The Chief Justice

Supreme Court of the United States.

Memorandum.

10/3, 1946

Re Memo Concerning No. 5, Elec. Power & Light Corp. v. S.E.C., et al.

Dear Chief:

In my opinion the argument set for October 14 should be held as scheduled.

W.O.D.

Supreme Court of the United States.
Mr. Justice Black's Chambers
Memorandum.

October 4., 1946

To: The Chief Justice

In re No. 5, Electric Power & Light Corporation v. S.E.C.

I think we should hear argument on October 14th.

H.L.B.

Supreme Court of the United States
Washington, D. C.

Ch Cases

October 3, 1946

MEMORANDUM TO THE CHIEF JUSTICE

Replying to your memorandum of October 2 as to a postponement of the date for the reargument in Cases Nos. 4 and 5 (American Power & Light Co. v. S.E.C., and Electric Power & Light Corp. v. S.E.C.) it seems clear to me from the correspondence that the argument should not be postponed.

H.H.B.

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

October 2, 1946

Dear Chief:

Answering your inquiry regarding the deferment of argument in Electric Power & Light v. S. E. C. in view of the matters set forth by counsel, I am of the opinion that the contingencies which might render the case moot through compliance with the order of the S. E. C. are too remote and speculative to warrant further postponement. The cases have been on the docket for several years, and I am of the opinion that they should be heard as scheduled.

Faithfully yours,

F. F.

The Chief Justice

Original Filed in VIP Correspondence File

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
JUSTICE FRANK MURPHY

October 9, 1946

Dear Chief Justice,

I have read carefully the correspondence you circulated in Nos. 4 and 5, American Power & Light Co. v. S. E. C., and Electric Power & Light Corp. v. S. E. C.

I see nothing therein that should change the status of these cases in any way. Certainly they are not moot merely because new plans have been submitted to the S. E. C. And I see no valid reason for postponing argument. It is well that we know the facts contained in these letters, but we should not delay our proceedings merely because the petitioners have submitted new plans which may or may not be acceptable to the S. E. C. It seems to me that the S. E. C. would do nothing to make these cases moot before our decision comes down.

It is my view, therefore, that nothing should be done about this matter and that the cases should be argued and decided as scheduled.

As you may know, I have a peculiar interest in these cases. The late Chief Justice assigned them to me for opinion last term, along with the North American and Engineers Public Service cases. I had finished most of the work on the Engineers Public Service and the American Power & Light - Electric Power & Light opinions and was about ready to circulate them when, unfortunately, the good Chief Justice died, destroying the necessary quorum. I have done additional work on these cases this past summer and can get them out in short order should the decisions be the same.

With every good wish,

Sincerely,

Frank Murphy.

Mr. Chief Justice Vinson

Original Filed in VIP Correspondence File

Supreme Court of the United States.

Memorandum.

October 8, , 1946

Justice Douglas informs that he is disqualified in these cases.

Supreme Court of the United States.

Memorandum.

----------, 194

No 5 - Oct Term 1946
Elec Light & Power vs S.E.C.
I disqualified since it
involved a question on which
I filed a brief as Assistant
Atty Gen

Jackson

Supreme Court of the United States.

Memorandum.

October 2, 1946

Memorandum to the Associate Justices

From: The Chief Justice

I would appreciate receiving your views in regard to the attached.

F.M.V.

Disqualified—S.F.R.

COPY

CAHILL, GORDON, ZACHRY & REINDEL
(Cotton & Franklin)

Sixty-Three Wall Street

New York 5

September 23, 1946.

Dear Mr. Chief Justice:

The case of Electric Power & Light Corporation v. Securities and Exchange Commission, which is No. 5 on the calendar of the Court for the October Term, 1946, was argued in November, 1945, but due to the lack of a quorum resulting from the death of the late Chief Justice Stone, remains undecided. It has been set for reargument on October 14, 1946. I am counsel for the petitioner in that case, Electric Power & Light Corporation.

The appeal involves an order issued by the Securities and Exchange Commission on August 22, 1942, requiring the dissolution of Electric Power & Light Corporation pursuant to Section 11 of the Public Utility Holding Company Act.

Since the prior argument of the appeal, a plan for compliance by Electric with that Act was formulated after lengthy conferences with the staff of the Commission, and was filed with the Commission. Hearings on the plan have been closed and the oral argument on the plan before the Commission has been completed. If the plan is carried out, the appeal in this Court will become moot. There is enclosed a memorandum outlining the status of the plan proceeding in this regard.

I have discussed this matter with the Solicitor for the Commission, who tells me that he has discussed it with representatives of the Solicitor General's office, and both he and the Solicitor General desire argument on October 14th. This is entirely satisfactory to me.

However, I felt it my duty as an attorney to call to the attention of this Court, before argument, the possibility that this case may become moot before decision. I am not requesting the Court to take any action with respect to postponing the argument or otherwise, but I felt that the Court was entitled to be advised in advance of the argument of the status of the case in this regard.

I am sending copies of this letter to the Solicitor General, the Solicitor for the Commission, and counsel for American Power & Light Company, the petitioner in the companion case, No. 4 in the October Term, 1946.

Respectfully yours,

(Signed) DANIEL JAMES.

Honorable Frederick M. Vinson,
Chief Justice of the United States,
Supreme Court of the United States,
Washington 13, D. C.

(Enclosure)

COPY

MEMORANDUM September 23, 1946.

Re: Electric Power & Light Corporation
v. Securities and Exchange Commission

No. 5, October Term, 1946

This appeal involves a decision of the Circuit Court of Appeals for the First Circuit affirming an order issued by the Securities and Exchange Commission on August 22, 1942, requiring the dissolution of Electric Power & Light Corporation (herein called Electric) pursuant to Section 11 of the Public Utility Holding Company Act of 1935.

In connection with subsequent proceedings before the Securities and Exchange Commission (SEC Docket No. 54-139), a plan for compliance by Electric with Section 11 of the Public Utility Holding Company Act was proposed on July 1, 1946, by Electric and its parent company, Electric Bond and Share Company. That Plan, as its first paragraph recites, is a compromise arrived at by the managements of the two proponent companies in the light of conferences with the staff of the Commission.

The Plan also adverts to the appeal in the Supreme Court, referred to above, and says that, since the carrying out of the Plan will render that appeal moot, Electric will consent to the dismissal of the writ of certiorari or will take other appropriate steps to terminate the appeal.

The Plan involves, as one step in its accomplishment, the formation of a new company, to which are to be transferred the holdings of Electric in four electric utility subsidiaries operating in Arkansas, Louisiana and Mississippi. With respect to the time when the dissolution appeal will become moot, Electric has informed the Commission that the appeal may be dismissed with Electric's consent upon the carrying out of the foregoing step in the Plan.

Hearings on the Plan were closed in August, 1946, and oral argument before the Commission was held on Friday, September 20th. The Plan awaits decision by the Commission on the question of whether it should be approved.

The program for carrying out the Plan contemplates that after approval by the Commission, the Plan will be submitted to a United States District Court for enforcement

under the provisions of Section 11(e) of the Public Utility Holding Company Act. It will then be submitted to the preferred stockholders of Electric, and under its provisions it will become effective when 60% or more of the outstanding preferred stock is deposited under the Plan or when declared effective by the proponents upon the deposit of a smaller percentage of shares. In that connection, therefore, it is relevant to point out that a question as to the feasibility of the Plan exists in the present unsettled state of stock market conditions, because the major changes in the market have taken place since the closing of the record in August.

However, the staff of the Commission has agreed in principle with the Plan as a method of complying with the Public Utility Holding Company Act, including the formation of the new company and the transfer to it of the electric utility subsidiaries in Arkansas, Louisiana and Mississippi, but the staff has stated that it feels such transfer should coincide with the taking of the other steps for compliance which are provided for in the Plan. The statement to the Commission of the staff's position, as shown by the transcript of the oral argument before it, is set forth in the appendix to this memorandum. For an understanding of the statement by Commission counsel set forth in the appendix, it may be noted that the ALMNO companies referred to by him are the subsidiaries mentioned in this paragraph.

In view of the fact that the Plan was worked out in the light of conferences with the staff of the Commission and in view of the staff's agreement in principle with the Plan, the solution of problems under the Public Utility Holding Company Act presented by the Plan would seem to have more than an ordinary chance for approval by the Commission.

C O P Y

APPENDIX

STATEMENT OF COUNSEL FOR SECURITIES AND EXCHANGE COMMISSION REGARDING PLAN OF ELECTRIC POWER & LIGHT CORPORATION.

The staff desires to address itself to only one aspect of the joint plan filed by Electric and Bond and Share -- the aspect which relates to the transfer of Electric's interest in its ALMNO subsidiaries; i.e., Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service, Inc., to a newly organized holding company. The staff desires to make the following statement:

We believe that there is nothing in the order of the Commission directing the dissolution of Electric which prevents the creation of a new holding company which would acquire such of Electric's properties as the Commission found would constitute a retainable system or systems under the Act and which would thereafter be disposed of by Electric. For Example, the Commission recently approved the formation of a new holding company by American Power & Light Company, which is also under order of dissolution, and permitted the transfer of securities to the new holding company after finding that the properties to be controlled constituted an integrated system, subject to the requirement that American dispose

of the securities of such new holding company within a period of one year.

Generally speaking, under the applicable standards of Section 10 of the Act, such transfers to and acquisitions by such new holding company should not be permitted by the Commission unless the properties proposed to be acquired are found by the Commission to constitute a utility system or systems retainable by such new holding company under the integration standards of the Act. In the present case, however, the staff of the Commission, in the light of the reservation or jurisdiction with respect to all 11(b)(1) problems contained in the joint plan, has no objection to those aspects of the joint plan which provide for the creation of a new holding company and the acquisition by it of the ALMNO companies prior to a determination of what properties can ultimately be retained by such holding company under the integration standards of the Act. Such acquisitions by the new holding company are to coincide with, are an integral part of, and appear to be necessary to facilitate and expedite the accomplishment of other major steps required by Section 11: the separation from common

control with the ALMNO companies of United Gas Corporation and its subsidiaries, the satisfaction and retirement of Electric's preferred stocks with their heavy arrearages, the dissolution of Electric, and the divestment by Bond and Share of its interests (present and to be acquired pursuant to the plan) in Electric and its subsidiaries. In view of the fact that the joint plan proposes steps which represent major steps toward compliance with Section 11, we believe that the Commission should conclude that it is appropriate, as an aid to the expeditious accomplishment of these steps, to defer its decision as to the status under Section 11 of the properties proposed to be acquired by the new company. Under the circumstances and assuming that the transfer by Electric of ALMNO's securities to a new holding company as contemplated by the joint plan coincides with the taking of the other major steps toward compliance with Section 11 contemplated by the plan and notwithstanding that Section 11 problems as to the status of the new holding company and its subsidiaries remain, the staff has no objection to the creation of the new holding company.

COPY

ROOT, BALLANTINE, HARLAN, BUSHBY & PALMER

31 Nassau Street

New York 5

September 26, 1946

Honorable Fred M. Vinson, Chief Justice,
Supreme Court of the United States,
Washington, D. C.

Re: American Power & Light Company v. S.E.C.
No. 4 - October Term 1946

Dear Sir:

We have received from Daniel James, Esq., counsel for the appellant in the case of Electric Power & Light Corporation versus Securities and Exchange Commission, No. 5 on the calendar of the Court for the October Term, 1946, a copy of the letter of September 23, 1946, which Mr. James sent to you.

We represent the appellant in the American Power & Light Company case which also involves an order issued by the Securities and Exchange Commission on August 22, 1942. That order required the dissolution of American Power & Light Company pursuant to Section 11 of the Public Utility Holding Company Act. The case was argued before this Court in November, 1945, with the Electric Power & Light Corporation case, and both are set for reargument on October 14th.

Pending the disposition of the appeal American Power & Light Company has filed with the Commission a plan for retirement of its preferred stocks. No hearings have as yet been held on the plan. Should the plan be approved by the Commission and by a District Court the validity of the dissolution order would become moot. Whether or not the plan can be consummated will not be known for some months.

We have discussed with counsel for the Securities and Exchange Commission whether under these circumstances the appeal should be argued as set. They expressed the view that the legal questions presented by the appeal should be determined. It is, therefore, our expectation to argue the appeal on October 14th as now set.

We are sending copies of this letter to the Solicitor General, counsel for the Securities and Exchange Commission and counsel for Electric Power & Light Corporation.

Respectfully yours,

(Signed) ARTHUR A. BALLANTINE

XXXXXXXXXXX
Solicitor

September 27, 1946

The Chief Justice

The Supreme Court

Re: Electric Power & Light Corporation v. S.E.C. and American Power & Light Company v. S.E.C., Nos. 5 and 4, October Term 1946.

My dear Mr. Chief Justice:

Daniel James, Esquire, of counsel for Electric Power & Light Corporation, has sent me a copy of his letter to you dated September 23, 1946. While the letter does not request deferment of the reargument in Electric Power & Light Corporation v. Securities and Exchange Commission, No. 5, this term, and correctly states that the Commission, after discussion with representatives of the Solicitor General, opposes deferment of that argument, I believe I should state the reasons why the Commission takes this position.

The reason given by Mr. James for possible deferment of the argument is his belief that the case may become moot before decision through voluntary compliance by Electric Power & Light Corporation with the contested dissolution order of the Commission. As indicated in the accompanying memorandum, the Commission believes that this possibility is at best an uncertain one. The carrying out of the plan of Electric Power & Light Corporation, now pending before the Commission, is contingent upon resolution favorable to the proponent companies, both by the Commission and by any reviewing court, of objections which have been vigorously urged by public security holders and, in addition, as the companies have conceded, upon a return of stock market conditions comparable to those existing on July 1, 1946, when the plan was filed. It would seem that Electric itself does not regard the possibility of voluntary compliance as sufficiently certain to warrant dismissal of its petition for a writ of certiorari.

More fundamentally, it is our view that even a very good possibility of voluntary compliance with a contested order under Section 11(b) of the Public Utility Holding Company Act would not warrant permitting proceedings for review of the

order to continue indefinitely upon the docket of a reviewing court. It should be noted that during the entire period of contested administrative hearings and of judicial review with respect to orders of the Commission under Section 11(b) of the Act there has been widespread voluntary compliance by the industry, both in the case of companies which were contesting the Commission's orders and of those which have not done so. Electric Power & Light and other holding companies in the Electric Bond and Share system have been no exception. In fact it was pointed out in the Government's brief in the American Power & Light and Electric Power & Light cases that a sister holding company, National Power & Light, had accepted, without seeking judicial review thereof, a dissolution order similar to that contested by the petitioners and had virtually completed compliance. It was also noted that, despite the pendency of their review proceedings, American Power & Light and Electric Power & Light had made substantial progress towards compliance, and that both companies had originally announced to their stockholders that they did not intend to seek review of the orders involved. (See Government's brief, pp. 19-20, 22-23, 109-124.) There is thus nothing novel in the possibility of voluntary compliance by Electric while contesting the Commission's order in the courts.

We believe this overlapping between compliance and litigation is inevitable so long as Electric desires to litigate the legal necessity for taking steps which it may recognize to be desirable and in the interest of its security holders. What appears to us to be at stake is its desire to retain control over the time schedule for compliance. While voluntary compliance was anticipated by Congress, it is an essential part of the legislative scheme that effective compulsory processes be available both as an incentive to voluntary compliance and for use in case voluntary compliance should fail of accomplishment with reasonable expedition. To that end Section 11(b) makes it "the duty of the Commission, as soon as practicable after January 1, 1938," to enter compulsive orders defining the action to be required of each registered holding company and subsidiary to comply with the statute. Such orders are reviewable in the Circuit Court of Appeals and on certiorari in this Court for the very purpose, we believe, of eliminating any possible controversy prior to the enforcement stage, in the event that the Commission should find it necessary to apply to a district court for enforcement under Section 11(d). This legislative purpose cannot be achieved if proceedings

on review are to be suspended, in the hope of voluntary compliance, until the time when the Commission finds it necessary to seek district court enforcement. Thus, while no stay of the Commission's order has been sought pending review, there is a practical, if not a legal, obstacle to seeking district court enforcement proceedings while the case is pending on review.

It seems to us, therefore, that irrespective of the risk of actually jeopardizing enforcement, to permit the case to remain on the Court's calendar without a decision on the merits would be an unwarranted departure from the enforcement scheme prescribed by the Congress. This is quite apart from the futility of speculating as to whether voluntary compliance may or may not precede decision by this Court. It should not be overlooked that whether or not the case remains upon the calendar for disposition is one of the imponderables which may well affect the timing of the companies' efforts for voluntary compliance.

This letter has been discussed with the Solicitor General who has authorized me to state that he agrees with the view of the Commission that argument in the Electric Power & Light case should not be deferred.

Since this letter was prepared I have received a copy of the letter dated September 26, 1946, sent to you by Arthur A. Ballantine, Esquire, of counsel for American Power & Light Company. Since the possibility of the American Power & Light case becoming moot before decision is, if anything, more remote than the Electric Power & Light case, it has not seemed necessary to deal separately with Mr. Ballantine's letter.

Copies of this letter and the enclosure are being sent to counsel for petitioners and I am also enclosing additional copies for distribution among other members of the Court in the event that this may be desired.

Respectfully yours,

Roger S. Foster
Solicitor

Encls:

September 27, 1946

MEMORANDUM

Re: Electric Power & Light Corporation
v. Securities and Exchange Commission

No. 5, October Term, 1946

The letter of September 23, 1946 of Daniel James, Esq., counsel for Electric Power & Light Corporation (Electric), encloses a memorandum outlining the status of the plan filed by Electric for compliance with Section 11 of the Public Utility Holding Company Act. The memorandum briefly refers to the plan and the steps to be taken thereunder and concludes:

> "In view of the fact that the plan was worked out in the light of conferences with the staff of the Commission and in view of the staff's agreement in principle with the plan, the solution of problems under the Public Utility Holding Company Act presented by the plan would seem to have more than an ordinary chance for approval by the Commission."

Relying upon his premise that Electric's plan "would seem to have more than ordinary chance for approval by the Commission", Mr. James is, in effect, suggesting that Electric's appeal from the Commission's dissolution order has such likelihood of becoming moot in the near future that it would be wasteful of the Court's time to hear argument upon and decide the appeal. We believe, based on Mr. James' own admissions before the Commission and on the circumstances surrounding the plan, that Mr. James' premise is unsound.

In the first place, the plan has been vigorously contested in briefs and oral argument before the Commission by representatives of holders of a substantial amount of Electric's First Preferred stock, representatives of its Second Preferred stock, and by a common stockholder of Bond and Share. The intensity of the opposition and the large stockholdings of the opposing groups suggest the possibility of protracted court litigation in the event the Commission should approve the plan and, therefore, considerable delay before the plan can be consummated even if it is eventually upheld upon appeal.

As Mr. James himself has admitted, moreover, the plan is not feasible under present circumstances; its feasibility is dependent upon a sharp rise in current market price levels of utility stocks--a rise which Electric and Bond and Share optimistically hope will occur but which, obviously, is highly speculative. The

plan provides for the creation of a new holding company, the transfer to such company of Electric's holdings in Arkansas Power & Light Company, Mississippi Power & Light Company, Louisiana Power & Light Company, and New Orleans Public Service, Inc.--the so-called "Southern System"--the settlement of claims between Electric Bond and Share Company and Electric, the retirement of Electric's preferred stocks by voluntary exchange offers of portfolio securities or, in the alternative, by specified cash payments, and the dissolution of Electric.

As to the new holding company and the transfer to it of the electric utility subsidiaries in Arkansas, Louisiana, and Mississippi, the plan provides that the Commission will reserve jurisdiction to determine whether, under the standards of Section 11(b)(1), such properties can be retained by the new holding company. As the Commission's staff stated to the Commission in the oral argument in the Electric case, the staff has no objection to the creation of such holding company prior to a determination by the Commission of the status under Section 11(b)(1) of the properties to be controlled by it as long as the creation of such new holding company is an integral part of the plan and aids materially in the expeditious accomplishment of the other aspects of the plan which represent major steps in compliance with Section 11(b). The staff's statement to the Commission is set forth in the appendix to Mr. James' memorandum.

The plan offers to the holders of the $7 Preferred stock 10 shares of United Gas Corporation common stock (United Gas is a subsidiary of Electric), or 9 shares of the new company's common stock, or $192 in cash. Similar offers, purportedly proportionate to the interests involved, are made to Electric's $6 Preferred stock and to its $7 Second Preferred stock. The plan is to become effective in the event holders of 60 percent of the Preferred stocks accept securities in exchange for their Preferred stocks, but Electric and Bond and Share reserve the right to declare such exchange offer effective upon acceptance by a lesser number of shares.

