT. REV. CODE OF 1954, § 355(a)(2)(C); see S. REP. NO. 1622, 83d Cong., 2d Sess. 50 (1954). Additional requirements were made. INT. REV. CODE OF 1954, §§ 355(a)(1)(D)(i), (ii), 355(b)(2); see note 29 *infra*.

[17] See text accompanying note 28 *infra*. The Commissioner also contended that simultaneous amalgamating and divisive reorganizations are inherently incompatible. 367 F.2d at 796.

[18] Section 20, 73 Stat. 462 (1959), 12 U.S.C. § 215(e) (1964).

[19] 42 T.C. at 792.

[20] 367 F.2d at 799. The Tax Court had also found a valid business purpose in the transaction and carefully outlined its reasons. 42 T.C. at 787-88.

[21] As the court pointed out, the day after the merger American opened "with the same employees, the same depositors, and customers." 367 F.2d at 799. See also the discussion of the Tax Court. 42 T.C. at 792.

[22] On June 30, 1960, American transferred the assets of its insurance department to Agency in exchange for all of its common stock: 420,000 shares. American then distributed all 420,000 shares of Agency to its shareholders "on a share for share basis in accordance with their respective holdings of the 420,000 shares of American." 42 T.C. at 782. American's stockholders then exchanged their American shares for shares of stock in the merged bank, completing the transaction. Thus their equities remained the same after the spin-off and merger. See 367 F.2d at 799; 42 T.C. at 782; Note, *Tax Treatment of Corporate Divisions*, 52 COLUM. L. REV. 408, 415 (1952).

[23] 367 F.2d at 799.

[24] 336 F.2d 714 (6th Cir. 1964). The American Crayon Company was merged into the Joseph Dixon Crucible Company. Pursuant to the merger agreement, American Crayon's warehouse business was spun-off as an unwanted asset. The district court treated the transaction as a taxable dividend. Curtis v. United States, 215 F. Supp. 885 (N.D. Ohio 1963). The Sixth Circuit affirmed, stating: "It . . . appears to us that Congress plainly intended to require that the *parent* company must continue in active existence after a 'spin-off' reorganization in order for the resulting stock distribution to qualify for nonrecognition." 336 F.2d at 721.

[25] *Id.* at 715. The merger took place in 1957.

the *Curtis* court retreated to section 112(b)(11) of the 1939 Code to find congressional intent in support of its position.[26] The language of section 112(b)(11)(A) of the 1939 Code required that "any corporation which is a party to such reorganization [be] . . . *intended* to continue the active conduct of a trade or business after such reorganization."[27] In contrast, section 355(b)(1)(A) provides that both the "distributing corporation, and the controlled corporation [must be] . . . engaged *immediately after* the distribution in the active conduct of a trade or business . . . ."[28] This change of language would seem to indicate that Congress purposely abandoned the subjective test of *intent* articulated in the 1939 Code in favor of the more objective requirement that both corporations conduct active business *immediately* after the distribution. This test, coupled with the added safeguards incorporated into section 355,[29] would achieve the congressional purpose of preventing tax avoidance through the use of spin-offs, while eliminating any speculation concerning "intentions"—an element always difficult to prove.[30] The Fourth Circuit, while acknowledging the possibility of distinguishing the two cases, emphasized its disapproval of *Curtis*, stating: "We simply take a different view."[31]

The *Morris* decision is the better reasoned because the holding of *Curtis* suggests that in both cases had the distributing corporation been the survivor of the merger, the result would have been the nonrecognition of gain or loss under section 355. The Fourth Circuit was correct in stating that tax incidence should not turn on so fortuitous a circumstance,[32] nor would a literal reading of section 355 dictate such a strange result. Congress, it would seem, intended to keep the postdistribution requirements at a minimum while writing highly particularized requirements respecting the duration of the active business prior to the distribution.[33]

Many difficulties in the area of corporate reorganization stem from the conflicting interests of the Government and the business community.[34] Both favor the separation of large concerns into smaller units when done for valid business

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[26] *Id.* at 720-21; see notes 27-30 *infra* and accompanying text.

[27] Int. Rev. Code of 1939, § 112(b)(11)(A), added by ch. 521, § 317(a), 65 Stat. 493 (1951). (Emphasis added.)