The ratios of exchange of securities for Electric's Preferred stocks were geared to the approximate market value of the common stock of United Gas and the estimated market value of the new company as of June 1946. It was at that time that the general features of the plan were discussed with the staff. Obviously, in order for this type of plan to be feasible, there must be a reasonable relationship between the market value of the securities offered to the Preferred stockholders and the cash alternative. It appears that while the exchange offer and the cash alternative may have been in reasonable relation to

each other market-wise at the time the plan was filed, the recent downward changes in the market have destroyed the relationship. At September 24, 1946 the market price of United Gas common was approximately $15-3/8 per share as compared with a range of $19-1/8 to $20-1/8 per share when the plan was discussed in June and $19-1/8 when the plan was filed on July 1, 1946. It becomes apparent in the light of present market conditions that the great majority of $7 Preferred stockholders, for example, would, in all liklihood, elect to receive $192 in cash as against 10 shares of United Gas common stock having a present market value of approximately $154. This situation is equally applicable to Electric's other classes of Preferred stock. Under these circumstances the plan would almost certainly not become effective because, unless a substantial proportion of Preferred stockholders are willing to accept the securities offered in exchange for their Preferred stock rather than taking cash, Electric would be faced with huge cash requirements. For example, if all security holders took cash rather than securities, Electric's cash requirements would be $158,282,917.

That the plan is no longer feasible is recognized by Electric and its counsel. In the oral argument before the Commission on September 20, 1946, Mr. James said:

> "That brings me to the question of the feasibility of this plan. The record of the plan was closed in August of this year. It was a proceeding which had commenced in November 1945 and the record is long and thorough and extensive. There can be no doubt that on the record as it stood when it closed, this was an entirely feasible plan. The advice of the managements of both the proponent corporations from all of their banker acquaintances was to the effect that the plan would work and would work well. I submit that the plan ought not to be judged in the light of the present unsettled market condition. My client tells me--and I am also advised by Bond and Share--that their best advice is that the present market situation is one which should right itself in the reasonably near future. I won't attempt any predictions here, but I don't think that in the present unsettled state this plan, particularly on the exchange portion of it, should be abandoned. The best advice that my client gets and that Electric Bond and Share gets is that the market will again recover and take the upward trend. It is their hope and expectation that the plan will again be feasible and that it can be put through and made to work."

In the light of all the foregoing, the conclusion contained in Mr. Jones' memorandum that the plan "would seem to have more than an ordinary chance for approval by the Commission", is open to grave question at this time.

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

December 3. 1946

Dear Chief:

In reply to your memorandum of November 29th regarding the original cases on our docket, I have the following observations to make:

No. 1 New Mexico v. Colorado

I assume that the financial and physical reasons for failure to draw the boundary line are formally before us on a recent report of the boundary commissioner. Therefore, the suit must remain open and there is nothing further to be done, though it might be desirable from time to time to nudge the parties for appropriate inquiries through the Clerk.

Nos. 2, 3 and 4. Wisconsin et al v. Illinois

This is the suit involving the famous Chicago drainage canal controversy which I suspect ought to be kept open in view of the continuing injunction against diversion of Lake Michigan waters. But, in any event, I should think it was desirable to have the Clerk write to all the plaintiffs and ascertain to what extent their prayers for relief have been satisfied.

No. 5 New Jersey v. New York

Since the Court retains jurisdiction in this Delaware River diversion controversy, I should think the suit ought to remain open.

No. 6 Nebraska v. Wyoming

For similar reasons this suit ought to remain open.

No. 7 Texas v. Florida

Since this involves the claim of Massachusetts to a tax on Hetty Green's son's estate, the case can be closed as soon as we are advised by Massachusetts that her claim has been completely satisfied.

No. 8 Kansas v. Missouri

I assume that this must remain open.

No. 9, 10, 11, and 12

These four cases are in various stages of adjudication at this Term.

Faithfully yours,

FF.

The Chief Justice

Original Filed in VIP Correspondence File

NOVEMBER 29, 1946

MEMORANDUM

TO: The Associate Justices

FROM: The Chief Justice

In Re: Original Cases on Docket

No. 1 New Mexico v. Colorado.

Nos. 2,3 & 4 Wisconsin, Michigan, New York, et al v. Illinois and Sanitary District of Chicago, et al.

No. 5 New Jersey v. New York and City of New York.

No. 6 Nebraska v. Wyoming, et al.

No. 7 Texas v. Florida, et al

Should there be any orders or action in the foregoing numbers?

F. M. V.

OFFICE OF THE CLERK,
Supreme Court of the United States,
Washington 13, D. C.

November 22, 1946.

My dear Mr. Chief Justice:

Pursuant to your direction I have surveyed the twelve cases comprising the present Original Docket of the Court. A brief statement, in each case, showing its status is submitted to you herewith.

Yours very sincerely,

Charles Elmore Cropley

Honorable Fred M. Vinson,
Chief Justice of the United States,
Washington.

STATUS OF ORIGINAL CASES ON DOCKET

No. 1. New Mexico v. Colorado (filed October 29, 1919)

Subject: Boundary.

By decree entered April 23, 1925 (268 U.S. 108), the boundary was fixed and a commissioner appointed to run the true boundary, construct monuments and file a report. The commissioner is still engaged in this operation. Failure of the states to make necessary appropriations has been the main factor in the delay in completion of the project, although a contributing factor is inability to engage in the work except during a brief period each year due to mountainous nature of country and high altitudes.

Nos. 2, 3 and 4. Wisconsin, Michigan, New York, et al. v. Illinois and Sanitary District of Chicago, et al. (Filed July 14, 1922, March 8, 1926, and Oct. 22, 1926)

Subject: Diversion of water from Lake Michigan.

By decree entered April 21, 1930 (281 U.S. 696), the amount of water to be withdrawn was limited and the Sanitary District of Chicago directed to report semi-annually as to progress made in the construction of sewage treatment plants. The final report of the Sanitary District, filed Jan. 3, 1939, showed completion of the projects.

The decree further provided that "this Court retains jurisdiction of the above-entitled suits for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy."

In 1939 the State of Illinois applied for a modification of the decree. The matter was referred to a Special Master, and his report confirmed (313 U.S. 547). No later proceedings.

No. 5. New Jersey v. New York and City of New York (filed May 22, 1929)

Subject: Diversion of water from the Delaware River.

By decree entered May 25, 1931 (283 U.S. 805) a limitation was placed on the amount of water which might be diverted and such diversion conditioned upon the construction of a sewage treatment plant. The Court "retains jurisdiction of the suit for the purpose of any order or direction or modification of this decree, or any supplemental decree that it may deem at any time proper in relation to the subject matter in controversy." No report required or made. No subsequent proceedings.

No. 6. Nebraska v. Wyoming et al. (filed October 15, 1934)

Subject: Apportionment of water of the North Platte River.

Decree of apportionment entered October 8, 1945 (325 U.S. 665) provides under paragraph XIII: "The Court retains jurisdiction of this suit for the purpose

of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy."

No. 7. Texas v. Florida, et al. (Filed March 15, 1937)

Subject: Determination of the true domicile of a decedent as the basis of rival claims of four states for death taxes.

The decree entered May 15, 1939 (306 U.S. 435) provides: "3. The cause will be retained upon the docket for such further action as may be necessary and proper and the parties or any of them may at any time hereafter apply for relief as they may be advised." No subsequent proceedings.

No. 8. Kansas v. Missouri. (Filed May 27, 1940)

Subject: Boundary.

Final decree entered June 5, 1944, provided: "Both states having requested postponement of entry of an order directing the placing of suitable monuments or markers on the above designated boundary until they have had opportunity to consider exchanging certain lands and to make such exchanges, jurisdiction of this cause is retained for the purpose of entering such order at an appropriate time."

Appropriate resolutions have been adopted by the state legislatures and at their request for further time for consideration an order was entered Oct. 8, 1945, extending the time for marking the boundary until further order of the Court.

No. 9. Illinois v. Indiana, et al. (Filed October 18, 1943)

Subject: Pollution of waters of Lake Michigan.

Exceptions to interim report of Special Master due December 16, 1946.

No. 10. United States v. Wyoming and Ohio Oil Co. (Filed Oct. 9, 1944)

Subject: Suit to establish title to certain lands.

Exceptions to report of Special Master to be filed by December 2, 1946.

No. 11. Georgia v. The Pennsylvania Railroad Company, et al. (Filed March 26, 1945)

Subject: Freight rates.

Final arguments before Special Master scheduled for March of 1947.

No. 12. United States v. California. (Filed October 22, 1945)

Subject: Tidelands.

Assigned for argument on the pleadings - February 3, 1947.

August 30, 1947

Re: Jordan writ for Habeas Corpus.

On Thursday morning, August 28th, Mr. Holzworth, attorney for Jordan, called me at the Waldorf-Astoria, and asked me about the action on the petition for habeas corpus in this case. I told him I had examined all the papers that he had left with the Clerk of the Supreme Court, and had denied the petition without prejudice. I had the language of the order definitely in my mind since I had written it, and I quoted the order to him ver batim. He thanked me for the information.

Later I received the attached note, informing me that Mr. Holzworth had telephoned to say that he had talked over the long distance telephone with Justice Stevens and Justice Clark, and that Justice Clark was on vacation, and it was necessary to resubmit the writ for habeas corpus to the Supreme Court. He wanted to know when I was returning to Washington.

On the morning of August 29th, I received from the mail desk, delivered by a lady attendant of the hotel, a letter in longhand together with a note informing me that they would have it typewritten and sent to me. Later in the day I received the latter from Mr. Holzworth together with an order which I took to be a copy of the original petition with a couple of delineations on the first page. (I gave Mr. Cullinan of the Clerk's Office this paper today; I also gave him the letter of August 29th, both the longhand document and the typewritten one.)

Later in the afternoon of the 29th, Mr. Holzworth telephoned me, and I advised him the grounds upon which I had reached the conclusion - that he had not made a showing that he had exhausted his remedies before the Federal District Court or the Justices thereof qualified to entertain the application; that his first petition stated that Justices Stevens, Edgerton and Clark had considered themselves disqualified, and in the second paper he had stated that Justice Clark was leaving town, and also made mention of having talked with Justice Edgerton's clerk rather than Justice Edgerton himself. I told him that there were three other Justices on the U.S. Circuit Court of Appeals to whom he had not made reference. He stated that he had been informed they were out of town. I told him that there was nothing in the affidavit to that effect. He thought that there was, but I assured him that there wasn't. Then we discussed the District Judge situation, and I mentioned that he had not stated in his affidavit who were in town and who were out of the District, but had simply said that on August 17th, 18th, 19th and 20th he had presented the petition to all the Justices who were in the District. I explained to him the situation as I understood it of the Justices of the U.S. Circuit Court of Appeals in considering or not considering the petition for the writ in the absence of his showing that the District Court and the Justices thereof had had opportunity to consider the matter. I further told him about the policy

of the Supreme Court in a matter of this kind, and that it was necessary for him to specify clearly that there were no Justices present in the District in the Lower Courts before I would entertain the petition on the merits. I informed him that on the face of the papers I would have felt thoroughly justified in denying the petition, but in view of the situation, I thought it was the proper thing to deny without prejudice, and then give him a blue print with which he could work to get consideration on the merits in the lower courts.

Mr. Holzworth stated that when he went to file the petition with the District Court he found that there was some costs attached to it, and he was unable to get any Justice to say that it could be done without cost. I told him, of course, it would be encumbent upon him to comply with the law in getting the matter considered.

He was very pleasant, expressed his regrets for calling upon me while I was attending the Legion Convention, and thanked me at least a half dozen times for considering the matter and for my patience with him and the courteous treatment he had received from me. I told him it was my duty to consider matters of this kind, and thanked him for his very generous remarks about this particular case and about my work as Chief Justice, etc.

Mr. Holzworth advised me that he would come down to Washington on Tuesday, September 2nd, and pursue the matter further before the lower courts or Justices thereof. He asked me to return the document he had transmitted to me on the 29th to the Mail Desk of the hotel. I told him I wouldn't care to do that because I wasn't satisfied that he would get it in that manner, and that since he had presented it to me I felt it should become a part of the file in the case.

I do not have any of the papers in this case before me, and I have dictated this memorandum as to the contents of the documents from memory.

****

Vinson

1080-2 CHIEF JUSTICE VINSON
MR HOLZWORTH TELEPHONED TO SAY THAT HE
HAD TALKED OVER THE LONG DISTANCE TELEPHONE
WITH JUSTICE STEVENS AND JUSTICE CLARK
OF THE COURT OF APPEALS JUSTICE CLARK
IS IS LEAVING ON HIS VACATION AND THERE
IS NO OTHER AVAILABLE AND IT IS THEREFORE
NECESSARY TO RESUBMIT FOR A WRIT TO THE
SUPREME COURT WOULD LIKE TO KNOW WHEN YOU
ARE RETURNING TO WASHINGTON
CORTLANDT 7-1900 THANK YOU
1 P M 80/132

October 30, 1947

Re: No. 156 Misc. - Hawkins v. Clemmer.

The Court granted leave to file petition for writ of habeas corpus presented by Mr. John Holtzworth. The petition for a writ of habeas corpus was denied, and the application for a stay of execution was also denied.

Vote of the Conference on granting or denying the petition was as follows:

Deny	Grant
Burton,	Murphy
Rutledge,	
Jackson,	
Frankfurter,	
Reed,	
Black, and	
Vinson.	

Justice Douglas took no part in the proceedings in this case.

THE COMPOSITION, JURISDICTION AND OPERATIONS OF THE TRIBUNALS INVOLVING THE PARTICIPATION OF THE UNITED STATES WHICH HAVE TRIED GERMAN WAR CRIMES CASES.

The punishment of war criminals was an established policy and purpose of the nations allied in the war against Germany. On November 1, 1943, President Roosevelt, Prime Minister Churchill, and Premier Stalin issued the following declaration (sometimes known as the Moscow declaration):

> At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein.
>
> * * * * * * *
>
> The above declaration is without prejudice to the case of the major criminals, whose offences have no particular geographical localisation and who will be punished by the joint decision of the Governments of the Allies. [9 State Dept. Bull. 311]

The translation of that policy into action begins with the Joint Chiefs of Staff directive (JCS 1067) of May 1945 to General Eisenhower as Commanding General of the United States forces of occupation in Germany. With respect to war crimes it was provided that "You will search out, arrest, and hold, pending receipt by you of further instructions as to their disposition, Adolf Hitler, his chief Nazi associates, other war criminals and all persons who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes." The text of J.C.S. 1067 is contained in Dept. of State Publication 2423, p. 40. As the tribunals described

hereafter were established, further JCS directives were issued providing for the necessary cooperation of the occupation forces and the military government.

Pursuant to the allied policy, Germans accused of war crimes have been tried before three types of tribunals involving the participation of the United States. These courts will be referred to herein as (1) the International Military Tribunal, (2) the Control Council courts, and (3) the military government courts. Since they differ from each other in such respects as source of jurisdiction, composition, and nature of jurisdiction, they will be discussed separately below.

1. The International Military Tribunal (Nuremberg).

At about the time of the German surrender in May 1945, the President, by Executive Order 9547, dated May 4, 1945 (10 F.R. 4961), declared as follows:

> By virtue of the authority vested in me as President and as Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, it is ordered as follows:
>
> 1. Associate Justice Robert H. Jackson is hereby designated to act as the Representative of the United States and as its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers and their principal agents and accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal. He shall serve without additional compensation but shall receive such allowance for expenses as may be authorized by the President.
>
> * * * * * * *
>
> 3. The Representative named herein is authorized to cooperate with, and receive the assistance of, any foreign Government to the extent deemed necessary by him to accomplish the purpose of this order.

On August 8, 1945, meeting in London, representatives of the United States, France, Great Britain and the Soviet Union entered an agreement which,

after reciting the Moscow Declaration of November 1, 1943, referred to above, provided for the establishment of the International Military Tribunal. Mr. Justice Jackson signed the agreement on behalf of the United States. The Charter of the International Military Tribunal was an integral part of the London Agreement. Article 1 of the Charter stated that the Tribunal was established "for the just and prompt trial and punishment of the major war criminals of the European Axis". Article 2 provided that the Tribunal was to consist of four members and four alternates, one of each to be designated by each of the signatory governments. Each of the four nations designated a member and alternate. By Executive Order 9626, dated September 24, 1945 (10 F.R. 12113), the President declared as follows:

> By virtue of the authority vested in me by the Constitution and the statutes, and as President of the United States and Commander in Chief of the Army and Navy of the United States, it is ordered as follows:
>
> 1. In accordance with Article II of the Charter of the International Military Tribunal established by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the trial and punishment of the major war criminals of the European Axis, pursuant to their agreement of August 8, 1945, I hereby appoint Francis Biddle of Pennsylvania to be the Member for the United States of the International Military Tribunal and John J. Parker of North Carolina to be the Alternate Member for the United States of the International Military Tribunal.
>
> 2. The Member for the United States of the International Military Tribunal shall receive such compensation and allowance for expenses as may be determined by the Secretary of State. The Alternate Member shall serve without compensation but shall receive such allowance for expenses as may be authorized by the Secretary of State.

The jurisdiction of the Tribunal was defined in Article 6, of the Charter, as follows:

> The Tribunal established by the agreement referred to in article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) Crimes against peace: Namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> (b) War Crimes: Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) Crimes against humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

In accordance with Article 14 of the Charter, each of the four signatory governments designated a chief prosecutor. Mr. Justice Jackson

acted as Chief Prosecutor on behalf of the United States. Article 30 provided that, "The expenses of the Tribunal and of the trials, shall be charged by the signatories against the funds allotted for maintenance of the Control Council for Germany.

Article 27 provided that, "The Tribunal shall have the right to impose upon a defendant, on conviction, death or such other punishment as shall be determined by it to be just." Article 28 provided that, "In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Only one trial was conducted by the International Military Tribunal (Nuremberg), that involving the principal German Nazi or military leaders, Goering, et al. The defendants in that case were variously charged with crimes in all three categories of Article 6 of the Charter, namely crimes against peace, war crimes, and crimes against humanity. After a trial, nineteen defendants were convicted and three were acquitted. Twelve of the nineteen were sentenced to death, three to life imprisonment, and four to imprisonment for varying terms of years. The sentences were approved by the Control Council for Germany, in accordance with Article 29 of the Charter. The death sentences have all been executed, except that of Martin Bormann who was sentenced in absentia, and who has not yet been apprehended. The defendants who were sentenced to imprisonment are confined at Spandau, Germany, under the authority of the four nations represented in the Control Council.

2. Control Council courts.

Supreme governmental power in Germany is vested in the Control Council for Germany, a quadripartite body consisting of representatives of the United States, Great Britain, France, and the Soviet Union. In the Berlin Declaration, June 5, 1945, those four governments announced as follows:

> The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. [12 State Dep't. Bull. 1051]

On the same date, the four governments announced the creation of the Control Council as follows:

> 1. In the period when Germany is carrying out the basic requirements of unconditional surrender, supreme authority in Germany will be exercised, on instructions from their Governments, by the Soviet, British, United States, and French Commanders-in-Chief, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole. The four Commanders-in-Chief will together constitute the Control Council. Each Commander-in-Chief will be assisted by a political adviser.
>
> 2. The Control Council, whose decisions shall be unanimous, will ensure appropriate uniformity of action by the Commanders-in-Chief in their respective zones of occupation and will reach agreed decisions on the chief questions affecting Germany as a whole. [12 State Dep't. Bull. 1054]

General Clay, the Military Governor for the American Zone in Germany, is the United States' member of the Control Council. His predecessors in those capacities were General of the Army Eisenhower and Lieutenant General McNarney, in that order.

On December 20, 1945, the Control Council enacted Control Council Law No. 10, which is the legal foundation for the Control Council or zonal

courts. It was signed on behalf of the United States by General McNarney, then United States Commander in Chief in Germany. The full text of the law appears in 15 State Dep't. Bull. 862-863. Control Council Law No. 10 states as its purpose "to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal." Article I provides that the Moscow Declaration of November 1, 1943, and the London Agreement of August 8, 1945, "are made integral parts of this law." Article II recognizes and defines (a) crimes against peace, (b) war crimes, and (c) crimes against humanity, substantially in the same terms as in the Charter of the International Military Tribunal. It also defines as a crime, "membership in categories of a criminal group or organization declared criminal by the International Military Tribunal." Section 3 of Article II authorizes punishments ranging from death to deprivation of civil rights. Paragraph 4 of the Article states the principles that acting in an official capacity or in obedience to the orders of a superior does not free a person from responsibility for a crime.

Article III of Control Council Law No. 10 provides, inter alia, that "Each occupying authority, within its zone of occupation (a) shall have the right to cause persons within such zone suspected of having committed a crime, * * * to be arrested * * *; (d) shall have the right to cause all persons so arrested * * * to be brought to trial before an appropriate tribunal." Paragraph 2 of Article III provides that:

> The Tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is

> intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.

The other provisions of Control Council Law No. 10 deal largely with the delivery of defendants and the availability of witnesses from one occupation zone to another.

The implementation of Control Council Law No. 10 in the United States Zone of Occupation. Acting under Control Council Law No. 10, the Military Governor of the United States Zone of Occupation on October 18, 1946, issued Ordinance No. 7 "to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein contained shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offenses."

Article II of Ordinance No. 7 provides in part as follows:

> (a) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 certain tribunals to be known as "Military Tribunals" shall be established hereunder.
>
> (b) Each such tribunal shall consist of three or more members to be designated by the Military Governor. One alternate member may be designated to any tribunal if deemed advisable by the Military Governor. Except as provided in subsection (c) of this Article, all members and alternates shall be lawyers who have been admitted to practice, for at least five years, in the highest courts of one of the United States or its territories or of the District of Columbia, or who have been admitted to practice in the United States Supreme Court.

(c) The Military Governor may in his discretion enter into an agreement with one or more other zone commanders of the member nations of the Allied Control Authority providing for the joint trial of any case or cases. In such cases the tribunals shall consist of three or more members as may be provided in the agreement. In such cases the tribunals may include properly qualified lawyers designated by the other member nations.

Article XV provides that the judgments of the tribunals as to the guilt or innocence of the accused shall be final and not subject to review. Article XVI authorizes such a tribunal to impose, upon conviction, one or more of the penalties provided in Article II, Section 3 of Control Council Law No. 10. Article XVII provides that except in cases tried by joint zonal courts "the record of each case shall be forwarded to the Military Governor who shall have the power to mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof." Also, Article XVIII provides that "No sentence of death shall be carried into execution unless and until confirmed in writing by the Military Governor."

Other provisions of Ordinance No. 7 prescribe the procedure to be followed by the tribunals, and provide for a Central Secretariat to assist the tribunals.[1/]

Composition of the Control Council courts. By a series of executive orders, the President has designated various American citizens to act as members and alternates on the military tribunals established by Ordinance No. 7. Most of these persons have been judges or former judges of American state courts. Typical of these executive orders is the first one,

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1/ Ordinance No. 7 was amended by Ordinance No. 11, effective February 17, 1947, principally to provide for a supervisory committee of the presiding judges and for joint sessions of the tribunals.

Executive Order 9813, of December 20, 1946 (11 F.R. 14607), which reads in part as follows:

> By virtue of the authority vested in me by the Constitution and the statutes, and as President of the United States and Commander in Chief of the Army and Navy of the United States, and in the interest of the military and foreign affairs functions of the United States, it is ordered as follows:
>
> 1. I hereby designate Walter B. Beals, Chief Justice of the Supreme Court of the State of Washington, Harold L. Sebring, Associate Justice of the Supreme Court of the State of Florida, Johnson Tal Crawford, Judge of a District Court of the State of Oklahoma, as the Members, and Victor C. Swearingen, former Special Assistant to the Attorney General, as the Alternate Member, of one of the several military tribunals established by the Military Governor for the United States Zone of Occupation within Germany pursuant to the quadripartite agreement of the Control Council for Germany, enacted December 20, 1945, as Control Council Law No. 10, and pursuant to Articles 10 and 11 of the Charter of the International Military Tribunal, which Tribunal was established by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, for the trial and punishment of major war criminals of the European Axis. Such members and alternate member may, at the direction of the Military Governor of the United States Zone of Occupation, serve on any of the several military tribunals above mentioned.
>
> 2. The Members and the Alternate Member herein designated shall receive such compensation and allowances for expenses as may be determined by the Secretary of War and as may be payable from appropriations or funds available to the War Department for such purposes.

Similar designations were made by the following Executive Orders:

9819 - Jan. 10, 1947 (12 F.R. 205); 9827 - Feb. 21, 1947 (12 F.R. 1215); 9852 - May 16, 1947 (12 F.R. 3183); 9858 - May 31, 1947 (12 F.R. 3555); 9868 - June 24, 1947 (12 F.R. 4135); 9882 - Aug. 7, 1947 (12 F.R. 5417); 9917 - Dec. 31, 1947 (13 F.R. 26). The members thus designated were assigned to tribunals by the Military Governor.

The Prosecution. On January 16, 1946, the President, by Executive Order 9679 (11 F.R. 703) vested the Chief of Counsel, Mr. Justice Jackson, with the additional authority to proceed before occupation tribunals, and provided that upon his vacation of office a Chief of Counsel be appointed by the United States Military Governor for Germany. On October 24, 1946, General Order No. 301 announced the transfer of the Office of Chief of Counsel for War Crimes to the Office of Military Government (U. S.) for Germany and the appointment of Brigadier General Taylor as Chief of Counsel.

Offenses tried. The charges tried by the tribunals have embraced offenses in all of the categories of Article II (1) of Control Council Law. However, none of the convictions have been based upon "crimes against peace". The defendants have included civilian, diplomatic and military officials charged with responsibility at the policy-making level, industrialists, and doctors charged with medical atrocities.

Results of the trials. Twelve cases were tried, 11 of which have been decided. One hundred and twenty-three defendants have been convicted, and 33 acquitted. Twenty-four of those found guilty were sentenced to death. Twenty were given life sentences and the remainder were given sentences ranging from 5 to 25 years. To date, seven of the death sentences have been executed. The defendants sentenced to imprisonment are confined at Landsberg, Germany, as are the defendants who were sentenced to imprisonment by the military government courts described hereafter. It is presently contemplated that no further trials pursuant to Control Council Law No. 10 will be held in the United States Zone. Milch v. United States, 332 U.S. 789, and Brandt v. United States, 333 U.S. 836, in which the Court denied motions for leave to

file petitions for writs of habeas corpus, were cases arising under Control Council Law No. 10.

Proceedings by other nations under Control Council Law No. 10. Information has been requested, but has not yet been received, as to the British action under Control Council Law No. 10. However, a report prepared for the Department of the Army on the proceedings of the French General Tribunal at Rastatt indicates extensive French action under Control Council Law No. 10. This report states that by the end of 1947, the Rastatt Tribunal had rendered judgments under that Law in 81 cases, involving 361 defendants, of whom 304 were convicted. It is interesting to note that in many cases the French General Tribunal included both judges and prosecutors from other countries such as Holland, Norway, Luxemburg, Belgium and Poland.

The international character of Control Council tribunals. It is not the purpose of this memorandum to enlarge upon the Government's general position that the military tribunals established pursuant to Control Council Law No. 10 are tribunals exercising international authority. However, it is interesting to note the following characterizations by the tribunals themselves. In Military Tribunals Case No. 1, United States v. Brandt, the court stated:

> The jurisdiction and powers of this tribunal are fixed and determined by Law No. 10 of the Control Council for Germany. (Unprinted opinion; transcript available.)

In United States v. Alstoetter et al. Judge Brand of the Supreme Court of Oregon discussed at length the source of the Tribunal's authority and reached the conclusion that Control Council Law No. 10 was an exercise of

supreme legislative power in and for Germany. At page 10621 of the transcript he states:

> It (CC Law 10) is the legislative product of the only body in existence having and exercising general law making power throughout the Reich * * *. Since the Charter and CC Law 10 are the product of legislative action by an international authority it follows of necessity that there is no national constitution of any one state which could be invoked to invalidate the substantive provision of such international legislation.

He said further:

> The tribunals are authorized by Ordinance No. 7 and dependent upon the substantive jurisdictional provision of CC Law 10 and are thus based upon international authority and retain international characteristics.

In Case No. 5, United States v. Flick et al, the court deciding motions "among other things attacking the jurisdiction of this Tribunal", held:

> As to the Tribunal, its nature and competence:
>
> The Tribunal is not a court of the United States as that term is used in the Constitution of the United States. It is not a Court-Martial. It is not a military commission. It is an International Tribunal established by the International Control Council, the high legislative branch of the Four Allied Powers now controlling Germany. (Control Council Law No. 10 of 20 December 1945.) The Judges were legally appointed by the Military Governor and the later act of the President of the United States in respect to this was nothing more than a confirmation of the appointments by the Military Governor. The Tribunal administers international law. It is not bound by the general statutes of the United States or even by those parts of its Constitution which relate to courts of the United States.

3. Military Government Courts.

The third type of tribunal which has tried war crimes cases is the military government court, often referred to as the Dachau courts. The Dammam, Schallermaier, Seidel and Puhr cases (Misc. Nos. 234, 249, 259, 318 Misc.), now pending before the Supreme Court, arose out of judgments of military government courts,[2/] as did Everett v. Truman (the Malmedy case) leave to file denied 334 U.S. 824; In the Matter of Franz Weiss, No. 93 Misc., leave to file denied October 11, 1948. These courts are composed entirely of officers of the American armed forces. They are appointed by or under the authority of the Commander in Chief, European Theatre. Early in the Occupation, Army and Military District Commanders were authorized to appoint military government courts for the trial of war crimes; at the present time, the authority to appoint such courts is limited to the Theatre Commander and to the Commanding General, U. S. Forces, in Austria.

The Department of the Army advises that the military government courts try only cases involving charges of violations of the laws and usages of war, i.e., such as are defined in the Hague and Geneva Conventions and set forth in the Rules of Land Warfare. In the Military Government Regulation, Title 5 (Legal and Penal Administration), paragraph 5-390 provides as follows:

2/ These courts are to be distinguished from the military government courts established by Military Government Ordinances 31, 32 and 33 for the trial of ordinary criminal offenses committed in the United States Zone of Occupation by either American or German civilians. The latter courts have no war crimes jurisdiction, but rather are founded upon the duty imposed upon the occupying power by international law to restore and maintain law and order. Also, these latter courts are largely staffed with civilian judges.

> a. Cases involving offenses committed prior to 9 May 1945 against the laws and usages of war or the law of the Occupied Territory or any part thereof, commonly known as "War Crimes" and such other related cases as may from time to time be designated, shall be tried before specially appointed MG Courts, except where otherwise directed by CINCEUR.
>
> b. Cases involving offenses committed prior to 9 May 1945, commonly known as crimes against the peace and crimes against humanity, as defined in Article II, Control Council Law No. 10, and such other related cases as may from time to time be designated, shall be tried before specially appointed Military Tribunals established in accordance, with MG Ordinance No. 7, as amended and Regulation No. 1 under MG Ordinance No. 7, as amended (MGR 23-403).

Thus, military government courts have jurisdiction only over the so-called conventional war crimes. They have no jurisdiction over "crimes against peace" and "crimes against humanity" as defined in Control Council Law No. 10.

Most of the persons tried before American military government courts were members of enemy armed forces when their alleged offenses were committed. The civilians who have been so tried were themselves subject to international law in such respects as the treatment of prisoners-of-war.

Charges are preferred by the Deputy Theatre Judge Advocate for War Crimes, who also assigns prosecuting and American defense counsel. The military government courts largely follow the procedures of a general court-martial. An exception to this general statement is the admission, in the discretion of the court, of affidavits and other hearsay evidence even in cases where death is a possible punishment, as

in In the Matter of Yamashita, 327 U.S. 1. American officers are assigned as defense counsel, and the accused may be represented by German or American civilian counsel if he so desires.

The judgments of the special military government courts are reviewed by the Deputy Theatre Judge Advocate for War Crimes and by the Theatre Judge Advocate. The Theatre Judge Advocate is assisted in his review function by War Crimes Boards of Review, each Board consisting of three officers who are lawyers. This is a full review, rather than limited to review of the sentence as in the case of Control Council courts. The Theatre Judge Advocate has been authorized and directed to exercise the powers of the Theatre Commander in all cases not involving a death sentence. No death sentence may be carried into effect without the approval of the Theatre Commander.

The trials of Nazi war criminals before United States special military government courts have been completed. A total of 491 cases, involving 1,682 defendants, have been heard. Of 1,416 convictions, 426 defendants were sentenced to death, 199 to imprisonment for life, and the remainder to terms extending to 50 years' imprisonment. As of December 3, 1948, 254 of the confirmed death sentences had been executed.

As noted above, the tribunals which have tried war crimes cases are to be distinguished from the military government courts which exercise ordinary civil and criminal jurisdiction over certain classes of persons and offenses. These latter courts, which are

presently established under Military Government Ordinances 31, 32 and 33, possess no jurisdiction over war crimes. For that reason they are not described in this memorandum. However, the Federal Register for January 11, 1949 (14 F. R. 124-133) contains the text of the Ordinances, setting forth in considerable detail the composition, jurisdiction and procedure of these courts.

February 1949.

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
THE CHIEF JUSTICE

April 5th, 1948.-

Mr. Justice Black
Frankfurter
Douglas
Murphy
Jackson
Rutledge

In Re:--Petition of Bennett H. Meyers for bail pending appeal to the Court of Appeals for the District of Columbia -

The above referred to petition is being circulated.

In connection therewith, for your information in the 80th Congress Senator Ferguson was the No. 2 man on the Committee.

C.J.

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
THE CHIEF JUSTICE

April 5th, 1948.-

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C.J.

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
THE CHIEF JUSTICE

April 7th, 1948.-

Mr. Justice Black
Frankfurter
Douglas
Murphy
Jackson
Rutledge

In Re:--Petition of Bennett H. Meyers for bail pending appeal to the Court of Appeals for the District of Columbia -

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C.J.

In Re: Petition of Bennett E Meyers for Bail pending appeal to the Court of Appeals for the District of Columbia.

CHAMBERS OF THE CHIEF JUSTICE

April 3 ~~8~~ 1948.

From the Chief Justice,

FOR CIRCULATION.

	Should bail be allowed? ~~Noted?~~ YES	NO
Mr. Justice Black.....		
Mr. Justice Reed.....		
Mr. Justice Frankfurter.....		
Mr. Justice Douglas.....		
Mr. Justice Murphy.....		
Mr. Justice Jackson.....		
Mr. Justice Rutledge.....		
Mr. Justice Burton.....		
THE CHIEF JUSTICE Please return to.....		

the Chief Justice.

In Re: Petition of Bennett E Meyers for Bail pending appeal to the Court of Appeals for the District of Columbia.

CHAMBERS OF THE CHIEF JUSTICE

April 3 1948.

From the Chief Justice,

FOR CIRCULATION.

	Should bail be allowed? ~~Noted~~ YES	NO
Mr. Justice Black.....	HLB	
Mr. Justice Reed.....		Reed
Mr. Justice Frankfurter.....	See memo	
Mr. Justice Douglas.....	WOD	
Mr. Justice Murphy.....	✓	
Mr. Justice Jackson.....	not voting	
Mr. Justice Rutledge.....	Probably not W.R.	
Mr. Justice Burton.....	4/7/48 not voting	
THE CHIEF JUSTICE		

Please return to the Chief Justice.

(probably will dissent because I issue as to validity of Commission)

Memorandum re Bennet Meyers Petition for Bail

My views on the question of refusal of bail after conviction where an appeal is taken is influenced by my experience under U. S. Attorney, Henry L. Stimson, in the Southern District of New York. Even as to cases in which defendants claimed that questions raided on appeal were serious, but as to which the Government had no doubt, it was our policy to urge denial of bail coupled, however, with the readiness of the Government to argue the appeal at once on the stenographic minutes of the trial and not wait for the printing of record or briefs. Judge Hough, the then presiding District Judge, in cases of even great public interest denied bail and the Circuit Court of Appeals for the Second Circuit acted on the tender of the Government to hear the case at once.

In this case we have the added factor of what amounts to an appeal here from the exercise of discretion by the Court of Appeals denying bail, weakened of course by the fact that one member of that Court dissented.

I would vote "no" on whether or not bail should be allowed by us, but I would couple it with a statement that this Court assumes that the Court of Appeals for the District is ready to hear the appeal at once on the stenographic minutes of the trial and on typewritten briefs.

Felix Frankfurter

April 6, 1948

LAW OFFICES
JAMES E. WATSON
ORIN DeM. WALKER
815 15TH STREET, N.W.
WASHINGTON 5, D.C.

TELEPHONE
NATIONAL 2968

CABLE ADDRESS
"WATKER"

Denied
7/21/48

July 19, 1948

Honorable Fred M. Vinson
Chief Justice of the United States
Washington, D. C.

My dear Justice:

I am enclosing herewith petition of Hugh N. Rakes, about which I have been hoping that I might see you and talk to you personally, but Mr. Kelly Kash tells me that he went up to see you and that you are acquainted with the situation.

I have not been well for some time and have not been getting around as I used to do, but I am very happy to say that I am better and one of these days I want to have the pleasure of seeing you.

I shall appreciate your views on this case. All we want is an extension of thirty days so as to give Mr. Rakes an opportunity to get his assets together and arrange to meet his payments.

I am very glad that you are so successful in your position and know you were meant for it. You are a great credit to this country.

With every good wish, I am

Sincerely yours,

James E. Watson

James E. Watson

Encl.

Re: Koki Hirota v. General MacArthur, et al

Kenji Dohihara v. General MacArthur, et al

CONFERENCE, NOVEMBER 26, 1948 - 3:45 P.M.

PRESENT: William Logan, Jr.,
David F. Smith,
Attorneys for the Petitioners.
George Washington, Acting Solicitor General
Major General Thomas H. Green, Judge Advocate General of the Army,
Brigadier General Hoover, Assistant to Major General Green.
Harold H. Willey,
David E. Feller,
THE CHIEF JUSTICE.

At the outset of the conference, Mr. Logan stated that he had a telephonic conversation with Mr. Brannon of Tokyo to the effect that two of the Japanese who received death sentences from the Allied Tribunal wanted him to represent them in bringing the case to the Supreme Court.

Mr. David Smith, in a telegram dated November 24th, asked my personal intervention with General MacArthur to stay the death sentences to allow filing of petitions for writs of habeas corpus here.

Mr. Logan stated that the petitions had been forwarded from Tokyo by air mail, but for some reason had not arrived, and that copies would be mailed out from Tokyo.

Mr. Logan stated, and re-affirmed his statement after my question to him, that "General MacArthur was the Allied Commander under designation from the nations who were signatories to the surrender agreement on the Battleship Missouri; that he had constituted the Allied Tribunal under authority and direction of those allied nations; and pursuant thereto had constituted the International Allied Tribunal with representatives of ten or more of these nations, with Mr. Webb from Australia presiding."

I inquired with reference to the jurisdiction of the Supreme Court in such a matter, and he stated that he is endeavoring to stay the hand of an American citizen, who had exceeded any authority conferred upon him as an American General.

During this part of the discussion, I read the language of the Constitution found in Article III, Section 2,pertaining to the jurisdiction of the Supreme Court.

At the beginning of the conference, Mr. Logan admitted he had filed no papers with the Clerk of the Supreme Court, and there was no motion pending, but that the time element was such he had been unable to present them. I stated that I did not feel that I could pass upon any oral application; that there had to be a written application so that the action sought would have a definite basis.

Acting Solicitor General Washington then gave his views in regard to the jurisdiction of the Supreme Court. He was of the opinion that the Supreme Court had no jurisdiction, but that the Department of Justice wanted to be fair. He inquired of General Green in respect of the attitude of the War Department, and General Green stated that the War Department did not feel that General MacArthur, as the Allied Commander, was in the chain of command, and that they did not feel that they could direct his staying the executions pending disposition of the cases in the Supreme Court. However, he said that he felt if the Court or the Chief Justice desired that it be done, they would contact General MacArthur indicating their views that a stay should be granted.

I replied that I did not feel that,under all the circumstances, with no papers filed, and the present understanding that it was an International Tribunal which had tried the cases, I should express any views in the matter at this time; that they had heard all I had heard on the question; that I was of the opinion from past action that the Department of Justice would endeavor to be fair, permitting an opportunity for consideration of the rights of litigants and would-be litigants; but that it was a matter for the Department of Justice and the War Department to determine so far as the action of the War Department in approaching General MacArthur was concerned.

As I recall it, the Acting Solicitor General and General Green indicated that they would suggest to General MacArthur that the executions of the two defendants who were attempting to present their claims were to be stayed.

This is being dictated on Monday, November 29th, and is not an attempt to give the full dicussion had at the conference. It merely sets down the high lights of the meeting.

The Chief Justice.

WESTERN UNION TELEGRAM

LDC261 PD=M WASHINGTON DC 24 716P=

NOV 24 PM 7 50

CHIEF JUSTICE FRED M VINSON=

WARDMAN PARK HOTEL WASHDC=

AMERICAN DEFENSE COUNSEL TOKYO WAR TRIALS RESPECTFULLY REQUEST YOUR PERSONAL INTERVENTION WITH GENERAL MACARTHUR TOKYO TO STAY DEATH SENTENCES TEN DAYS TO ALLOW FILING PETITIONS WRITS HABEUS CORPUS BEFORE SUPREME COURT. PETITION NOW IN MAIL BUT NOT YET RECEIVED. PETITIONS RAISE SERIOUS QUESTIONS OF NATIONAL IMPORTANCE=

DAVID F SMITH ROGER SMITH HOTEL WASHINGTON DC
DEFENSE COUNSEL FOR KOKI HIROTA=

UNITED STATES COURT OF APPEALS
WASHINGTON 1, D. C.

December 10, 1948.

Hon. Fred M. Vinson, Chief Justice,
Supreme Court of the United States,
Wardman Park Hotel,
Washington, D.C.

Re: Misc. No. 171 Wheeler and Patton
v. Reid

Dear Chief Justice Vinson:

I enclose herewith copies of the memorandum opinion and order of the United States Court of Appeals in the above entitled matter. I enclose also a copy of the various papers presented to the court in this matter, except a stipulation (referred to in the order) of which we have no extra copy.* These are all of the items I mentioned in our telephone conversation.