[28] INT. REV. CODE OF 1954, § 355(b)(1)(A). (Emphasis added.)

[29] Immediately before the distribution, the corporation whose shares are being distributed must be controlled as provided in INT. REV. CODE OF 1954, § 368(c), by the distributing corporation. INT. REV. CODE OF 1954, § 355(a)(1)(D). The trade or business to be spun-off must have been conducted for five years prior to the distribution. INT. REV. CODE OF 1954, § 355(b)(2)(B). The business cannot be acquired in a transaction in which gain or loss was recognized within the five-year period. INT. REV. CODE OF 1954, § 355(b)(2)(C).

[30] "Section 355(a)(1)(B) does not refer to present intentions but merely to arrangements negotiated or agreed upon prior to the distribution to sell the stock or securities. Thus, any speculation concerning 'intentions,' always difficult to prove or disprove, is eliminated." Friedman, *Divisive Corporate Reorganizations Under the 1954 Code*, 10 TAX L. REV. 487, 495 (1955).

[31] 367 F.2d at 802.

[32] "Surely, the Congress which drafted these comprehensive provisions did not intend the incidence of taxation to turn upon so insubstantial a technicality." *Id.* at 799.

[33] *Compare* INT. REV. CODE OF 1954, § 355(b)(1)(A), *with* INT. REV. CODE OF 1954, § 355(b)(2).

[34] Curtis v. United States, 336 F.2d 714, 715 (6th Cir. 1964), citing Dean, *Spin-offs*, N.Y.U. 15TH INST. ON FED. TAX. 571, 590 (1957).

purposes.[35] Yet the Government is understandably adverse to the distribution of earnings and profits at capital gains rates.[36] Conflicts of these interests can best be resolved by a careful analysis of the economic and business reasons motivating the transaction, provided the literal requirements of the statute have been met as in *Morris*, rather than by an *ad hoc* categorizing of each case without regard to economic realities or congressional intent. Should possible abuse arise after *Morris*, the Commissioner has adequate redress in the pervasive judicial principles enunciated by the Supreme Court in *Gregory v. Helvering*,[37] codified in the "device" provision of section 355(a)(1)(B).[38]

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[35] Helvering v. Gregory, 69 F.2d 809, 811 (2d Cir. 1934) (L. Hand, J.); S. REP. NO. 781, 82d Cong., 1st Sess. 58 (1951). See generally BITTKER & EUSTICE, *op. cit. supra* note 8, §§ 11.02, 12.01; 3 MERTENS, *op. cit. supra* note 2, § 20.101; Friedman, *supra* note 30, at 494; Jacobs, *supra* note 11, at 156.

[36] See Gregory v. Helvering, 293 U.S. 465 (1935); INT. REV. CODE OF 1954, § 355(a)(1)(B); Int. Rev. Code of 1939, § 112(b)(11)(B), added by ch. 521, § 317(a), 65 Stat. 493 (1951); 3 MERTENS, *op. cit. supra* note 2, § 20.103.

[37] 293 U.S. 465 (1935), *affirming* 69 F.2d 809 (2d Cir. 1934); see note 8 *supra* and accompanying text.

[38] INT. REV. CODE OF 1954, § 355(a)(1)(B); see 367 F.2d at 796-97.

WILLS—SPENDTHRIFT TRUSTS—ELECTION—WHERE SURVIVING SPOUSE RENOUNCES STATUTORY FORCED SHARE IN FAVOR OF TESTAMENTARY SPENDTHRIFT TRUST, SPENDTHRIFT PROVISION MAY BE AVOIDED BY CREDITORS. *Utley v. Graves*, 258 F. Supp. 959 (D.D.C. 1966), *appeal docketed sub nom. American Security & Trust Co. v. Utley*, No. 20589, D.C. Cir., Oct. 24, 1966.

In lieu of taking a statutory share of his wife's estate, Graves elected[1] to accept the provisions of her will which named him the beneficiary of a spendthrift trust.[2] Utley, a judgment creditor of Graves, instituted garnishment proceedings against American Security & Trust Company, the trustee, for the amount of the original judgment.[3] The trustee opposed the proceeding on the ground that the spendthrift provision in the will placed the trust beyond the reach of creditors. *Held*, where the surviving spouse renounces his statutory forced share in favor

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[1] D.C. CODE ANN. § 19-113(a) (Supp. V, 1966) provides that the surviving spouse will be barred from any statutory rights in the real and personal estate of the deceased or from dower rights, if such surviving spouse was devised real estate or was bequeathed a personal estate in the will, unless he files a renunciation of the will within six months after it is admitted to probate.