In addition I am enclosing a copy of a memorandum opinion and order in the matter of Reginald J. Wheeler, petitioner for a writ of habeas corpus. This I did not mention in our telephone conversation since it has no connection with the matter above set forth. However since counsel might mention it to you I enclose a copy herewith. The opinion and order resulted as you will note from an application made to me individually as Circuit Judge by Wheeler for a petition for a writ of habeas corpus. This was made by Wheeler personally through the jailor, not through his counsel. I declined to entertain the petition for the reasons stated in the opinion. Since under the Judicial Code a circuit judge to whom a petition for writ of habeas corpus is presented is acting as a trial judge and must according to the statute file his order in the records of the District Court (28 U.S.C. § 2241 (1948)), I take it that any appeal from such an order would be to the United States Court of Appeals and only thereafter to the Supreme Court.

Respectfully yours,

Harold M. Stephens

HAROLD M. STEPHENS,
Chief Judge.

* The stipulation you will not need as the effect of it was merely to put before the court as if originals copies of the petition for the writ of habeas corpus, of the return and answer, of the order and certificate signed by the trial judge and of the memorandum of points and authorities in support of the answer to the rule to show cause in the trial court. The contents of these papers sufficiently appear in the opinion of this court.

UNITED STATES COURT OF APPEALS
for the
District of Columbia Circuit

Reginald J. Wheeler and Jesse James Patton, Petitioners	)	
v.	)	Miscellaneous No. 171
Curtis Reid, Superintendent, Washington Asylum & Jail	)	

Memorandum Opinion

December 10 1948

Before STEPHENS, C.J., and EDGERTON and WILBUR K. MILLER, JJ.

STEPHENS, C.J.: There have been presented to this court petitions for leave to appeal, and proceed in forma pauperis, from a judgment of the United States District Court for the District of Columbia entered December 9, 1948, dismissing a petition for a writ of habeas corpus filed by Reginald J. Wheeler and Jesse James Patton in Habeas Corpus No. 3483, Wheeler and Patton v. Reid, and discharging the rule to show cause which had been issued pursuant to such petition. There has been presented also a motion by the petitioners Wheeler and Patton for stay pending appeal of sentences of death imposed upon petitioners effective December 10, 1948. The petitions and motion are ordered filed.

The petitioners were on December 6, 1946, after conviction in the United States District Court for the District of Columbia of the offense of murder in the first degree in Criminal Case No. 77122, sentenced to punishment of death by electrocution on March 28, 1947. From time to time thereafter execution of these sentences was stayed. On December 7, 1948, sentences of death were reimposed upon the petitioners

to be carried out on December 10, 1948. On December 9, 1948, a petition for writ of habeas corpus against Curtis Reid, Superintendent of the Washington Asylum & Jail, was filed in the District Court by the petitioners jointly alleging that the sentences imposed on December 7, 1948, were void because of the provisions of D.C. Code (1940) § 23-703 providing:

> Upon the conviction of any person in the District of Columbia of a crime the punishment of which is death, it shall be the duty of the presiding judge to sentence such convicted person to death according to the terms of sections 23-701 to 23-704, and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be transmitted, by the clerk of the court in which such sentence is pronounced, to the superintendent of the District jail, not less than ten days prior to the time fixed in the sentence of the court for the execution of the same. (Jan. 30, 1925, 43 Stat. 799, ch. 115, § 3.)

Petitioners alleged that since the sentences were imposed on December 7, 1948, and were to be carried into execution on December 10, 1948, the statutory requirement was not met. The District Court issued a rule to show cause why a writ of habeas corpus should not issue and to this a return and answer was filed by the respondent Reid. Thereupon there was a hearing before the District Court. At the conclusion of this hearing the order above referred to dismissing the petition and discharging the rule was entered. Application was then made by the petitioners for leave to prosecute an appeal without prepayment of costs and the trial judge filed a certificate in the following terms:

> If by "good faith" is meant a sincere belief on the part of the petitioners that the judgment of the Court just made should be reversed, I have no doubt that they have such feeling. If by "good faith" is meant do I consider whether or not the question involved is one as to which there is reasonable basis for a different conclusion, I do not. This states fully my view on the question of good faith. I realize that the term "good faith" is somewhat ambiguous.

Thereupon the present petitions and motion in this court were filed as above set forth.

For the reasons set forth below we think the petitions for leave to appeal and proceed in forma pauperis from the judgment of the District Court and the motion for stay of sentences should be denied.

28 U.S.C. § 1915 (a) provides:

> Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

We think that the certificate of the trial judge is in effect a certificate that the appeal sought to be taken is not taken in good faith and that for that reason the second paragraph of the statute just quoted applies. But if the certificate of the trial judge be treated as self-contradictory and therefore as no certificate, then the first paragraph of the statute just quoted applies. That paragraph invests this court with discretion as to whether or not to allow an appeal in forma pauperis and requires the court to give consideration in the exercise of its discretion to the nature of the appeal. We have considered the nature of the appeal as disclosed in the petitions which we have allowed to be filed and as disclosed by the statements of counsel for the petitioners who have appeared before us and made oral argument in support of the petitions and we are of the view that no substantial question is involved in the appeal and that it is accordingly without merit and ought not be allowed.

D.C.Code (1940) § 23-703 above quoted must be read in connection with D.C.Code (1940) § 23-114 which provides:

> In case of a sentence of death, the time fixed for the execution of the sentence shall not be considered an essential part of the sentence, and if it be not executed at the time therein appointed, by reason of the pendency of an appeal or for other cause, the court may appoint another day for carrying the same into execution. (Mar. 3, 1901, 31 Stat. 1340, ch. 854, § 926.)

Section 23-703 must also be read in connection with its legislative history. S. Rep. No. 67, to accompany S. 387, 68th Cong., 1st Sess., which was the bill which when enacted became § 23-703, states: "Section 3 allows 10 days in which to make ready the death chamber, summon the witnesses, and make any other preparations. This provision is

based on the South Carolina statute, 1912." The same statement is made in the House Report; see H. R. Rep. No. 156, to accompany S. 387, 68th Cong., 1st Sess. We think that, when § 23-703 is read in connection with § 23-114 and in connection with the legislative history, it is clear that § 23-703 was intended not for the benefit of defendants upon whom death sentences were to be imposed but in aid of the prison authorities charged with execution of such sentences. We think also that, even if § 23-703 be thought to be for the benefit of defendants rather than of prison authorities, it applies only to the sentence imposed upon the conviction and not upon subsequent sentences reimposed after stays of execution.

In accordance with the foregoing the petitions for leave to appeal and to proceed in forma pauperis and the motion for stay of sentences are

Denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

REGINALD J. WHEELER
and
JESSE JAMES PATTON

Appellant

vs

CURTIS REID, Superintendent
Washington Asylum & Jail

Appellee

No. 171, Misc.

PETITION FOR LEAVE TO FILE PETITION TO PROCEED IN FORMA PAUPERIS

Now come the petitioners through their counsel and move the Court for leave to file petition for leave to proceed in this Court in forma pauperis - petition for leave to proceed in forma pauperis annexed hereto and made a part hereof.

James J. Laughlin
James J. Laughlin
Counsel for Appellant Wheeler

Curtis P. Mitchell
Curtis P. Mitchell
Counsel for Appellant Patton

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

REGINALD J. WHEELER
and
JESSE JAMES PATTON
Appellant

vs

CURTIS REID, Superintendent
Washington Asylum & Jail
Appellee

No. _____

PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Now come the petitioners through their counsel and say unto the Court that they are under sentence of death, said sentence to be carried into effect between the hours of 10:00 A.M. and 2:00 P.M., Friday, December 10, 1948.

Petitioners were sentenced in December, 1946, and the sentence was transmitted to the District Jail in conformity with Title 23, Section 703, D. C. Code. This provision provides as follows:

> "Upon the conviction of any person in the District of Columbia of a crime the punishment of which is death, it shall be the duty of the presiding judge to sentence such convicted person to death * * * and a certified copy thereof shall be transmitted, by the clerk of the court in which such sentence is pronounced, to the superintendent of the District jail, not less than ten days prior to the time fixed in the sentence of the court for the execution of the same."

The petitioners were under sentence of death, said sentence to be carried out between the hours of 10:00 A.M. and 2:00 P.M., Friday, December 3, 1948, but at about 1:35 P.M. December 3, the execution was stayed by this Court on its own motion until Tuesday, December 7, 1948. There was therefore nothing in writing in the hands of the jailer at 2:00 P.M., the final moment for carrying this sentence into effect.

Petitioners were brought into District Court Tuesday, December 7, and Judge Alexander Holtzoff, in writing, fixed a new sentence in that the sentence was ordered to be carried out between the hours above mentioned on December 10, 1948. A certified copy of Judge Holtzoff's order was transmitted to the jailer.

The contention is made in this case that 10 days must intervene between the date of the new sentence and the carrying into effect of said sentence, and therefore insufficient time has elapsed.

On December 9, 1948 petitioners filed in the United States District Court petition for writ of habeas corpus. Judge Morris, sitting in District Court, ordered a rule to show cause issued; the rule was issued returnable at 12:00 noon, December 9. After hearing on the rule and the return thereto the rule was discharged and petition dismissed.

Petitioners now desire to have this Court pass upon the legal questions involved and the legal effect of the certificate issued by Judge Morris, which is being transmitted to this Court, we understand, by the United States Attorney. Judge Morris, although issuing a certificate, being transmitted to this Court, would not permit the petitioners to proceed in forma pauperis.

Since petitioners desire to appeal we ask that Rule 45, Subdivision 1, of the Supreme Court Rules, be made applicable: "Pending review of a decision refusing a writ of habeas corpus, custody of the prisoner shall not be disturbed."

WHEREFORE, petitioners ask that they be permitted to proceed in this Court without prepayment of costs.

James J. Laughlin
James J. Laughlin
Counsel for Appellant Wheeler

Curtis P. Mitchell
Curtis P. Mitchell
Counsel for Appellant Patte

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REGINALD J. WHEELER :
and :
JESSE JAMES PATTON, : No. 171, Misc.
Petitioners :
vs. :
CURTIS REID, Superintendent :
Washington Asylum & Jail,
Respondent :

PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Now come Reginald J. Wheeler and Jesse James Patton, who are citizens of the United States, and seek permission of this Court to file their petition for an appeal of the ruling of the United States District Court for the District of Columbia on their petition for writ of habeas corpus and to proceed herein without prepayment of costs.

Petitioners say unto this Honorable Court that because of their poverty they are unable to prepay the usual costs and fees. Petitioners say unto this Honorable Court that on December 9, 1948 their petition for habeas corpus was filed in the United States District Court and a ruling to show cause was issued by the Honorable Judge James W. Morris, sitting in that Court; and that after hearing relative to the issues of the writ, the same was denied.

The petitioners requested the Honorable Judge James W. Morris to certify the cause as being taken in good faith and to allow your petitioners to proceed without prepayment of costs. However, your petitioners are informed and verily believe that the Honorable Judge aforementioned has prepared a statement which is to be transmitted to this Honorable Court.

WHEREFORE, petitioners pray that they be permitted to proceed in this Court without prepayment of costs.

REGINALD J. WHEELER
Reginald J. Wheeler

By

James J. Laughlin,
Attorney for Petitioner

Jesse James Patton

By

CURTIS P. MITCHELL
Curtis P. Mitchell
Attorney for Petitioner

In the interest of security, expediency and in consideration of the fact that time is of the essence, this petition is signed by counsel for the petitioners, who are informed and believe, in view of the previous affidavits in Forma Pauperis filed herein, that the petitioners are in a condition of poverty and are actually unable to provide for the payment of the usual costs and fees, counsel therefore respectfully request that the petition be allowed to be filed upon the signatures of counsel hereto.

James J. Laughlin

CURTIS P. MITCHELL
Curtis P. Mitchell

Subscribed and sworn to before me this 9 day of December, 1948.

DETTY E. M. DANIEL
Notary Public, D.C.

Subscribed and sworn to before me by Jas. J. Laughlin this 9th day of December, 1948.
Joseph W. Stewart

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

REGINALD J. WHEELER	:	
and	:	
JESSE JAMES PATTON,	:	
Petitioners	:	
vs.	:	No. 171, Misc.
CURTIS REID, Superintendent Washington Asylum & Jail,	:	
Respondent	:	

MOTION FOR STAY OF EXECUTION

Come now Reginald J. Wheeler and Jesse James Patton, by and through their attorneys, and state to this Honorable Court that they are under sentence of death and that said sentence has been set for execution on December 10, 1948 between the hours of 10:00 A.M. and 2:00 P.M.

And further, the petitioners state that a petition has been filed in this Honorable Court appealing from and asking for a review of the judgment of the United States District Court for the District of Columbia entered December 9, 1948 and denying the issuance of a writ of habeas corpus to the petitioners herein.

Counsel for petitioners state further that there is a substantial question of law involved which calls for determination by this Honorable Court.

WHEREFORE, petitioners pray that a stay be granted in this cause until such time as this Honorable Court passes upon the issues presented in your petitioners' appeal.

James J. Laughlin

Curtis P. Mitchell
Attorneys for Petitioners

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 171, Miscellaneous October TERM 1948.

Reginald J. Wheeler and
Jesse James Patton, Petitioners,

v.

Curtis Reid, Superintendent,
Washington Asylum & Jail,

Respondent.

Before: Stephens, C. J., and Edgerton and Wilbur K. Miller, JJ.

ORDER

The above entitled matter came on for hearing on petitioners' applications for leave to file petitions for leave to proceed on appeal in forma pauperis from an order of the United States District Court for the District of Columbia dismissing their petition for a writ of habeas corpus in case entitled Habeas Corpus No. 3483, Wheeler and Patton v. Reid, and on petitioners' motion for stay of execution of the sentence of death in Criminal Case No. 77,122, United States v. Wheeler and Patton, and on the stipulation of counsel for the parties as to certain portions of the record of said District Court in said case entitled Habeas Corpus No. 3483, Wheeler and Patton v. Reid, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered by the court that the clerk be, and he is hereby, directed to file the above-mentioned papers; and it is

FURTHER ORDERED by the court that the petition for leave to appeal in forma pauperis from the above-mentioned order in case entitled Habeas Corpus No. 3483, Wheeler and Patton v. Reid, be, and it is hereby, denied for the reasons set forth in the opinion of this court concurrently filed herein; and it is

ALSO FURTHER ORDERED by the court that the motion for stay of execution of the judgment of said District Court in Criminal Case No. 77,122, United States v. Wheeler and Patton, be, and it is hereby, denied.

Per Curiam.

Dated December 10, 1948, at 1:35 a. m.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

IN RE:)

REGINALD J. WHEELER) Habeas Corpus No. 3483

and

JESSE JAMES PATTON)

PETITION FOR WRIT OF HABEAS CORPUS

Now comes the petitioners and say they are at the present time confined in the Washington Asylum & Jail by and in the person of Curtis Reid, Superintendent, and are under sentence of death - said sentence to be carried out December 10, 1948 between the hours of 10:00 A.M. and 2:00 P.M.

Petitioners say that the judgment and sentence of this Court is void for the reason that Title 23, Section 703, of the D.C. Code provides:

> "Upon the conviction of any person in the District of Columbia of a crime the punishment of which is death, it shall be the duty of the presiding judge to sentence such convicted person to death * * * and a certified copy thereof shall be transmitted, by the clerk of the court in which such sentence is pronounced, to the superintendent of the District jail, not less than ten days prior to the time fixed in the sentence of the court for the execution of the same."

Petitioners say that since the sentence was originally imposed it was stayed from time to time and on December 7, 1948 the sentence was modified to provide for the imposition of the death penalty on December 10, and a certified copy of the new judgment was forwarded to the respondent.

Petitioners say that since less than three days intervened, the statutory requirement was not met and the judgment under which they are now held is void.

WHEREFORE, the premises considered, petitioners pray:

That writ of habeas corpus issue from this Court directed to the respondent commanding him to produce the bodies of your petitioners before this Court on a day and at an hour named in said writ to show cause, if any he has, why commitment should not be corrected as required by law, and petitioners dealt with as the ends of justice require.

/s/ Reginald J. Wheeler
Reginald J. Wheeler

/s/ Jesse James Patton
Jesse James Patton

BY: /s/ James J. Laughlin

Subscribed and sworn to
before me this 8th
day of December, 1948.

/s/ Grace E. Gause
Notary Public, D. C.

SEAL

Let petitioners proceed as prayed in their affidavit without prepayment of costs.

United States District Judge

Let this writ issue returnable on the _____ day of December, 1948, at ____ o'clock _.M.

United States District Judge

December 3, 1948.

Re: Miscellaneous No. 170 Jesse James Patton v. United States
" No. 169 Reginald J. Wheeler v. United States

Memorandum of oral rulings of Court

The court will order the clerk to file the papers which in Wheeler's and Patton's behalf have been presented to and received by the clerk.

With respect to Rule 33, Federal Rules of Criminal Procedure: That rule provides:

> . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. . . .

Mr. Mitchell, as counsel for Patton, contends that that rule forbids the execution of sentence before two years after the sentence has been imposed. That appears to us not to be the meaning of the rule. Such a construction of the rule would make it impossible to execute any sentence, whether in a capital case or not, until two years had expired after imposition of the sentence. We think the rule means merely that if a convicted defendant does discover new evidence he may within two years after sentence make a motion for new trial. But the rule is not applicable here. No motion for new trial has been made by Patton or in his behalf on the ground of newly discovered evidence and his counsel here states that there is at present no basis for such a motion. Therefore the rule has not been invoked.

With respect to Wheeler: Title 28, Section 1915 (a), second paragraph, provides that an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith. In the instant case the trial court has made no certificate. Paragraph (a) of Section 1915, however, provides:

> Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

That paragraph invests the court with discretion as to whether or not to allow an

appeal in forma pauperis and requires the court to give consideration in the exercise of its discretion to the nature of the appeal. We have considered the nature of the appeal as disclosed in the papers which we have allowed to be filed and as disclosed by the statements of counsel concerning alleged false testimony and suppressed testimony at the trial. It is our conclusion that the petition for leave to proceed in forma pauperis with respect to both Wheeler and Patton and the petition for stay of execution should both be denied and they are denied on the ground that the applications are not made in good faith and are frivolous.

In making this ruling we have treated the papers filed on behalf of Patton as an application to be allowed to appeal in forma pauperis upon the same grounds as those urged by Wheeler as well as upon the ground that Rule 33 forbids execution before two years after sentence and that therefore the trial court should have stayed the execution of Patton.

Clerk file this
memorandum.
H.M.S.

Nr. Chief Justice:

Judge Stephens telephoned that in conversation with you, you had inquired as to whether or not he had prepared a memorandum with respect to the action, and the basis therefor, taken by his court; that at that time he had not prepared such a memorandum. However, he subsequently set down some notes with respect to the action taken and the attached copy of them is sent for your information.

k-

December 17, 1948.

MEMORANDUM FOR THE CHIEF JUSTICE

IN RE: Cases Nos. 336, 404, and 431

These three cases present the question as to the constitutionality of the section 9(h) of the Taft-Hartley Act, which requires the filing of non-communist affidavits by union officers.

In No. 336 (American Communications Association, CIO, et al. v. Douds) the court on November 8th noted probable jurisdiction of an appeal from the District Court (S.N.Y.) and the case is scheduled for argument in the January session.

In No. 404 (Osman, et al. v. Douds), also an appeal from the District Court (S.N.Y.), the Court on December 6th voted to withhold action until the decision in No. 336.

In No. 431 (United Steelworkers of America, et al. v. NLRB), on petition for certiorari (7th Circuit), the Government filed a memorandum on December 2nd not opposing. That petition has not been listed for conference as I did not consider it ripe, the reason being that it is tied up on one record with case No.435 (Inland Steel Co. v. NLRB), in which case the Government's brief is not due until January 2nd. The two cases were heard together in the Court of Appeals and decided in one opinion. The issue in No. 435 is as to the applicability of the collective bargaining section of the Act to petitioner's retirement and pension plan.

Counsel in No. 336 and No. 404 have addressed a letter to you, suggesting that if the Court has determined to hold No. 404 for No. 336 it reconsider such action.

Counsel in No. 431 have sent this office nine copies of a letter addressed to the Court, requesting that consideration of their petition be not delayed pending the maturity of No.435 and that the petition be granted and set for hearing with No. 336.

The object of both letters is to suggest that No. 336 may be a moot case and consequently the issue as to the constitutionality of the non-communist affidavit may not be resolved and decision of that question would be delayed pending hearing and determination of No. 404 and/or No. 431.

Unless you direct otherwise I will not list the matters for conference tomorrow.

WILLEY

Filed

Tidelands

1510 Morris Building
Philadelphia 2, Pa.
Rittenhouse 0650

Special Master/
Orig No. 12

January 25, 1949

My dear Chief Justice:

I have carefully canvassed the matter about which you spoke to me on the telephone yesterday. I deeply appreciate the confidence which moved you and the members of the Court to think of me in this connection. I look upon the proffer as a call to duty and I have tried my best to find a way to answer that call.

As you know, I have made various commitments which an acceptance of the mastership in question would require me to cancel.

I am sorry to tell you that I feel morally bound to carry on the activities to which I am committed, which I think would be impossible were I to become master

in the Tidelands case. It is with great regret, therefore, that I tell you I feel I cannot undertake to act in the case.

With my sincere regards, I am,

Faithfully yours,

Douglas Edwards

To the Chief Justice
Supreme Court of the United States
Washington 13, D. C.

OFFICE OF THE GOVERNOR

SPRINGFIELD

February 16, 1949

ADLAI E. STEVENSON
GOVERNOR

Mr. Arthur Seder
Supreme Court of the United States Building
Washington, D. C.

Dear Art:

Here is a copy of a letter which describes the current status of the post-conviction rule. The March term begins as I remember about the middle of March and lasts for a couple of weeks, although I am not precisely sure of the dates. They probably would not adopt a rule until close to the end of the term.

I was in Chicago for a few days recently and saw the Law School group. All seem well, happy and busy.

Sincerely,

Walter V. Schaefer
Administrative Assistant

Pers. Post Conviction Proc.

CONRAD H. POPPENHUSEN
EDWARD R. JOHNSTON
FLOYD E. THOMPSON
ANAN RAYMOND
FREDERICK MAYER
WILLIAM R. SWISSLER
HENRY J. BRANDT
ALBERT K. ORSCHEL
ALBERT E. JENNER, JR.
MAX BLOOMSTEIN, JR.
JAMES A. SPROWL
SAMUEL W. BLOCK

ROGER W. BARRETT
ALAN R. JOHNSTON
GILBERT H. HENNESSEY, JR.
RALPH A. MAYER
EDWARD H. HATTON
CHARLES J. O'LAUGHLIN
JOSEPH C. OWENS
ADDIS E. HULL III
EDWARD E. LYNN

DUPLICATE ORIGINAL

LAW OFFICES
POPPENHUSEN, JOHNSTON, THOMPSON & RAYMOND
ELEVEN SOUTH LA SALLE STREET
CHICAGO 3

TELEPHONE
RANDOLPH 6-0220
CABLE ADDRESS
"POPPENJOHN"

February 10, 1949

Stephen A. Mitchell, Esq.,
Board of Trade Building,
141 W. Jackson Blvd.,
Chicago 4, Ill.

Re: Post-Conviction Hearings

Dear Steve:

I have delayed responding to your letter of January 25th because I was awaiting word from Judge Fulton in answer to a letter I had written him during the course of the January term. I heard from Judge Fulton on Friday of last week. He stated that because of the illnesses of Justices Wilson and Gunn, the Court was unable to take any action on the pending proposals for adoption of rules but that he believed the Court would do so at the March term and that, in any event, he would do his level best to obtain action at that time. In my letter I called attention to the fact that unless the Court acted at least by the March term, legislation would undoubtedly be forthcoming, very likely of a character much unsuited to the Court's desires. Justice Fulton acknowledged this possibility.

Under the circumstances, I think it wise that we take no legislative action until the adjournment of the March term of court. If you or Bill or Walter should have any views otherwise, please let me know.

Very truly yours,

ALBERT E. JENNER, JR

AEJ:NC
cc. Wilber G. Katz
Walter V. Schaefer

OFFICE OF THE GOVERNOR

SPRINGFIELD

ADLAI E. STEVENSON
GOVERNOR

May 15, 1949

Mr. Arthur Seder
Supreme Court of the United States
Washington, D. C.

Dear Art:

I am sorry that my reply to your letter of the sixth has been so long delayed. Your letter went first to the Law School and then was forwarded down here. After I received it I made inquiries as to the current state of affairs.

Last Thursday Mr. Jenner discussed with one of the Justices the attitude of the Court concerning our proposed rule. The inaction of the Court to date was explained upon the ground that two of the Justices (Wilson and Gunn) have been ill for some time.

Mr. Jenner's reaction, and mine, is that the Court does not intend to adopt any rule relating to this subject. No legislation has been introduced to date, and I would doubt very seriously the possibility of the enactment of any legislation on this subject during this session, which will end on July 1. The whole situation is most disappointing. A good many of us had hoped that it could be cleaned up rather expeditiously by the Court but it is pretty clear now that we were overly optimistic.

Sincerely,

Walter V. Schaefer
~~Administrative Assistant~~

OFFICE OF THE GOVERNOR

SPRINGFIELD

ADLAI E. STEVENSON
GOVERNOR

May 27, 1949

RECEIVED
MAY 31 10 39 AM '49
CHAMBERS OF THE
CHIEF JUSTICE

Mr. Arthur Seder
Supreme Court of the United States
Washington, D. C.

Dear Art:

I have just heard this morning that the Illinois court has determined that it would not adopt the post conviction rule which we submitted to them early last fall.

On May 25 a bill was introduced in the State Senate by Senator Walker Butler of Chicago which apparently attempts to deal with this situation by habeas corpus. The printed bill is not yet available, but I shall send a copy on to you as soon as I can get one. The difficulties with the habeas corpus approach, as you know, are that the ruling of the trial court is not reviewable under the state court system and that the decision of the court is not resjudicata.

I talked to Senator Butler and he is not optimistic about the prospects for passage of his bill. It is very late in the session to begin to put through a bill which requires as much education and exposition as is involved in this problem.

Sincerely,

Walter V. Schaefer

File
noted 6/10/49

MAYER, MEYER, AUSTRIAN & PLATT

CONTINENTAL ILLINOIS BANK BUILDING

CHICAGO 4

June 8, 1949

Hon. Fred M. Vinson
Chief Justice of the United States
Washington 13, D. C.

My dear Mr. Chief Justice:

Thank you very much for your kind letter of June 6 re Smith v. Ragen, No. 760.

I am grateful for your expression of appreciation of my small services. However, I feel, as I am sure most members of the Bar do, that the privilege of being a member of the Bar of the Supreme Court more than repays one for the comparatively slight amount of time he gives to the affairs of indigent petitioners.

With my very best wishes, I remain

Sincerely,

Herbert A. Friedlich

June 6, 1949

Mr. Herbert A. Friedlich,
Continental Illinois Bank Building,
Chicago 4, Illinois.

My dear Mr. Friedlich:

As the Clerk of this Court has undoubtedly notified you, the case in which you were appointed counsel for the petition, No. 760, Smith v. Ragen, was disposed of in a blanket order involving seven other petitions from Illinois prisoners. In each case, the order of the Illinois Circuit Court denying the petition for habeas corpus was vacated and the cause remanded with directions to consider the Illinois Supreme Court's pronouncement in People v. Loftus, 400 Ill. 432. In view of the similar procedural problem involved in the case with which you are associated, the Court thought it unwise to make a different disposition of the cause, even though the petition for certiorari had been granted and the case set for argument.

I realize that you have already spent considerable of your valuable time in the preparation of this case, and I sincerely regret that the circumstances are such that your generous acceptance of the Court's request caused you unnecessary trouble and expense. We are extremely grateful to all members of the bar who accept appointments to represent indigent petitioners. The unanimity with which such appointments are accepted is a source of great pride to the Court. I wish, therefore, to convey to you the Court's appreciation for your acceptance of an undertaking in the public interest and your unselfish endeavors pursuant thereto.

Very truly yours,

June 6, 1949

Mr. Herbert A. Friedlich
Continental Illinois Bank Building
Chicago 4, Illinois

My dear Mr. Friedlich:

As the Clerk of this Court has undoubtedly notified you, the case in which you were appointed counsel for the petitioner, No. 265 Misc., Smith v. Ragen, was disposed of in a blanket order involving seven other petitions from Illinois prisoners. In each case the order of the Illinois Circuit court denying the petition for habeas corpus was vacated and the cause remanded with directions to consider the Illinois Supreme Court's pronouncement in People v. Loftus, 400 Ill. 432. In view of the similar procedural problem involved in the case with which you are associated, the Court thought it unwise to make a different disposition of the cause, even though the petition for certiorari had been granted and the case set for argument.

I realize that you have already spent considerable of your valuable time in the preparation of this case, and I sincerely regret that the circumstances are such that your generous acceptance of the Court's request caused you unnecessary trouble and expense. We are extremely grateful to all members of the bar who accept appointments to represent indigent petitioners. The unanimity with which such appointments are accepted is a source of great pride to the Court. ~~I am only sorry that you were deprived of the only compensation the Court can pay--the sense of fulfillment of an undertaking entered into in the public interest.~~

~~Thank you again for your very generous response to this Court's request. I am~~

Very truly yours,

I wish, therefore, to convey to you the Court's appreciation for your acceptance of an undertaking in the public interest and your unselfish endeavors pursuant thereto.

June 23rd, 1949.

Honorable William Denman, Chief Judge
United States Court of Appeals,
Ninth Judicial Circuit
San Francisco, California.

IN RE: No. 691, October Term, 1948.

Peter Petersen, Clara Belle Petersen, husband and wife, and George D. Patrick,

.....Petitioners

v.

Christ's Church of the Golden Rule, a corporation, Paul W. Sampsell, L. Boteler, and McIntyre Faries, as Trustees in Bankruptcy of the Estate of Christ's Church of The Golden Rule, a corporation, Bankrupt.

.....Respondents.

Dear Judge Denman:

There is enclosed herewith a copy of "Affidavit of Howard B. Crittenden, Jr., for order permitting Withdrawal as Attorney for Petitioners" filed in this Court in the above styled cause.

On Monday, June 20, 1949, the Court denied Mr. Crittenden's application, and, also, upon consideration, denied the petition for Writ of Certiorari which had been presented.

In this connection, inasmuch as the proceedings herein involve a Member of the Bar of this Court and, as such, an Officer of this Court, it was felt that you should be fully informed and advised with respect to the statements of Mr. Crittenden concerning the proceedings in the Bankruptcy Court.

By direction of the Court.

Chief Justice.

ILLINOIS STATE BAR ASSOCIATION
ORGANIZED JANUARY 4, 1877

Office of the President, ALBERT E. JENNER, JR., 11 SOUTH LASALLE STREET, CHICAGO 3, ILLINOIS

July 14, 1949

Honorable Fred M. Vinson
Chief Justice of the United States Supreme Court
Supreme Court Building
Washington 25, D.C.

My dear Chief Justice Vinson:

I am advised that you were conscious, to a degree at least, of the efforts of the organized bar in Illinois during the past year to induce the Supreme Court of Illinois to adopt a rule of Court on the subject of post-conviction hearing procedure. It may be that the proposed rule itself came to your attention. I understand that prior to the handing down of the opinion of the Court in Jack O'Lee Young v. Ragen on June 6 of this year, you were informed that the Supreme Court of Illinois had advised the Committees of the Chicago and Illinois State Bar Associations of its decision not to promulgate either the proposed rule or a modification thereof.

Upon being advised of the determination of the Supreme Court of Illinois, the Associations revised the proposed rule in a statutory form and caused it to be introduced in the Illinois General Assembly which was then in session. I am pleased to report to you that the bill, as amended, passed both houses of the General Assembly. As of this moment, the bill has not yet reached Governor Stevenson's desk. However, he is awaiting it and has announced to the press and assured me that he will be pleased to have the opportunity to affix his approval thereto. I would say that by the time this letter reaches you, the bill will have become part of the statutory law of Illinois. I am enclosing a copy of the bill as amended and adopted.

The organized bar of this State has been very much concerned in the past few years with the problem of the

inadequacy of the post-conviction hearing procedure in this State. We believe that the new legislation supplies a certain and adequate remedy to persons incarcerated in the penitentiary to obtain hearing upon their claim, if any, that in the proceeding that resulted in their incarceration they were denied substantial federal constitutional rights within the meaning of your opinion in the Young case in which you stated:

> "The doctrine of exhaustion of state remedies, to which this Court has required the scrupulous adherence of all federal courts see Ex parte Hawk, 321 U.S. 114 and cases cited, presupposes that some adequate state remedy exists."

Respectfully yours,

President

AEJ:do
Encl.

14

Reported from Senate, June 7, 1949.

Read by title, ordered printed and to a first reading.

A BILL

For an Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed to them by the Constitution of the United States or the State of Illinois, or both, have been denied or violated, in proceedings in which they were convicted.

Be in enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Any person imprisoned in the penitentiary who aserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Act. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. Petitioner shall also serve another copy upon the state's attorney by any of the methods provided in Rule 7 of the supreme court. The clerk shall docket the petition upon his receipt thereof and bring the same promptly to the attention of the court. No proceeding under this Act shall be commenced more than five years after

rendition of final judgment, or more than three years after the effective date of this act, whichever is later, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.

Sec. 2. The petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and shall clearly set forth the respects in which petitioner's constitutional rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition.

Sec. 3. Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.

Sec. 4. If the petition alleges that the petitioner is unable to pay the costs of the proceeding, the court may order that the petitioner be permitted to proceed as a poor person. If the petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel.

Sec. 5. Within thirty days after the filing and docketing of the petition, or within such further time as the court may fix, the State shall answer or move to dismiss. No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party. The court may in its discretion grant leave, at any stage of the proceeding prior to entry of judgment, to withdraw the petition. The court may in its discretion make such orders as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just and reasonable and as is generally provided in Rule 8 of the supreme court and section 46 of the Civil Practice Act.

AMENDMENT TO

66th G. A **SENATE BILL NO. 630 IN HOUSE** 1949

14

Adopted June 17, 1949.

AMENDMENT NO. 1.

Amend printed Senate Bill No. 630 in House on page 3 by striking all of Section 7 and inserting in lieu thereof the following:

"Sec. 7. Any final judgment entered upon such a petition may be reviewed by the supreme court on writ of error brought within six months from the entry of the judgment."

1827—300

Sec. 6. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, bail or discharge as may be necessary and proper.

Sec. 7. Any order dismissing the petition and any order entered after trial of the issues shall be final unless reversed on writ of error from the supreme court brought within one year from the rendition of the order.

Any such order may be reviewed by the supreme court on writ of error brought within one year from the rendition of the order.

August 2, 1949

Mr. Albert E. Jenner, Jr.,
11 South LaSalle Street,
Chicago 3, Illinois.

Dear Mr. Jenner:

Thank you for your letter of July 14th, with which you enclosed copy of Illinois Senate Bill No. 630, with reference to post-conviction hearing procedure. I appreciate your courtesy in writing me and sending me a copy of the bill.

With kind regards,

Sincerely,

(Signed) Fred M. Vinson

PLK:McH

THE SOLICITOR GENERAL

WASHINGTON

August 10th — 49.

Dear Mr. Chief Justice:

We are preparing a brief in No. 83 — I had a long memorandum on the subject from the F.C.C., and I authorized a brief on June 28th. I suppose it should be coming along soon.

Hope to see you soon — and get some pointers on how I should argue before the new Justices.

Sincerely —

— Phil —

State of Georgia
Supreme Court
Atlanta

September 27, 1949

Hon. Fred V. Vinson,
Chief Justice of the United States,
The Supreme Court of the United States,
Washington, D. C.

Dear Mr. Chief Justice:

Mr. Morris Abrams, an attorney at law, residing in Atlanta, Georgia, who is admitted to practice in the Supreme Court of Georgia, but who has not been admitted to this court long enough to enable him to be admitted to practice in your court, advises me that he has pending in your court cases which he desires very much to argue. The purpose of this letter is to inquire of you whether or not you can suspend your rule and allow him to argue his cases before your court.

I know Mr. Abrams very well and know that he is a brilliant lawyer, entirely capable of handling any matter before your court in a way that would be helpful to the court. I, therefore, wish to request that you extend to him this privilege, if possible.

I would be happy to receive notice from you that the privelege requested is granted. With kind personal regards, I remain,

Sincerely your friend,

W. H. Duckworth

W. H. DUCKWORTH,
Chief Justice.

WHD/rb

October 18, 1949

Honorable W. H. Duckworth,
Chief Justice,
State of Georgia Supreme Court,
Atlanta, Georgia.

Dear Mr. Chief Justice:

I have your letter of September 27th in which you request that Mr. Morris Abrams be granted permission to argue certain cases before the Supreme Court of the United States.

In order that we may identify the cases in which Mr. Abrams is interested, I would appreciate it if you would ascertain from him the style of the cases and the numbers. After I have received this information, we will be happy to give the matter consideration.

With kind personal regards,

Sincerely,

(Signed) Fred M. Vinson

Gibbs

THE OFFICE OF THE DISTRICT ATTORNEY
OF
DELAWARE COUNTY
MEDIA, PENNSYLVANIA

DISTRICT ATTORNEY
C. WILLIAM KRAFT, JR.

TELEPHONE · MEDIA 1350 OR 0600

ASSISTANT DISTRICT ATTORNEYS
KARL W. JOHNSON
FIRST ASSISTANT
EDWARD H. BRYANT, JR.
SOLOMON L. HAGY
R. PAUL LESSY
JOSEPH E. PAPPANO
RAYMOND R. START

October 27th, 1949

Honorable Fred M. Vinson, Chief Justice,
United States Supreme Court,
Supreme Court Building,
Washington, D.C.

In re: October Term 1948 - 418
Edward Gibbs vs C.J. Burke, Warden
Eastern State Penitentiary

Dear Sir:

Pursuant to the decision of your Honorable Court, the opinion by Mr. Justice Reed, the above named defendant was given a new trial in this county on October 10th, 1949.

It may be of interest to you to know that at the time he was called for trial, the defendant desired to enter a plea of guilty, provided that he was given a lighter sentence. When the case was returned here for trial, the defendant requested the appointment of Mervin R. Turk, Esquire, one of our outstanding attorneys. Mr. Turk accepted the request and presented a vigorous defense.

The results of the trial were that the jury considered the case about fifteen minutes and found the defendant guilty as charged. The court then assigned to the defendant the same sentence that had previously been imposed.

Also, of passing interest, is the fact that neither the previous Judge nor I, as the Assistant District Attorney, had anything to do with the second trial.

Very truly yours,

Karl W. Johnson
1st Asst. District Attorney

KWJ:CD

cc-Judge Ervin

Apparently Dean Manion is referring to Case No. 334 -
United States v. Shoreline Cooperative Apts. -
probable jurisdiction was noted on 10/17/49

University of Notre Dame
COLLEGE OF LAW
NOTRE DAME, INDIANA

OFFICE OF THE DEAN
CLARENCE MANION

November 9, 1949

File

The Honorable Fred M. Vinson
Chief Justice
United States Supreme Court
Washington, D. C.

Dear Justice Vinson:

Enclosed herewith are the page proofs of a Note prepared by two of our senior law students on the "Delegation and Separability Aspects of The Housing and Rent Act of 1949". The article will appear in a forthcoming issue of the Notre Dame Lawyer but in view of the possible delays in the final publication, the page proofs are being forwarded.

I am aware of the fact that a decision of a particular case involving this constitutional point is now pending before the Supreme Court. The enclosed Note takes neither side of the controversy, but represents an objective treatment involving several novel approaches to a possible decision of the question. These pages are forwarded by me, "as a friend of the court", in the hope that this piece of research may be helpful to the Justices who will have the responsibility of deciding this important question.

With personal good wishes, I am

Sincerely yours,

CLARENCE MANION
DEAN

CM:ar

Encl: a/b

25 Notre Dame Lawyer 79 (1949)

CONTRIBUTORS TO THE FALL ISSUE

Alfred L. Scanlan, Assistant Professor of Law, University of Notre Dame. A.B., 1941, Columbia University; LL.B., 1946, LL.M., 1947, George Washington University School of Law; Attorney, Federal Power Commission, 1946-47. Member of the Bars of District of Columbia and Indiana. Contributor, George Washington Law Review, Rocky Mountain Law Review, Journal of Legal Education. Faculty Advisor, Notre Dame Lawyer.

Louis C. Kaplan, A.B., Yale University; LL.B., LL.M., Georgetown University School of Law. Attorney, Bureau of Law, Federal Power Commission. Contributor, Notre Dame Lawyer. Georgetown Law Journal.

Miriam Theresa Rooney, A.B., 1930; M.A., 1932; Ph.D., 1937, Catholic University of America; LL.B., 1942, George Washington University School of Law. Member of the Bars of the District of Columbia and the United States Supreme Court. Associate Editor, *The New Scholasticism,* 1945-48. Contributor to various legal and philosophical journals. Lecturer in Jurisprudence, Columbus University Law School, 1942-48. Associate Professor of Law, Catholic University of America.

NOTES

Constitutional Law

Delegation and Separability Aspects of the Housing and Rent Act of 1949*

Recent court decisions interpreting the Housing and Rent Act of 1949,[1] present an interesting conflict on the issue of the Act's constitutionality, specifically as respects Congress' power to delegate its legislative authority. A federal district court in Illinois recently held,

*A decision by the Supreme Court on the issue of the constitutionality of the Housing and Rent Act of 1949 appeared imminent as this note was being prepared and set in print. The present note has been prepared with a view toward presenting various issues which might arise in determining the validity either of the instant Act or any similar pieces of legislation subsequently enacted; i.e., while discussion of the issues has been specifically related to the provisions of the rent Act, the issues so presented are merely applied to, and not limited by, the provisions of that particular Act.