[2] A spendthrift trust is "one in which, by direction of the settlor or as a result of a statute, the right of the beneficiary to payments is not transferable by him or liable to be taken for the collection of his debts." BOGERT, TRUSTS AND TRUSTEES § 221, at 623 (2d ed. 1965). No special words are required to create a spendthrift trust. The courts will generally look to the intent of the testator as expressed in the language actually used. Morrow v. Apple, 58 App. D.C. 171, 172, 26 F.2d 543, 544 (1928).

[3] Graves defaulted on a promissory note, dated April 22, 1966, in the amount of $4,396.90.

of a testamentary spendthrift trust, the spendthrift provision may be avoided by his creditors.[4]

In England, with one exception,[5] spendthrift trust provisions have been rejected because of the common-law bias against restraints on alienation.[6] American courts have generally allowed the settlor to condition his gift,[7] reasoning that the beneficiary's creditors were not injured,[8] since the spendthrift provision withdrew nothing which was ever subject to their claims or upon which they may have relied.[9]

Where the donee gives consideration in return for the creation of the trust, however, he is considered a purchaser for value, and the spendthrift provisions are invalid.[10] To hold otherwise would allow the purchaser to exchange assets available to creditors for property secure from their claims, thereby frustrating their expectations.[11] Consideration has been construed to include the payment of incumbrances on the trust property by the beneficiary,[12] placing of improve-

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[4] Utley v. Graves, 258 F. Supp. 959, 961 (D.D.C. 1966) (Holtzoff, J.), *appeal docketed sub nom.* American Security & Trust Co. v. Utley, No. 20589, D.C. Cir., Oct. 24, 1966.

[5] The Court of Chancery permitted clauses restraining the alienation of a married woman's interest in order to avoid her common-law disabilities and thus not subject the estate to her husband's control. See, *e.g.*, *In re* Grey's Settlements, 34 Ch. D. 85 (1886); *In re* Currey, 32 Ch. D. 361 (1886); Baggett v. Meux, 1 Ph. 627, 41 Eng. Rep. 771 (Ch. 1846); Jackson v. Hobhouse, 2 Mer. 483, 35 Eng. Rep. 1025 (Ch. 1817).

[6] *E.g.*, Davidson v. Chalmers, 33 Beav. 653, 55 Eng. Rep. 522 (Ch. 1864); Younghusband v. Gisborne, 1 Coll. 400, 63 Eng. Rep. 473 (Ch. 1844); Brandon v. Robinson, 18 Ves. Jr. 429, 34 Eng. Rep. 379 (Ch. 1811). Restrictions on alienability "presumably had adverse sociological and economic consequences." BERGIN & HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 184 (1966).

[7] The legality of spendthrift trusts is maintained, by case or statute, with or without qualification, in all but four states: Kentucky, New Hampshire, Ohio, and Rhode Island. BOGERT *op. cit. supra* note 2, § 222, at 648 nn.16 & 17. Spendthrift trusts are valid in the District of Columbia. Morrow v. Apple, 58 App. D.C. 171, 26 F.2d 543 (1928); Fearson v. Dunlop, 21 D.C. (Tuck. & Cl.) 236 (1892); see Seidenberg v. Seidenberg, 126 F. Supp. 19 (D.D.C. 1954), *aff'd*, 96 U.S. App. D.C. 245, 225 F.2d 545 (1955).

[8] Where a spendthrift trust is held to be valid in relation to general creditors, certain creditors are considered to have special equities behind their claims and may attach regardless of the spendthrift provision. See Seidenberg v. Seidenberg, 96 U.S. App. D.C. 245, 225 F.2d 545 (1955) (claim for child support); Mercantile Trust Co. v. Hofferbert, 58 F. Supp. 701 (D. Md. 1944) (claim for federal income tax deficiency); Summers v. Summers, 177 Neb. 365, 128 N.W.2d 829 (1964) (claim for maintenance of wife).