[1] Pub. L. No. 31, 81st Cong., 1st Sess. (Mar. 29, 1949). This Act amends the 1947 Act, 61 Stat. 196 (1947), as amended, 50 U.S.C. App. § 1891 *et seq.* (Supp. 1949).

in *Woods v. Shoreline Cooperative Apartments, Inc., et al.*,[2] that the Act is an unconstitutional delegation of the legislative power of Congress insofar as the "local option" provisions [3] are concerned, and that these provisions are not separable from the remaining portions of the Act, despite the presence therein of a standard separability clause.[4] Thus the entire Act was, under the reasoning of the court, wholly unconstitutional. Squarely opposed to the holding in the *Shoreline* case is the subsequent decision handed down by a federal district court in California, in *United States v. Emery et al.*[5] This case upheld the "local option" provisions as a valid delegation of congressional power to the states and local communities. In a third case, *United States v. Resch*,[6] a federal district judge in Kentucky has stated that the "local option" provisions are valid, and that even if any of them were declared invalid, they would be separable from the rest of the Act. These decisions serve to point up some of the rather novel aspects of the problem of the permissible limits of Congress' delegation of its legislative power as raised by the recent rent control Act.

The scope of this note will be restricted to: a brief examination of the history of rent control legislation in the United States; the problem of delegation of congressional legislative power to the states and local communities under the Housing and Rent Act of 1949; the operation of the separability clause which is included in the Act. It will be assumed that the war powers, from which derive the congressional authority to pass any sort of rent control legislation, may still be validly exercised.[7]

It would be well at the outset to clarify the sense in which the term "delegation of legislative power" will be used. This phrase has been utilized by some courts to denote unconstitutionality per se,[8] while in other courts a delegation in itself is not conclusive of un-

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2 84 F. Supp. 660 (N. D. Ill. 1949).

3 Note 1 *supra*, at § 204 (j) (1), (2), (3) of the Act as amended.

4 Note 1 *supra*, at § 303 of the Act as amended.

5 85 F. Supp. 354 (S. D. Calif. 1949).

6 85 F. Supp. 389 (W. D. Ky. 1949). A fourth "test" suit was recently begun in Chicago before a special three-judge court. N. Y. Times, Sept. 13, 1949, p. 31, col. 1. Early interest in the progress of this case has dwindled since the Supreme Court has agreed to hear the *Shoreline* case in the near future. See 18 L. W. 3118 (1949).

7 Both the *Shoreline* and *Emery* cases proceeded on this assumption.

8 Early cases which seem to proceed upon this theory include: The Brig Aurora, 7 Cranch 382, 3 L. Ed. 379 (U. S. 1813); Field v. Clark, 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294 (1892); United States v. Grimaud, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563 (1911); Locke's Appeal, 72 Pa. 491 (1873); *cf.* more recent cases, where conferring of regulatory power was held to be a mere limitation by Congress of its own power. United States v. Rock Royal Cooperative, Inc., et al., 307 U. S. 553, 59 S. Ct. 993, 83 L. Ed. 1446 (1939) and Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441 (1939).

constitutionality, but merely presents the further and more important question of whether such delegation is "valid" or "invalid." [9] The tendency of courts today is to recognize, realistically, that many of the broad powers delegated by Congress are, to some extent at least, legislative in nature.[10] In accordance with this trend, the use of the term "delegation of legislative power," for the purposes of this note, will not of itself indicate an unconstitutional delegation, but will merely raise the further question of the validity of such delegation.

I.

Although the broad issue upon which the problems arising under the Act turn—namely, the issue of delegation of legislative power—reaches down into the roots of American constitutional history,[11] comprehensive federal rent control legislation was unknown in the United States until the recent war. The only federal act of general application in the first World War was the Soldiers' and Sailors' Civil Relief Act of 1918,[12] which merely protected families of service men from eviction and distress during their period of service, if rentals were not more than fifty dollars per month. Congress also passed a rent control act of a more comprehensive nature for the District of Columbia, which provided, with certain exceptions, that no judgments of eviction should issue for the duration of the war where tenants held under leases of one month or longer.[13] Five states passed rent control acts during the first World War,[14] but general housing conditions apparently did not warrant widespread legislation.

With the advent of the second World War, Congress, under the authority of its war powers, passed the Emergency Price Control Act of 1942,[15] which provided, inter alia, for the establishment, at the

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9 As long ago as 1916, Elihu Root stated that, as the result of the creation of various administrative boards, "the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight." Root *Public Service By The Bar,* 2 A.B.A.J. 736, 749 (1916). See an excellent and realistic discussion of delegation, in which the court construes *J. W. Hampton, Jr. & Co. v. United States,* 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1928), as recognizing a permissible area of delegation of legislative powers. State *ex rel.* Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 220 N. W. 929 (1928). See also Jaffe, *An Essay on Delegation of Legislative Power: II,* 42 COL. L. REV. 561 (1947); Cousens, *The Delegation of Federal Legislative Power to Executive Officials,* 33 MICH. L. REV. 512 (1934).

10 Authorities cited note 9 *supra.*

11 See, e.g., the early cases cited note 8 *supra.*

12 40 STAT. 440 (1918).

13 *Id.* at 443, § 300 (1).

14 See 51 HARV. L. REV. 427, 497 (1942), citing DRELLICH AND EMERY, RENT CONTROL IN WAR AND PEACE 16-20 (1939); see also, as to state rent control during and after the first World War, 95 Cong. Rec. 2956 (Mar. 22, 1949).

15 56 STAT. 23 (1942).

discretion of the Price Administrator, of controls over rental housing units in defense rental areas.[16] The broad powers given to the Administrator under this Act reflected the well-founded fear of the economic repercussions of the war. The purpose of the Act, as set forth in Section 1 (a), was, in part, "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering . . . and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency. . . ." In 1944, the Act, as amended,[17] was amended to allow the Administrator to decontrol rental units in areas where he found that there were adequate rental facilities, or where for other reasons rent control was no longer necessary.[18] In 1946, a Congressional change of policy was declared: ". . . that unnecessary or unduly prolonged controls over prices and rents and use of subsidies would be inconsistent with a return to . . . a peacetime economy." [19] In 1947, the duty of administering rent controls passed from the Office of Price Administration to the Office of the Housing Expediter, under the terms of the Housing and Rent Act of 1947.[20] The reason for the shift, of course, was the prospective expiration of the Emergency Price Control Act, and the realization by Congress, at the same time, of the continued need for federal rent controls. Congress, in this new Act, affirmed the policy of the 1946 price control legislation, and further stated that it was the congressional purpose "to terminate at the earliest practicable date, all Federal restrictions on rents on housing accommodations." [21]

Under the 1947 Act, the Housing Expediter was given substantially the same discretionary powers [22] to decontrol defense rental areas as had been given the Price Administrator under the earlier price control acts. However, the Expediter was directed to set up local advisory boards consisting of persons who were "representative citizens of the area," to be appointed by the Expediter from recommendations made by the respective Governors of the states. These local boards could make recommendations to the Expediter for decontrol of defense rental areas or portions thereof, subject to the approval of the Expediter. The action of the Expediter in approving or disapproving of these recommendations was not entirely discretionary, however. It was provided that: [23]

16 *Id.* at 24, § 2 (a).

17 56 STAT. 23 (1942), as amended, 57 STAT. 566 (1943).

18 56 STAT. 23 (1942), as amended, 58 STAT. 633 (1944).

19 56 STAT. 23 (1942), as amended, 60 STAT. 664 (1946).

20 61 STAT. 196 (1947), as amended, 50 U. S. C. App. 1891 *et seq.* (Supp. 1949), Pub. L. No. 31, 81st Cong., 1st Sess. (Mar. 29, 1949).

21 *Id.* at § 201 (a) of the 1947 Act. It is interesting to note that this section remained unchanged in the 1948 and 1949 amendments to the original Act.

22 *Id.* at § 204.

23 *Id.* at § 204 (e) (3).

> Any recommendation of a local board appropriately substantiated and in accordance with applicable law and regulations shall be approved and appropriate action shall promptly be taken to carry such recommendations into effect.

The meaning of this section was clarified in the 1948 amendment of the Act, which provided that a recommendation should be deemed "appropriately substantiated and in accordance with applicable law and regulations" if the local board: held a public hearing; gave proper notice of the place, date and purpose of the hearing; filed a copy of the recommendation with the Governor; kept a record of the proceedings and sent a copy thereof, along with its findings and recommendations, to the Expediter; and if the record contained adequate and substantial evidence to support the findings and recommendations of the local board.[24]

It was with this background of federal rent control legislation, and during the difficult transitional period between the war and the prospective return to a stabilized, normal economy that Congress, after extended committee and floor hearings and debates, passed the Housing and Rent Act of 1949. Included in this Act, in addition to the extension of many of the provisions of the previous rent acts, were the unique and presently controverted provisions for ending federal rent control at the option of state and local governing units.[25]

Congressional dissatisfaction with the progress of decontrol[26] under the previous rent control acts, which had vested virtually all decontrol powers in the Housing Expediter, coupled with the desire to end all federal rent controls at the earliest possible time,[27] led to the inclusion of the "local option" provisions in the 1949 Act. Consideration of these provisions will involve an examination of two fundamental problems. (1) Do the provisions giving the states and local governing units an opportunity to end federal rent control amount to a delegation of congressional legislative power; or are these provisions merely a limitation by Congress on the operation of its own law? (2) If any of the provisions do amount to a delegation, is the delegation valid, or is it an unconstitutional abdication by Congress of its legislative prerogatives?

II

Section 204 (j) (1) of the Housing and Rent Act provides:

> Whenever the governor of any State advises the Housing Expediter that the legislature of such State has adequately provided for the establishment and maintenance of maximum rents, or has specifically expressed its intent that State rent control shall be in lieu of Federal rent

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24 *Id.* at § 204 (e) (4) of the 1947 Act, as amended, 50 U. S. C. App. § 1894 (Supp. 1949).

25 See note 3 *supra.*

26 See, e.g., 95 Cong. Rec. 2521-6 (Mar. 15, 1949); 95 Cong. Rec. 2362-3 (Mar. 11, 1949).

27 See note 21 *supra.*

> control, with respect to housing accommodations within defense-rental areas in such State and of the date on which such State rent control will become effective, the Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under this Act, as amended, with respect to housing accommodations within such State shall be terminated as of the date on which State rent control is to become effective. As used in this subsection, the term "State" means any State, Territory, or possession of the United States.

Under this subsection, it would seem that Congress has merely given the states an opportunity, in lieu of federal rent control, to enact their own laws on the same subject matter. The power under which the states would enact rent control laws, is, of course, derived from their inherent police power, and not from the war powers. That the states, in the exercise of their police power, can enact valid rent control laws has been affirmed by the Supreme Court in *Marcus Brown Holding Company v. Feldman* [28] and *Edgar A. Levy Company v. Siegel.*[29] The subsection of the Housing and Rent Act presently under discussion does not specifically direct the states to take action to terminate rent control; furthermore, such action, if taken, need not have any reference to the emergency war powers, even though as a practical matter the need for rent control at this time obviously derives from the economic aftermath of the war, whether so stated or not. In any event, these provisions for decontrol seem proper in view of the fact that the states have power to pass rent control laws independently of the war effort, so long as Congress agrees, as it appears to have done under this subsection, that its own law, which can be based only on the war powers, shall not take precedence.

The provisions of this subsection are not strictly analogous either to state home rule or state "local option" laws, since the powers of the various state subdivisions in those instances are derived only from the states, while the power of the state is, in the matter of rent control, coexistent with, and not derived from federal power.

It should be noted that if the states, under this subsection of the Act, were authorized to exercise a continuing power to administer the *federal* law, this would of course amount to a delegation, valid or invalid, of congressional legislative power. But it might well be argued that this section, as it stands, is not a delegation of *any* congressional power, since, as has been pointed out, the states likewise have the power, though on a different basis, to enact rent control legislation, and since, by providing the states with the opportunity to provide their own controls, Congress has merely put a voluntary

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28 256 U. S. 170, 41 S. Ct. 465, 65 L. Ed. 877 (1921). Despite this case, the Illinois district court in the *Shoreline* case thought the existence of such power doubtful. 84 F. Supp. 660, 662 (N. D. Ill. 1949).

29 258 U. S. 242, 42 S. Ct. 289, 66 L. Ed. 595 (1922).

limitation on the operation and applicability of its own Act. Under this view, it does not become necessary to discuss, in this subsection, the question whether sufficient standards are laid down by Congress to guide the states—a question which would only arise if the subsection were construed to be a delegation of congressional legislative power to the states.[30] Under the concurrent powers theory which has been developed, it would not be the proper concern of Congress to tell the states how to exercise their own legislative powers. Likewise, it is not necessary to consider whether the absence of concurrent powers would conclusively establish that the provisions of this subsection involve delegation rather than congressional limitation. However, it seems pertinent to point out that, in addition to the concurrent powers theory, the constitutionality of this subsection might be upheld on the authority of *United States v. Rock Royal Cooperative, Inc., et al.*[31] and *Currin v. Wallace,*[32] in which individuals were given the power to determine whether an order issued under a congressional act was to apply to them. This power was held to be only a limitation by Congress on the operation of its own act, and not a delegation. These cases may be distinguishable on their facts from the situation presented under the rent Act, and the concurrent state powers theory would seem to be a sounder basis upon which to argue the constitutionality of this subsection of the Act. The *Rock Royal* and *Currin* cases are discussed further under subsection (j) (3) of the Act.

The only remaining issue as to this subsection, then, is whether it is separable from any other section of the Act which might be declared unconstitutional.[33]

Section 204 (j) (2) provides:

> If any State by law declares that Federal rent control is no longer necessary in such State or any part thereof and notifies the Housing Expediter of that fact, the Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under this act, as amended, with respect to housing accommodations within such State or part thereof shall be terminated on the fifteenth day after receipt of such advice. As used in this subsection, the term "State" means any State, Territory, or possession of the United States.

It would seem that the same reasoning as was applied to subsection 204 (j) (1) might likewise be applied here. Since the states (insofar as their laws do not conflict with federal law on the same subject matter) can enact rent control laws,[34] and since Congress can validly limit the operation of its own law,[35] Congress has, under this sub-

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30 The question of standards is discussed *infra.*

31 307 U. S. 553, 59 S. Ct. 993, 83 L. Ed. 1446 (1939).

32 306 U. S. 1, 59 S. Ct. 379, 55 L. Ed. 563 (1939).

33 The question of separability is discussed *infra,* under section III.

34 See notes 28 and 29 *supra.*

35 See, e.g., the *Rock Royal* and *Currin* cases, cited notes 31 and 32 *supra.*

section, merely placed a limitation on its own act by allowing the states to determine, under their own police powers, that *no* rent control is necessary. It would not seem to be an important distinction that one state law would continue rent control under a system of its own, while another would abolish it completely, since what Congress has done in both subsections 204 (j) (1) and 204 (j) (2) is to give the states a green light to legislate on the subject as they deem desirable.

A further question might arise, however, with respect to the role of the Governor of a state under this subsection. Is it within the *discretion* of the Governor to determine whether the state law is adequate and to refuse to advise the Housing Expediter as prescribed by this subsection if the Governor should feel that the law which the legislature has passed is inadequate? [36] If the Governor does have such discretion, then it would appear that the power to determine whether the federal law should continue to apply is not derived from concurrent legislative power alone, but rather is an attempt by Congress to delegate its power to a state executive officer. It is not clear that discretion is granted to the Governor under the wording of this section, however, and the problem of delegation to local officers is more squarely presented under section 204 (j) (3).

Section 204 (j) (3) provides:

> The Housing Expediter shall terminate the provisions of this title in any incorporated city, town or village upon receipt of a resolution of its governing body adopted for that purpose *in accordance with applicable local law* and based upon a finding by such governing body reached as a result of a public hearing held after 10 days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town or village; *Provided, however,* That such resolution is first approved by the Governor of the State before being transmitted to the Housing Expediter; *And provided further,* That where the major portion of a defense-rental area has been decontroled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area. (Emphasis partially supplied.)

The provisions of this subsection clearly place the process of decontrol outside the realm of concurrent state legislative power. Thus the general problem of the delegation of Congressional legislative power is inescapably presented. The argument might be advanced that the power of the local governing units to determine, under this subsection, whether the federal law is to continue to apply is merely, as in subsections (j) (1) and (j) (2), a voluntary limitation by Congress on the operation of its own Act. But a distinction may be drawn, in that in the latter instances a concurrent power already existed in the

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36 That the Senate Committee on Banking and Currency, to which the Housing and Rent Act of 1949 was referred, considered this language to vest discretion in the Governor, see section on State Action, SEN. REP. No. 127, 81st Cong., 1st Sess. (1949).

states, and Congress had merely indicated its readiness to step out of the way of the exercise of that power. But, as pointed out, no such concurrent power exists in local governing units. The *Rock Royal* and *Currin* cases involved situations somewhat analogous to the "local option" provisions of subsection (j) (3), and might seem, at first, to be authority for the proposition that the latter is a limitation by Congress on the application of its own Act. The *Rock Royal* case involved the constitutionality of the Agricultural Marketing Agreement Act,[37] under which the Secretary of Agriculture had authority to promulgate orders designed to carry out the stated policy of the Act. Such orders were only to go into effect when two-thirds of the producers of a particular commodity, in the locality involved, approved them. The Court, in upholding the Act, concerned itself mainly with the sufficiency of standards which had been set down for the guidance of the Secretary in formulating such orders. The problem of delegation of congressional authority to the local producers was passed over lightly. Under similar facts in the *Currin* case, in which the constitutionality of the Tobacco Inspection Act [38] was in issue, the validity of submitting an order of the Secretary of Agriculture which affected a given locality to a referendum of the local producers affected thereby was specifically upheld. The Court was of the opinion that Congress had merely placed a restriction on its own law by with-holding its operation where more than one-third of the tobacco growers opposed the order. These cases would seem to indicate, since the power of individuals to determine the application of an administrative order was held not to amount to a delegation, that the existence or non-existence of concurrent power is not a conclusive test of whether a delegation or a mere limitation is involved. In any event, there seem to be other considerations which would distinguish those cases from the situation involved under subsection (j) (3) of the Housing and Rent Act. The right to determine whether an entire Congressional act is to apply is certainly a broader power than is sanctioned under either the *Rock Royal* or the *Currin* case, although it might be argued that the difference is one of degree and not of kind. Furthermore, it may be suggested that in the *Rock Royal* and *Currin* cases, the Court found it necessary to avoid acknowledging that the power given to the producers constituted a delegation of any sort if the acts involved were to be sustained. That power of some sort was given is obvious; but the Court looked at the obverse side of the coin—at the fact that the giving of power to prevent the orders from taking effect was a voluntary limitation by Congress on its own laws. It would seem that both a limitation and a delegation of power were present under these acts. Inasmuch as the power given was to approve or disapprove administrative orders

37 50 STAT. 246 (1937), as amended, 7 U.S.C. § 601 (Supp. 1948).
38 49 STAT. 731 (1935), as amended, 7 U.S.C. § 501 (1946).

only, it could be termed only a quasi-legislative power, though the fact that such orders, once effective, had the force of law makes this appear to be a hairline distinction. Considered as legislative power, the delegation would seem to be of doubtful validity because of the lack of standards for the guidance of the producers in exercising this power. Thus the difficulty of upholding acts otherwise beneficial if the fact of delegation were recognized may have had something to do with the terminology adopted by the Court in the *Rock Royal* and *Currin* cases.

In the earlier case of *Carter v. Carter Coal Company, et al.*,[39] where an affirmative and broader power devolved upon individuals—the power to set wages and hours for the coal industry—the giving of such power to individuals was denounced by the Court as an unconstitutional delegation of legislative power. The fact that the power granted under the *Rock Royal* and *Currin* cases was only negative, and affected only executive orders, may justify considering it as a delegation of merely quasi-legislative powers, or, assuming that there were sufficient standards, as a permissible delegation of legislative power; but where such a power is conferred by Congress on others, it is difficult to see how it can be said that there is no delegation of any sort.

Assuming for purposes of discussion that the power to determine the applicability of federal rent controls under the Housing and Rent Act of 1949 *is* a delegation, valid or invalid, we come to the question whether under the Act congressional power can properly be delegated to local governing units of the states. The problem here is rather novel, since the question usually arises in connection with the delegation of federal power to other branches of the Federal Government. Local boards operating within the states under a federal authority and administering a federal law have been sustained when members of such boards have had no organic affiliation with local governing units, e.g., local rent control and O.P.A. offices.[40] However, the powers exercised by these local units were sustained on the theory that there was no invalid delegation by Congress of its legislative power; since local governing units were not involved in the local administration of these laws, the question which is now presented under subsection (j) (3) did not arise. Even if, under this subsection, there were deemed to be no delegation of congressional legislative power which would be improper if made to a federal board operating under a federal authority, it would seem that the delegation of *any* congressional authority to local governing units offends the concept of the division of powers under our consti-

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39 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

40 Woods v. Miller, 333 U. S. 138, 68 S. Ct. 421, 92 L. Ed. 596 (1948); Bowles v. Willingham, 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944); Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 892 (1944).

tutional system of government. There have been instances, under federal statutes, in which local officers have been appointed to serve concurrently in similar federal positions. But the exercise of such federal and state powers remained at all times separate and distinct, and any action under the federal authority in these cases was purely ministerial and admitted of no power to vary the federal law in any respect. At least one prominent writer has compiled examples of such instances and has stated:[41]

> Apparently there has been no federal or state legislation *expressly* designating the administrative officers of the one government as agents of the other. Indeed, such "blanket" appointments would, in some cases, meet constitutional difficulties . . . But much cooperation between the Union and the states has been effected by the executive appointment, with or without express authority of law, of state officers as federal officers and federal officers as state officers. Thus the state foresters become federal foresters, the local health authorities federal "epidemicologists," the state employment officers federal employment directors, sheriffs deputy marshals, state prohibition officers federal prohibition officers; and other such appointments are made where the federal and state governments perform corresponding functions. (Emphasis supplied.)

Under the Selective Draft Act for the first World War, the President was given authority to create draft boards "to be chosen from among the local authorities of such subdivisions or from other citizens residing in the subdivision" [42] and, in addition, "to utilize the service of any or all departments and any or all officers or agents of the United States and of the several States. . . ." [43] The validity of this Act was challenged on various grounds, among which was the contention that it involved an unconstitutional delegation of federal authority to state officials. The Supreme Court, in upholding the constitutionality of the Act, stated that this objection was "too wanting in merit to require further notice." [44] The fact that these appointments would not necessitate an overlapping of federal and state functions would seem to have been a significant factor in the decision of this case, along with the existence of a national emergency.

Can it be said that in subsection (j) (3) of the Housing and Rent Act, as in the examples just cited, Congress is merely for the sake of convenience utilizing a body which already exists, at the same time considering it as federally, and not locally constituted for this particular purpose? This could hardly be the case, since the Act specifies that the body shall conform to *local law* in carrying out its functions under the Act. It was clearly Congress' purpose to shift the

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41 Barnett, *Cooperation Between the Federal and State Governments,* 17 NAT. MUNIC. REV. 283, 287 (1928).

42 40 STAT. 79 (1917).

43 *Id.* at 80, § 6.

44 Arver v. United States, 245 U. S. 366, 389, 38 S. Ct. 159, 62 L. Ed. 349 (1918).

legislative burden to the Governors and local officials in this section of the Act, and to let them, acting as local officials primarily, terminate federal rent control when they thought it desirable. Hence the failure to give this power to the already existing local rent boards. Congress sought to give the localities authority to act on their own, apart from the federally constituted Housing Expediter and rent boards, so that if they were dissatisfied with the speed of decontrol by the federal officers, they could, in their capacity as local officers, take the matter into their own hands.[45] It is submitted that the spirit and letter alike of our federal system of government inveigh against such a delegation of federal authority to the political subdivisions of the states.

To state that it makes no real difference whether a local unit is created originally by the state—that the above argument upholds form over substance—is to argue that there is no real division of powers, if such statement is made where, as here, a local unit as such exercises federal powers. In this case it is also to overlook certain facts leading to the enactment of subsection (j) (3). The Congressional Record reveals that some Senators, at least, had grave doubts as to the constitutionality of this subsection. Senator Pepper commented:[46]

> It seems to me that there is very questionable authority for the Government of the United States to delegate to a subordinate political subdivision what amounts, for all practical purposes, to the exercise of legislative authority. We have gone far enough, it seems to me, in authorizing any State to enact a law setting up its own rent-control system covering the whole State, and, upon the facts being certified by the governor, eliminating that State from the area of Federal control . . . But, Mr. President, the Congress of the United States cannot properly delegate legislative authority. I think Congress should meet the issue squarely. We should either legislate upon rent control or get out of the field and leave it to the local authorities to legislate. If the municipalities want rent control, we should leave it up to them and to the States to provide it, if the Federal Government abandons the field. But this is a curious kind of arrangement, when we legislate, and we do not legislate, on rent control.

Arguments supporting the constitutionality of the subsection were also made in the Senate,[47] and the fact that the bill as passed included this subsection would seem to indicate that a majority of the Congress either considered the subsection to be constitutional or did not consider the problem.

There is an analogy which may be cited as favoring the validity of subsection (j) (3) (aside from the question of sufficiency of stand-

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45 See, e.g., 95 Cong. Rec. 2981, 3404 (Mar. 22, 1949) (Senators McClellan and Fulton favoring the proposal); 95 Cong. Rec. 2984-5 (Mar. 22, 1949) (Senators Pepper and Humphrey recognizing the purpose, but opposing the proposal).

46 95 Cong. Rec. 2984 (Mar. 22, 1949); see also argument of Sen. Sparkman, 95 Cong. Rec. 2875-6 (Mar. 21, 1949).

47 95 Cong. Rec. 2956 (Mar. 22, 1949); 95 Cong. Rec. 2879-80 (Mar. 21, 1949).

ards, discussed *infra*): the long-established practice of allowing cases involving federal statutes to be litigated in the state courts.[48] But some distinction may be found in the constitutional provision that the laws of Congress shall be binding on all the states;[49] since this is true, it seems only logical to allow the state courts to enforce such laws directly. But in point of fact, no convincing justification for this practice seems to exist; it has been declared to exist simply on the basis of respect for long custom and usage [50]—a sort of judicial prescriptive right. No such habit or usage exists with regard to the federal legislative branch; the state legislatures are nowhere directed to enact local laws similar to those passed in similar matters by Congress. In a converse situation, an attempt by a state legislature to let Congress and federal administrative boards create regulations for the state was overthrown, rather indignantly, in *Darweger v. Staats*.[51] And it would seem that Congress, on its part, can hardly allow the local governments to decide on the applicability of its laws without at least facing the charge of abdication of its legislative powers.

Another possible approach to the question of the constitutionality of subsection (j) (3) is from the direction of the sufficiency of the standards laid down by Congress for guidance of the local units. Pertinent here is the fact that the Illinois district court, in deciding the case of *Woods v. Shoreline Cooperative Apartments, Inc., et al.*,[52] held the entire "local option" section [53] unconstitutional on the ground that there were insufficient standards set out for the guidance of the state and local units. The court, in its opinion, stated:[54]

> It will be noted on reading the local option provisions of this Act that no standards are set up either for the determination of basic facts or rules for guidance of the States, municipalities, or other political subdivisions, in determining whether or not they shall remain under rent control. As far as Congress is concerned it has attempted to leave the matter entirely open to arbitrary determination by each State or other subdivision to decide for itself whether or not it wants rent control, and this entirely without rules or guide posts of any kind as to whether or not such rent control may be necessary in connection with the prosecution of the war effort.

Opposed to this view is the subsequent holding in *United States v. Emery et al.*,[55] by a federal district court in California:

> When the Congress authorized cities to recommend decontrol after hearings, the delegation of power in that respect was no greater than that given to the advisory committees under the Agricultural Act.

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48 See Note, 24 ORE. L. REV. 148 (1945).
49 U. S. CONST., Art. 6. cl. 2.
50 Barnett, *Delegation of Federal Jurisdiction*, 43 AM. L. REV. 852, 866 (1909).
51 267 N. Y. 290, 196 N. E. 61 (1935).
52 See note 2 *supra*.
53 See note 3 *supra*.
54 See note 2 *supra*, at 662.
55 See note 5 *supra*.

Before attempting to evaluate the standards laid down in the Act, it would be well briefly to examine the various tests for sufficiency of standards which have been developed by the courts.[56] Early decisions did not refer to sufficiency of standards as a test of constitutionality, possibly because they considered that any delegation of congressional power was invalid. This view was based upon the traditional concept, as expressed by Locke, that "The legislative cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others" [57] — and upon the maxim *delegata potestas non potest delegari.*[58]

The courts in early decisions adopted various refinements of reasoning to uphold what today would, in most cases, realistically be termed a delegation, valid or invalid. In *The Brig Aurora,*[59] an act of Congress which made the continued application of an embargo dependent upon the President's determination of whether Great Britain and France had ceased to violate the neutral commerce of the United States, was upheld against the contention that it involved a delegation of legislative power. The Supreme Court's answer was not direct. Ignoring the discretionary power delegated, the Court merely stated that Congress could exercise its discretion in continuing its laws either conditionally or expressly. A later case upholding a somewhat similar conferring of power on the President was *Field v. Clark.*[60] That case involved a congressional act giving the President discretionary power to suspend import duties. The Court decided that there was no delegation of legislative power, but merely a conferring of authority and discretion to determine when the contingency on which he was directed to take such action had occurred. In *United States v. Grimaud,*[61] an act of Congress had given the Secretary of Agriculture power to regulate the use of national forests, and provided that violation of his regulations was punishable as a crime. It was objected that only Congress could declare what actions should be criminal; but the Supreme Court, after first affirming a lower court decision holding the act un-

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56 Extensive examination of standards as a test of the constitutionality of delegation can be found in Jaffe, *An Essay on Delegation of Legislative Power: II,* 47 COL. L. REV. 561 (1947); Cousens, *The Delegation of Federal Legislative Power to Executive Officials,* 33 MICH. L. REV. 512 (1934); Sternberg, *Delegation of Legislative Authority,* 11 NOTRE DAME LAWYER 109 (1936). See also Notes, 20 N. Y. U. L. Q. REV. 347 (1945); 24 CALIF. L. REV. 184 (1935); 7 MISS. L. J. 411 (1935).

57 LOCKE, TREATISE OF CIVIL GOVERNMENT 95 (Sherman's ed. 1937).

58 A dim view is taken of the maxim's worth in Duff and Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law,* 14 CORN. L. Q. 168, 195 (1929), where the authors opine that the maxim, "kept alive by discussion and dicta in the earlier cases, rises as a ghost to hamper the efficient and proper distribution of the functions of government."

59 7 Cranch 382, 3 L. Ed. 379 (U. S. 1813).

60 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294 (1892).

61 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563 (1911).

constitutional,[62] reversed itself and unanimously held that the act involved only a delegation of administrative authority, and not of legislative power. The Court admitted that "it is difficult to define the line which separates legislative power to make laws from administrative regulations." [63] Professor Jaffe, in discussing this admission, comments, "Difficult indeed! Impossible, if what is meant is a difference in kind." [64] These cases are cited here to illustrate that the courts for many years, in considering problems similar to those presented in the rent control Act, would not construe them as presenting instances of legislative delegation. Adequate study has been made elsewhere of the gradual recognition, not yet universal, that constitutionality does not turn on the question whether there has been a delegation of legislative power, but rather whether such delegation is, in a given case, valid or invalid.[65] With the adoption of this latter view, implicitly or explicitly, sufficiency of standards has become a prime test in the determination of the constitutionality of delegation of Congress' legislative power. Early expressions of what may be called the standards test were made by Chief Justice Taft in *Mahler v. Eby* [66] and *J. W. Hampton, Jr. v. United States*.[67] In the *Mahler* case, it was stated that a historical understanding of certain words used by Congress in delegating authority may give them "the quality of a recognized standard." [68] In the *Hampton* case, where the President was given power to adjust tariff rates, a definite test was stated: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." [69]

That very broad powers may be delegated where standards are deemed sufficiently definite is attested by the existence and scope of operation of such governmental agencies as the National Labor Relations Board, the Securities and Exchange Commission, the Federal Power Commission, the Federal Communications Commission and the Interstate Commerce Commission, to name but a few. An examination of a few World War II cases involving the broad delegation of Congress' war powers will serve as concrete examples of what the Supreme Court has recently approved as sufficiently definite standards. In *Yakus v. United States*,[70] involving the constitutionality of price controls under

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62 216 U. S. 614, 30 S. Ct. 576, 54 L. Ed. 639 (1910).

63 See note 61 *supra*, 220 U. S. at 517.

64 Jaffe, *supra* note 56, at 567.

65 E.g., Jaffe, *supra* note 56, see also State *ex rel.* Wisconsin Inspection Bureau et al. v. Whitman, 196 Wis. 472, 220 N. W. 929, 937-42 (1928).

66 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549 (1924).

67 276 U. S. 394, 45 S. Ct. 348, 72 L. Ed. 624 (1928).

68 See note 66 *supra*, 264 U. S. at 40.

69 See note 67 *supra*, 276 U. S. at 409.

70 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

the Emergency Price Control Act of 1942, the Court summarized the standards laid down to guide the Price Administrator in the following manner: "that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period. . . ." [71] These standards were upheld by the Court as sufficiently definite. In *Bowles v. Willingham*,[72] in which the rent control section of the Emergency Price Control Act was challenged, a similar standard by which administrative action was to be guided was upheld. The Court in this decision stated:[73]

> Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority . . . Whether a particular grant of authority to an officer or agency is wise or unwise, raise questions which are none of our concern.

Finally, under the Housing and Rent Act of 1947, the Supreme Court upheld the constitutionality of the delegation of authority to the Housing Expediter, in the case of *Woods v. Miller*,[74] saying: [75]

> Under the present Act the Housing Expediter is authorized to remove the rent controls in any defense-rental area if in his judgment the need no longer exists by reason of new construction or satisfaction of demand in other ways. The powers thus delegated are far less extensive than those sustained in Bowles v. Willingham . . . Nor is there here a grant of unbridled discretion. The standards prescribed pass muster under our decisions.

There is, however, a limit to the generality of standards which Congress may prescribe, beyond which it may not go without the attempted delegation being struck down. Under the provisions of the National Industrial Recovery Act, section 9(c),[76] the President was authorized to prohibit transportation in interstate commerce of petroleum in excess of amounts permitted under state laws or regulations. The Act did not define the cirmustances and conditions under which the President was to allow or prohibit such transportation. An introductory section of the Act declared that there was a national emergency and that it was the policy of Congress to eliminate unfair competition and to conserve natural resources. In *Panama Refining Company v. Ryan*,[77] section 9(c) was held to be an unconstitutional delegation of power. The Court stated, "If section 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function." [78]

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71 321 U. S. at 427.
72 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944).
73 321 U. S. at 515.
74 333 U. S. 138, 68 S. Ct. 421, 92 L. Ed. 596 (1948).
75 333 U. S. at 144-5.
76 48 STAT. 200 (1933).
77 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935).
78 293 U. S. at 430.

In *A. L. A. Schechter Poultry Corporation et al. v. United States*,[79] certain other provisions of the N.I.R.A. were declared to be an unconstitutional delegation because of lack of sufficient standards. The Court construed these provisions as authorizing the President to approve or prescribe through codes of fair competition, prohibitions which the President and the formulators of such codes deemed wise and beneficial measures for governing trades and industries, so as to bring about industrial recovery and rehabilitation. The Court, in striking down these provisions, said: [80]

> But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation of trade or industry.

Finally, in the case of *Carter v. Carter Coal Company*,[81] the Bituminous Coal Conservation Act [82] was struck down, as an unconstitutional delegation of legislative power. The Act provided, in part, that a majority of the producers and miners were to be allowed to fix maximum hours and minimum wages. The Court did not discuss standards, but its holding would seem to imply that it could find no sufficient standards in the Act, and it termed the delegation "clearly arbitrary." [83]

With these cases in mind, the question may be considered whether, under subsection 204 (j) (3) of the Housing and Rent Act of 1949, there are sufficient standards set forth by which the delegation to the local governmental units could be sustained. This subsection, it will be recalled, allows local governing units to hold public hearings and adopt, under local laws, resolutions that there no longer exists such a rental housing shortage as to require rent control in the particular city, town or village. Furthermore, such resolutions are only to be effective if approved by the Governor. Does the failure of Congress to suggest to the Governor and the local bodies, as it did suggest to the Housing Expediter,[84] reasons upon which to base their determination of whether rent control has become unnecessary, cause the subsection to be invalid for lack of standards? The Illinois district court, in deciding the *Shoreline* case,[85] could find no standards whatever in this subsection, stating: [86]

> No standard is laid down as to what is or what is not a shortage of rental housing accommodations, nor is there any provision as to the procedure for or findings at a public hearing or how that public hearing is to reach any conclusion upon the question of whether or not rent control is no longer necessary or desirable.

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79 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 570 (1935).
80 295 U. S. at 537-8.
81 See note 39 *supra*.
82 49 STAT. 991 (1935).
83 See note 39 *supra*, 298 at 311. U.S.
84 See note 18 *supra*.
85 See note 2 *supra*.
86 See note 2 *supra*, at 663.

It is interesting to note, on the other hand, that the California district court, in upholding the constitutionality of the Act, made no mention of the question of standards.

It seems clear that no definite line can be drawn between what constitutes sufficient standards and what standards are insufficient. There is a broad twilight zone within which it is impossible to predict the outcome of the question of sufficiency of standards in advance of judicial determination. Perhaps the ultimate test as to sufficiency is contained in the decision of the relatively early case of *Buttfield v. Stranahan,*[87] where the Court concluded that "Congress legislated on the subject as far as was reasonably practicable." [88] In any event, it is suggested by an examination of the cases that the ultimate resolution of the problem may lie in the facts and circumstances of the individual case. It has been said that a doctrine limiting delegation ". . . is intelligible only in terms of the degree of delegation which the judiciary regards as appropriate in the circumstances." [89]

III.

Should one or more of the "local option" provisions of the Housing and Rent Act be held unconstitutional, the question will remain whether the separability clause can be given effect, so as to uphold the remaining parts of the Act. The separability clause states: [90]

> If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act, and the applicability of such provisions to other persons or circumstances, shall not be affected thereby.

It is generally accepted that there are two basic tests which must be satisfied if the parts of an act are to be considered separable. First, it must appear from an examination of legislative intent that the statute was intended to be separable; secondly, the act must be capable, as a practical matter, of effecive operation without the severed portion.[91] Where no separability clause is included, the presumption is that the statute was intended to be indivisible; the inclusion of a separability clause has the effect of reversing this presumption.[92] It might seem at first blush that the inclusion of a separability clause should be conclusive as to congressional intent. However, indiscriminate use of the separability clause has weakened its evidentiary effect. It has been suggested, as a remedy for this situation, that such clauses set out spe-

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87 192 U. S. 470, 24 S. Ct. 349, 48 L. Ed. 525 (1904).

88 192 U. S. at 496.

89 Jaffe, note 56 *supra,* at 581.

90 See note 4 *supra.*

91 SUTHERLAND, STATUTORY CONSTRUCTION § 2403 (3d ed. 1943).

92 Williams v. Standard Oil Company, 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287 (1929); Carter v. Carter Coal Company, *supra* note 39.

cifically the portions of an act which are intended to be separable,[93] and this procedure has been adopted in at least one instance.[94]

There would seem to be little argument but that the Housing and Rent Act could operate effectively if the "local option" provisions were severed from the remaining portion of the Act, since the remainder would be substantially the same as the original 1947 Act and its 1948 amendment. Consequently, the important remaining question is whether an examination of the Act's legislative history reveals congressional intent that the Act be separable. In refusing to give effect to the separability clause, the Illinois district court stated in the *Shoreline* case: [95]

> . . . it is entirely clear from all the sources available, including the debates in Congress, that the Act could never have passed without the local option provisions. They were the means principally relied upon as a way of returning the Government to the States and subdivisions immediately. Without these provisions there would be no way of decontrolling an area except through the powers given the administrator, and it is entirely clear from the local option provisions themselves that Congress did not consider those administrative means as adequate for accomplishing its declared purpose . . . It is my opinion that the unconstitutional portions of this Act, if considered with its preamble, greatly outweigh all of the other provisions for decontrol.

An examination of the legislative history of the Act, and of its preamble, does not seem to preclude the possibility for a conclusion as to congressional intent opposite to that arrived at by the Illinois court. The preamble does, indeed, as mentioned by the Illinois district court, state the congressional policy that federal rent control should end at the earliest practicable date. However, it should not be overlooked that the preamble also states that ". . . it is necessary for a limited time to impose certain restrictions upon rents charged for rental housing accommodations in defense rental areas." [96] Furthermore, the preamble is the same one which appeared in the original 1947 Act, and thus would not seem to have any particular significance with respect to the "local option" provisions of the recent Act.

The Illinois district court felt constrained, under the authority of the *Carter Coal Company* case, to hold that the Housing and Rent Act was not separable. However, the *Carter Coal Company* case was decided largely on the basis that the provisions of the Act there in question were not separable because of their basic interdependence. Since, as pointed out above, the separability of the Housing and Rent Act, from the point of its possibilities for practical and effective operation after separation, does not seem to be much in question, the *Carter Coal Com-*

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93 Stern, *Separability and Separability Clauses,* 51 HARV. L. REV. 76, 125 (1937).

94 Connally Hot Oil Act, 49 STAT. 30, 15 U. S. C. § 715c (1946).

95 See note 2 *supra,* at 666.

96 See note 21 *supra.*

pany case would not seem to be controlling authority; the separability question in regard to the recent rent control Act is largely one of congressional intent.