[9] *E.g.*, Nichols v. Eaton, 91 U.S. 716, 726 (1875); McColgan v. Walter Magee, Inc., 172 Cal. 182, 186, 155 Pac. 995, 997 (1916); Fearson v. Dunlop, 21 D.C. (Tuck. & Cl.) 236, 241 (1892); Broadway Nat'l Bank v. Adams, 133 Mass. 170, 173-74 (1882).

[10] McColgan v. Walter Magee, Inc., 172 Cal. 182, 155 Pac. 995 (1916); Security Trust Co. v. Sharp, 32 Del. Ch. 3, 77 A.2d 543 (Ch. 1950); Vanderbilt v. Balsan, 190 Misc. 824, 77 N.Y.S.2d 403 (Sup. Ct. 1948).

[11] The expectation is one of any creditor to be paid and is not a question of reliance on any specific property. See Schenck v. Barnes, 156 N.Y. 316, 50 N.E. 967 (1898).

> It would be a startling and revolutionary doctrine to hold that this reserved interest cannot be reached by the plaintiff as a creditor. If such is the law it would make it possible for a person free from debt to place his property beyond the reach of creditors, and secure to himself a comfortable support during life, without regard to his subsequent business ventures, contracts or losses.

Id. at 321, 50 N.E. at 968.

[12] Gilkey v. Gilkey, 162 Mich. 664, 127 N.W. 715 (1910).

ments on trust property by beneficiary,[13] creation of reciprocal trusts,[14] creation of trust in contemplation of marriage,[15] and the voluntary relinquishment of dower or curtesy rights.[16]

In *Utley*, a case of first impression,[17] the court decided that the renunciation of the forced share constituted consideration for the creation of the trust, thus invalidating its spendthrift provisions. The court relied on *Bank of Commerce v. Chambers*[18] which held that the election was consideration when the will *expressly* required that acceptance of the trust was to be in lieu of either dower or curtesy.[19] There was no such provision in *Utley*, and the beneficiary contended that the absence of such provision evidenced the fact that the creation of the trust was free and voluntary and not the product of bargaining between settlor and beneficiary.[20] The court, however, did not address itself to the settlor's intention, in effect holding the absence of the express provision to be immaterial.

There are decisions, not involving spendthrift provisions, holding that the lack of an express provision is immaterial regarding the giving of consideration for the bequest. These cases,[21] involving priority and tax questions, are distinguishable for they dealt with unique policy considerations. If the settlor's intention to make an offer is the crucial factor in determining whether consideration was given, then the absence of an express provision requiring an election would have been material in *Utley*. The courts, however, have never been concerned with the settlor's intention,[22] but have only required that the beneficiary give up

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[13] Woodruff v. Johnson, 8 N.J. Eq. 729 (Ct. Err. & App. 1851); State v. Nashville Trust Co., 28 Tenn. App. 388, 190 S.W.2d 785 (1944).

[14] Security Trust Co. v. Sharp, 32 Del. Ch. 3, 77 A.2d 543 (Ch. 1950); *cf.* Commissioner v. Warner, 127 F.2d 913 (9th Cir. 1942); Lehman v. Commissioner, 109 F.2d 99 (2d Cir.), *cert. denied*, 310 U.S. 637 (1940).

[15] Brown v. Macgill, 87 Md. 161, 39 Atl. 613 (1898); Jackson v. Von Zedlitz, 136 Mass. 342 (1884).

[16] ReQua v. Graham, 187 Ill. 67, 58 N.E. 357 (1900); Bank of Commerce v. Chambers, 96 Mo. 459, 10 S.W. 38 (1888). *Contra*, Robertson v. Schard, 142 Iowa 500, 119 N.W. 529 (1909); Merchants Nat'l Bank v. Crist, 140 Iowa 308, 118 N.W. 394 (1908).

[17] A Pennsylvania court was presented with the same factual pattern; however, it dismissed the case on procedural grounds, never reaching the merits. Miners Bank v. Weitzenkorn, 32 Luz. L. Reg. Rep. 129 (Pa. C.P. 1937).

[18] 96 Mo. 459, 10 S.W. 38 (1888).

[19] "The provisions herein made for my husband are upon condition that within six months after the probate of my will, he by deed, duly executed and in the said city of St. Louis duly recorded, release any right, title or estate as tenant by the curtesy he may have." *Id.* at 464, 10 S.W. at 40.

[20] Brief for Defendant, p. 2.

[21] In cases concerning the priority of legatees under the will, the surviving spouse, who has elected by operation of statute to take the bequest, has generally been deemed a purchaser so that his bequest might prevail against the claims of the other legatees. *E.g.*, Farnum v. Bascom, 122 Mass. 282, 288 (1877); Towle v. Swasey, 106 Mass. 100, 102 (1870); *In re* Denis' Estate, 169 Pa. 493, 495, 32 Atl. 436, 438 (1895); see Appeal of Kline, 117 Pa. 139, 11 Atl. 866 (1887). The tax court found for income tax purposes that a surviving spouse who elected by reason of statutory option was a purchaser for value of a testamentary trust. Fidelity-Philadelphia Trust Co., 25 B.T.A. 1359 (1932), *rev'd*, 63 F.2d 949 (3d Cir. 1933); Julia Butterworth, 23 B.T.A. 838 (1931), *rev'd*, 63 F.2d 944 (3d Cir. 1933). The Supreme Court, however, affirmed the reversal of these decisions on the ground that Congress had not intended the beneficiary under such circumstances to be a purchaser of the trust for tax purposes. Helvering v. Butterworth, 290 U.S. 365 (1933).

[22] If the court had focused on the settlor's intentions to make an offer, it might have still

something of substantial value in order that he be deemed a purchaser of the trust.[23] In *Utley*, the effect was the same whether the election was called for by express provision of the will or by operation of statute[24]—the creditor's rights were substantially impaired—and this effect was the court's primary consideration.[25]

This decision makes it impossible for an individual to create a testamentary spendthrift trust for his surviving spouse, which eliminates a prevalent use of these trusts.[26] The decision is, nevertheless, validly based on the court's concern with impairment of creditors' rights. Some commentators, however, question the desirability of such a far-reaching result.[27] It would seem that the court could have achieved a more logical result by voiding the trust's spendthrift provisions only to the extent of the consideration given by the beneficiary.[28] This is the amount that the creditors could have attached before the creation of the trust, and only this amount is the true measure of the detriment which they have suffered.[29] This approach would permit a testator to create a spendthrift trust for his spouse's benefit and yet not impair the rights of the beneficiary's creditors.

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reached the same result. See Mead v. Phillips, 77 U.S. App. D.C. 365, 372, 135 F.2d 819, 826 (1943) (dictum).

[23] See ReQua v. Graham, 187 Ill. 67, 58 N.E. 357 (1900); Bank of Commerce v. Chambers, 96 Mo. 459, 10 S.W. 38 (1888).

[24] "It would not seem to be material whether the will contains an express provision requiring an election. The same result should follow where the election occurs as a matter of law, the legal effect of accepting the bequest being to bar the curtesy interest." GRISWOLD, SPENDTHRIFT TRUSTS § 489, at 562 (2d ed. 1947).

[25] "If the doctrine [of spendthrift trusts] is to be sustained at all, it must rest exclusively on the rights of creditors." Nichols v. Eaton, 91 U.S. 716, 725 (1875).

[26] A settlor will now rely on either a trust-for-support or a discretionary trust, instead of a spendthrift trust, in order to immunize the beneficiary's interest from creditors' claims. A support trust by its nature cannot be attached by the creditors, while under a discretionary trust, the creditor has no right to compel payment, since the beneficiary himself cannot compel payment. Yet neither of these might satisfy completely the settlor's desires. For a more comprehensive treatment see BOGERT, *op. cit. supra* note 2, §§ 228-29.

[27] They feel that such a result is contrary to public policy in jurisdictions, such as the District of Columbia, where the validity of spendthrift trusts is maintained. RESTATEMENT (SECOND), TRUSTS § 156, comment *f* (1959); 1 SCOTT, TRUSTS § 156.3 (2d ed. 1956).

[28] See Gilkey v. Gilkey, 162 Mich. 664, 127 N.W. 715 (1910). In the instant case, the defendant would have been entitled to a statutory share of $171,945.76 whereas his trust estate was valued at $150,802.05. Brief for Appellee, p. 13, American Security & Trust Co. v. Utley, *appeal docketed*, No. 20589, D.C. Cir., Oct. 24, 1966.

[29] "This is all they could have reached, if he had elected to take curtesy instead of accepting the provisions of the will." 1 SCOTT, TRUSTS § 156.3, at 787 (2d ed. 1956).

BOOK COMMENTS

Averbach, Albert, and Price, Charles, eds. THE VERDICTS WERE JUST. Rochester: Lawyers Co-operative Publishing Co., 1966. Pp. ix, 277.

This anthology consists of accounts of eight famous trials related by the attorneys who handled the cases. The narratives depict the strategy of trial practice, but more so the numerous events leading up to the suit which ultimately affect the outcome. The subjects of the trials are varied, including negligence and products liability cases as well as the Eichmann and Chessman trials. Through these examples, the editors intend to inform the general reader of the characteristics and responsibility of the trial lawyer.

Cary, William L. POLITICS AND THE REGULATORY AGENCIES. New York: McGraw-Hill, 1967. Pp. 149. $5.95.

This study examines the major regulatory agencies and their relationship with the Executive and Congress. Since the powers of the agencies are limited by their budgets, the author analyzes the effects of this direct congressional control. On the other hand, there are the problems of passing legislation sponsored by the agency. Often this cannot be accomplished absent the lobbying support of the industries affected. Other topics are the general difficulty of maintaining a vital practice within the agency, recruiting talent, and planning policy in advance. The independence of the regulatory commissions is necessary, but not at the expense of the ability to effectuate their policy with the required funds and legislators.

Christensen, Thomas, ed. N.Y.U. NINETEENTH ANNUAL CONFERENCE ON LABOR LAW. Washington, D.C.: Bureau of National Affairs, 1967. Pp. xii, 444.

This volume is a series of lectures covering recent significant developments in labor law. The first major topic is the duty to bargain, considered in relation to union-authorization cards and the duty in the absence of formal certification. Other bargaining subjects treated are pattern bargaining and the antitrust laws, defamation suits arising from negotiations, mandatory issues and the demands by the unions for information. The labor problems in municipal employment and education are covered, in addition to the disputes in nonprofit institutions such as voluntary hospitals. Another important area is the effect of recent legislation on the traditional labor problems. Title VII of the Civil Rights Act and Medicare are specifically analysed. The concluding lectures focus on arbitration and grievance procedures, the effect of sale or merger on the collective-bargaining agreement, and the recent interpretations and extensions of the Supreme Court's *Fibreboard* decision.

Magrath, C. Peter. YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC. Providence, Rhode Island: Brown University Press, 1966. Pp. ix, 243. $6.00.

Professor Magrath chronicles the Georgia land scandal and the events

surrounding the Supreme Court decision in *Fletcher v. Peck.* Beginning with the original sale of 1795, which was rescinded by the Georgia legislature, the author traces the dispute through the state and national levels, developing the political alliances which influenced the ultimate result. The role of the anti-Yazooists, led by James Jackson, in upsetting the validity of the original sale transformed the dispute into a controversy over states rights which divided the Republican party. When the Yazooists brought their case before the courts, the controversy over the federalist makeup of the judiciary caused a delay. After a decision by the Supreme Court on the pleadings the counsel agreed to waive all exceptions to the pleadings thereby limiting the case to the merits of the Yazooist claims. Mr. Chief Justice Marshall used the case to assert the constitutional prohibition against the impairment of contracts and for the development of the vested rights theory. This was to have a profound influence on constitutional law for the rest of the century. The Yazooists then obtained a compensation bill. *Fletcher v. Peck* is also demonstrative of the influence of organized pressure groups on decisions, but the author concludes that more important is the prevailing attitude of society on the merits of the litigant's rights.

Schwartz, Bernard. THE ROOTS OF FREEDOM. New York: Hill and Wang, Inc., 1967. Pp. vii, 248. $5.75.

Professor Schwartz traces the constitutional history of England from the time of the Norman Conquest describing the growth of parliamentary government and the decline of the monarchy. The growth of English law is also considered in relation to its influences on American law. In the course of this history, the author treats the major figures in the legal system and their contributions. The basic focus, however, is on the development of the constitutional principles.

Schwartz, Louis. FREE ENTERPRISE AND ECONOMIC ORGANIZATION (3d ed.). Brooklyn: Foundation Press, 1966. 2 vols.

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