A great deal of the Senate and House debate on the proposed Act did revolve about the "local option" provisions, and this would seem to indicate that great importance was attached to these parts of the Act.[97] However, it seems quite natural that a major addition to an existing law should be debated at length, and that the provisions which had been in force under the previous Act should receive comparatively less attention. Also, the continued power of decontrol in the Housing Expediter would seem to indicate that Congress intended the two systems of decontrol to operate side by side.[98] In addition, there was considerable evidence in committee reports and in congressional debate of recognition of the fact that continued controls at the national level were necessary in many areas.[99]

Ultimately, it must be said that, just as in the question of sufficiency of standards, there exists considerable judicial leeway in determining the issue of separability. At least one prominent writer has concluded, after an examination of the cases involving separability, that ". . . the Court is free to decide each case the way it pleases without having its discretion fettered by any restraining doctrine," [100] and further that ". . . in important cases judicial decisions on separability often reflect the attitude of the judges towards the merits of the particular statute. . . ." [101]

Conclusions

The problem of delegation of legislative authority under the Housing and Rent Act, and the effect to be given the separability clause, will not be facilely resolved. An attempt has been made herein to suggest some of the possible avenues of approach in determining whether all or part of the Act should be upheld. The effects on the national economy of a general and instantaneous removal of rent controls would seem to be an important policy consideration in arriving at a solution to these problems, [102] in view of the still prevalent shortage of rental housing units.[103]

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97 See generally issues of Cong. Rec. cited in notes 45-47 *supra*.

98 95 Cong. Rec. 2521-3 (Mar. 15, 1949); 95 Cong. Rec. 2982 (Mar. 22, 1949); 95 Cong. Rec. 3404 (Mar. 29, 1949).

99 SEN. REP. No. 127, 81st Cong., 1st Sess. (1949) (introductory portion); 95 Cong. Rec. 2871, 2873, 2876, 2884, 2891 (Mar. 21, 1949).

100 Stern, note 93 *supra*, at 111.

101 Stern, note 93 *supra*, at 114.

102 A letter from the Housing Expediter, Tighe E. Woods, informed the writers that, as of October 12, 1949, a number of properly approved decontrol resolutions had been received pursuant to the "local option" provisions of the Act, as follows: section 204 (j) (1), one; section 204 (j) (2), two; section 204 (j) (3), 184. From these figures it would not appear that there has been any wholesale

The purely legal implications, especially the problem of delegation, and the various considerations arising in its determination, provide a fertile, if somewhat involved, ground upon which to speculate. Determination of the validity of the Act in question, involving as it does the added feature of delegation to state and local authorities instead of to federally constituted administrative agents, will be of importance far beyond the question of rent control's continued existence. The influence of the decision made by the Supreme Court in this case will be felt in any congressional consideration of the advisability of utilizing the state and local government in future pieces of legislation. Also, the Court may resolve some of the confusion which now surrounds the use of terminology in the question of delegation, the uncertainty as to what constitutes sufficient standards, and the effect of a standard separability clause.

John F. Bodle

E. A. Steffen, Jr.

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move toward decontrol, especially at the state level. This would seem to be evidence of the fact that the continued need for rent control in many localities is widely recognized, and that there is a general unwillingness to risk the economic repercussions which might be caused by ending rent controls.

103 See note 99 *supra*.

MEMORANDUM TO THE CHIEF JUSTICE

In re Darr v. Burford - No. 51

I have a feeling that I may have misled you in the matter of the ruling of the court below relative to the question it considered not properly raised. Defendant went to trial in two separate cases on the same day. In the first he was convicted and the jury fixed his punishment at 40 years. In the second, while the jury was deliberating, he changed his plea to guilty and was given 40 years more, to run consecutively with the sentence in the first case. He contended that the plea of guilty in the second case was induced by duress and the court said that that question could not be considered because defendant was not at the time being detained under the sentence in the second case but that if the question were subject to judicial determination it should be presented to the state court since it had not been urged in the earlier state habeas corpus proceeding. The validity of the guilty plea is raised here both in the petition for certiorari and the brief on the merits but I gather that the main point is whether defendant was afforded adequate time to prepare his defense and as to that there is no question but what it could have been entertained.

As to the question of submitting without argument. As I related to you yesterday counsel for petitioner appears to be a man 80 years of age, not a member of the bar of this court, and represents a party of "limited means". He wired "cannot appear for oral argument". We have a wire from Mr. Williamson, the Attorney General of Oklahoma, to the effect that if agreeable to the Court he waives oral argument but that if, after a survey of his brief, his presence is desired, he will comply.

Willey.

December 2, 1949.

SAM HOBBS
4TH DISTRICT ALABAMA

COMMITTEE:
JUDICIARY

OFFICE ADDRESS:
1131 HOUSE OFFICE BUILDING

HOME ADDRESS:
SELMA, ALABAMA

Congress of the United States
House of Representatives
Washington, D. C.

January 10, 1950

Chief Justice Fred Vinson,
Supreme Court of the United States,
Washington 13, D. C.

My dear Mr. Chief Justice:

Mr. Cropley has advised me by letter received today of the favorable action of the Court on my motion to participate in the oral argument when the case of Henderson v. United States, et al. comes up.

Please accept my sincere thanks for this approval of my request.

With high esteem,

Most gratefully,

Sam Hobbs

h/g

WASHINGTON D.C. OFFICE
BAAR BUILDING

C. J. talked to Tolley

LAW OFFICES
JOHN F. FINERTY
120 BROADWAY
NEW YORK 5, N.Y.

January 30, 1950

Honorable Fred M. Vinson,
Chief Justice,
Supreme Court of the United States,
Washington, D. C.

In re The United States and the Interstate Commerce Commission v. United States Smelting, Refining and Mining Company, American Smelting and Refining Company, Denver and Rio Grande Western Railroad and Union Pacific Railroad Company, Consolidated Causes, No. 173, October Term, 1949

My dear Mr. Chief Justice:

The above proceedings are set for argument before the Court on February 13th. After conference with all counsel for appellees and consultation with counsel for appellants, I beg to request that the Court assign each side two hours for argument. Counsel for appellants authorize me to say that they recognize that under the circumstances hereinafter stated, such additional time is reasonably necessary for appellees, and that they, of course, desire equal time, but that it may prove possible for them to present their argument in somewhat shorter time.

The reasons for the request of appellees for two hours for the presentation of their argument are as follows:

While the order of the Statutory Court appealed from is a single order of permanent injunction, such order is in reality directed to two separate and distinct orders of the Interstate Commerce Commission, made on two separate and distinct records. One record involves the terminal switching services of the appellee carriers at the smelter of the appellee, United States Smelting, Refining and Mining Company at Midvale, Utah. The other record involves the terminal switching services of the appellee carriers at two separate smelters of the appellee American Smelting and Refining Company located respectively at Garfield, Utah and Leadville, Colorado. The proceedings, therefore, came before the Statutory Court on two separate complaints directed to such separate orders of the Interstate Commerce

Commission, and to the separate records on which such orders were based.

Because of a general similarity of the factual and legal questions involved, the two complaints were however presented to the Statutory Court at a single hearing, at which, nevertheless, separate records were made as to each complaint. These separate records were necessary because there are certain substantial factual differences, both in the physical operations of the appellee carriers at each of the respective smelters, and in the published tariff provisions under which such operations are conducted. Moreover, there are certain substantial distinctions in the histories of the respective proveedings before the Interstate Commerce Commission. It is pertinent to add that the consolidated printed record before this Court contains some 1400 pages.

It is, therefore, impracticable, and indeed impossible, for a single argument to be presented upon behalf of the two appellee industries on this appeal, and the same considerations preclude a single argument upon behalf of the two appellee carriers. Accordingly it has been agreed, subject to the approval of the Court, that Mr. Gibson for the Denver and Rio Grande Western Railroad Company, and Mr. Collins for the Union Pacific Railroad Company, shall each present a fifteen minute argument, and that Mr. Horsky, as counsel for the United States Smelting, Refining and Mining Company, and I, as counsel for the American Smelting & Refining Company, shall divide the remaining hour and a half.

I may add that, in addition to the appellee carriers and the appellee industries, the respective State Commissions and the respective State Mining Associations of Utah and Colorado, are also appellees and are filing briefs with the Court, but have agreed to forego request for participation in argument because of the additional time essential to adequate argument on behalf of the appellee carriers and industries.

The Court may be assured that if on argument, it should develop to be possible for appellees to shorten their time for argument, they will make every endeavor to do so. They trust, however, that in view of the extensive and complex questions of law and fact which must be presented,

the Court will accept their assurance that such additional time is essential for adequate presentation of their respective interests and will grant the time requested.

Sincerely yours,

JFF/af

ccs. Solicitor General
Mr. Crenshaw
Mr. Gibson
Mr. Collins
Mr. Horsky
Mr. Cannon

Office of the Solicitor General
Washington, D. C.

RECEIVED
FEB 10 9 19 AM '50
CHAMBERS OF THE
CHIEF JUSTICE

February Ninth
1950

File

Honorable Fred M. Vinson,
Chief Justice,
Supreme Court of the United States,
Washington, D. C.

NOTED
FEB 20 1950
F.M.V.

Dear Mr. Chief Justice:-

I enclose herewith a copy of a letter I have received today from Mr. J. Marvin Haynes, counsel for the U. S. Graphite Co., petitioner in No. 532, this term, for a writ of certiorari in a case in which Charles Sawyer, Secretary of Commerce, is the respondent.

Mr. Haynes calls my attention to the circumstance that you were Director of Economic Stabilization, and as such a member of the War Mobilization Committee, from May 27th, 1943. It is apparent that counsel for the petitioner desires this fact to be brought to the attention of the Court.

Respectfully yours,

Philip B. Perlman

Philip B. Perlman
Solicitor General

c
o
p
y

J. MARVIN HAYNES
Counsellor at Law
Continental Building
Washington 5, D.C.

February 9, 1950

The Honorable Philip Perlman
Solicitor General of the United States
Washington, D. C.

Re: The United States Graphite Company,
Petitioner
v.
Charles Sawyer, Secretary of Commerce,
Respondent.
No. 532

Dear Sir:

On pages 6 and 7 of the Respondent's brief in opposition to the above company's petition for a writ of certiorari, it is stated that the amendment of certain regulations, which are in dispute, was done under the advice and direction of the Office of War Mobilization. I believe that this statement was designed to impress on the Court that this amendment had the approval of the Office of War Mobilization.

Taken by itself there could be no objection to such a statement, but when considered with the following facts, it might appear that Respondent is seeking to take advantage of the fact that Chief Justice Vinson was a part of the Office of War Mobilization at that time.

1. On May 27, 1943, by Executive Order No. 9347, the Office of War Mobilization was created.

2. Paragraph II of the Order provides that there is established in the Office the "War Mobilization Committee . . ." and that "the Committee shall consist, in addition to the Director, of the Secretary of War, the Secretary of the Navy, the Chairman of the Munitions Assignment Board, the Chairman of the War Production Board, and the Director of Economic Stabilization." This Director was, of course, Chief Justice Vinson, as will appear hereinafter.

3. On May 27, 1943, the same date that the Office of War Mobilization was created, Chief Justice Vinson resigned from the Judiciary, and on May 28, 1943 was made Director

of Economic Stabilization, which had been created on October 3, 1942 by Executive Order No. 9250.

4. I am advised that Chief Justice Vinson served in this position from May 28, 1943 to March, 1945.

I believe the Chief Justice resigned from the Judiciary with the knowledge that the Office of War Mobilization was being created on that date, and that the President had requested him to become part of the Office of War Mobilization.

Courtesy prompts me to call this matter to your attention as I do not believe that your office would knowingly attempt to take advantage of this situation. I expect to file a reply to Respondent's brief, and before covering this part of the answer, I thought I should give you an opportunity to take whatever action you deem advisable under the circumstances.

Very truly yours,

J. MARVIN HAYNES /s/

JMH:T

DEPARTMENT OF THE ATTORNEY GENERAL

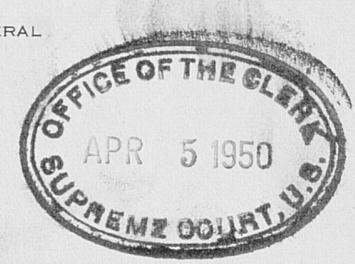
LANSING 2, MICHIGAN

OFFICE OF THE SOLICITOR GENERAL

EDMUND E. SHEPHERD
SOLICITOR GENERAL

456

April 3, 1950



The Honorable Charles Elmore Cropley
Clerk of the United States Supreme Court
Washington 13, D.C.

Re: UAW v. O'Brien, et al
No. 456, October Term 1949

Dear Mr. Cropley:

Due to pressure of other work which has developed since my return from Washington, I find it impossible toprepare and file a comprehensive reply brief in No. 456. I deeply appreciate the courtesy extended me in this regard and I regret my inability to take advantage of it.

Sincerely yours,

Edmund E. Shepherd

Edmund E. Shepherd

EES:ms

CC: Mr. Joseph L. Rauh, Jr.
c/o Rauh and Levy
1631 K Street, Northwest
Washington 6, D.C.

Honorable David P. Findling
Associate General Counsel
National Labor Relations Board
Washington 25, D.C.

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
THE CHIEF JUSTICE

May 19th, 1950 -

Mr. Justice Black
Mr. Justice Reed
Mr. Justice Frankfurter
Mr. Justice Douglas
Mr. Justice Jackson
Mr. Justice Burton
Mr. Justice Clark ✓
Mr. Justice Minton.

No. 345 Misc. Perez, Petitioner)
v.)
People of the State)
of New York.)

The attached letter and application for stay of execution were received today by Mr. Justice Black. It is a capital case and execution is set "for the week of May 22nd". Petition for cert. was denied on Feb. 6th and Rehearing denied March 13th.

Similar application was previously submitted to Mr. Justice Jackson and denied by him.

In view of the petitioner's expressed desire that the matter receive the attention of each individual member of the Court, I am circulating it for your action.

Fred M. Vinson
Chief Justice -

Original Filed in VIP Correspondence File

SUPREME COURT OF THE UNITED STATES

No. --------, October Term, 1949.

UNITED STATES OF AMERICA, ex rel.
ELLEN KNAUFF,
Petitioner,

vs.

J. HOWARD McGRATH, Attorney General, and EDWARD J. SHAUGHNESSY, as District Director of the Immigration and Naturalization Service for the New York District, and to whomsoever may have the custody of the body of ELLEN KNAUFF

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the deportation of Ellen Knauff be, and the same is hereby, stayed pending consideration of the petition for certiorari, provided the same is filed on or before May 25th, 1950. The petition and record may be submitted in typewritten form.

/s/ ROBERT H. JACKSON
Associate Justice of the Supreme Court of the United States.

Dated this 17th
day of May, 1950.

SUPREME COURT OF THE UNITED STATES

No. _____, October Term, 1949

United States of America, ex rel. Ellen Knauff, Petitioner,

v.

J. Howard McGrath, Attorney General and Edward J. Shaughnessy, as District Director of the Immigration and Naturalization Service for the New York District, and to whomsoever may have the custody of the body of Ellen Knauff.

On Application for Stay.

(May 17, 1950)

By Mr. Justice Jackson,

As Circuit Justice for the Second Circuit, it is my almost invariable practice to refuse stays which the Court of Appeals or its judges have denied. This because they are closer to the facts, have heard the merits fully argued, and because I have confidence that they would grant stays in worthy cases. This rare departure from practice may call for a word of explanation.

The decision of the Court of Appeals denying petitioner relief on habeas corpus was handed down yesterday and, about four o'clock yesterday afternoon, stay was denied. The court suggested to counsel that he could apply "at Washington" for a stay and counsel announced a purpose to do so. Immediately, however, the Department of Justice notified petitioner to be ready to be shipped on a commercial plane leaving New York this morning at eleven o'clock. This scarcely gave counsel time to prepare an application for stay here and no time for me to hold a hearing on it. As the case comes to me, I am informed that preparations are complete at the airport to deport her in a matter of minutes.

Bundling this woman onto an airplane to get her out of this country within hours after the decision of the Court of Appeals, if accomplished, would have two consequences. First, it probably would defeat this Court's jurisdiction to consider

her petition for review. Second, it would circumvent any action by Congress -- which the Department has vigorously opposed -- to cancel her exclusion, already unanimously taken by the House of Representatives. In this connection, the Department of Justice was given hearing by a subcommittee of the Judiciary Committee of the House of Representatives. After considering the objections of the Department of Justice, the Committee nevertheless reported favorably on the bill and the House of Representatives, with rare unanimity, decided the exclusion order should be cancelled. That bill, together with a like measure introduced in the Senate, is now before the Senate Judiciary Committee for consideration. There appears also to have been an agreement by the Department with the Congress to withhold action under such circumstances, but I have been unable in the time allowed to ascertain its text.

If the Department had at any time shown even probable grounds to believe that presence of this woman a few days more in this country might jeopardize national security, even infinitesimally, I should refuse the stay. But the Department of Justice has not only had opportunity, it has been importuned to show courts or Congress any reason for its exclusion order.

Not only is the petitioner unable to learn what the specific charges against her are, but neither can the courts which are asked to play at least a consenting part in her exclusion, nor the Congress, which is in the midst of an effort to stop it. It overtaxes credulity to believe that it would jeopardize the security of the United States to impart to coordinate branches of the Government some inkling of the charges against this woman.

That the purpose of this haste to rush her out of the country is to defeat any effort to have this Court review her present habeas corpus proceeding, appears from statements

apparently made to the press by the Government's counsel in the Court of Appeals. We are not ordinarily satisfied with newspaper evidence, but the speed of events has left no time for verification. The statements of several reputable newspapers are in substantial accord: After the court suggested that petitioner's counsel could apply at Washington for a stay and he said he would do so, the Government attorney answered, as quoted in an Associated Press dispatch appearing in the Baltimore Sun, "She may not be here then." The New York Herald Tribune attributes to him the statement that she may be deported by the time action is taken and that the case would then be academic. The New York Times quotes him as later stating he would advise the Department of Justice that "There are no legal impediments at this time which would prevent her immediate deportation." This leaves no doubt that the purpose is to defeat the jurisdiction of this Court as well as the determination of Congress.

It may well be that this removal eventually will be sustained. But to consummate it while the right to do so is still in litigation cannot be permitted, and to attempt to do so after a bill to forbid it has already passed one House by unanimous vote and while it is pending in the other is alleged to be a most unusual departure from administrative practice. Nothing has been produced to show why this particular petitioner should be so discriminated against. To stand between the individual and arbitrary action by the Government is the highest function of this Court.

It is not for me to now reach any conclusion as to the merits of the decision below. But to grant writs to protect the Court's jurisdiction to inquire into the matter is one of the most usual functions of an individual Justice. Because the Government's action since decision by the Court

of Appeals would have the effect of foreclosing petitioner's right to be heard in this Court, I grant the stay.

(S) ROBERT H. JACKSON

May 17, 1950

Associate Justice, Supreme Court of the United States.

WESTERN RESERVE UNIVERSITY
CLEVELAND 14, OHIO

CLEVELAND COLLEGE
~~167 PUBLIC SQUARE~~
504 Women's Federal Bldg.

May 23, 1950

The Chief Justice
The Supreme Court
Washington, D.C.

My dear Mr. Chief Justice:

The July 1950 issue of Labor Law Journal (a Commerce Clearing House publication) will carry an article which I have written on Section 304 of The Labor Management Relations (Taft-Hartley) Act entitled "Restrictions on Political Contributions."

Would it be possible for someone in your office to send me press releases and/or references about any Supreme Court decision issued since March 15, 1950 which would involve Section 304? If any decisions involving Section 304 are released before June 15 would your office please send me relevant descriptive materials?

Thank you very much for any help you may give me in this matter.

Very truly yours,

Dallas M Young (wy)

Dallas M Young, Director
Labor Relations Center

Filed

dmy:wy

PAUL, WEISS, WHARTON & GARRISON

61 BROADWAY, NEW YORK 6, N.Y.

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COUNSEL

*WASHINGTON OFFICE
1614 EYE STREET, N.W.
WASHINGTON 6, D.C.

May 26, 1950

The Honorable Fred M. Vinson
Chief Justice of the United States
United States Supreme Court
Washington, D. C.

My dear Mr. Chief Justice:

I have been struggling to complete my report as Special Master in the case of Georgia v. Pennsylvania Railroad Company, et al., in time for filing with your Court before adjournment.

It now appears that the printing schedule is such that in all likelihood delivery of the report to the Court will not be possible until on or about June 12th, which will probably be after your adjournment.

I have talked the matter over with Mr. Cropley and I understand that there will be no difficulty about filing the report with him after the Court has adjourned, but that, without some special directions from the Court, the report, if so filed after adjournment, could not be released to the parties until resumption of the Court in the fall.

I know that it would be helpful to the parties, and I believe that it would be helpful to the Court in the end, if the Clerk were to be authorized to release the report upon its being filed with him. This would enable counsel for the parties to consider and analyze the report during the summer, and to work on their

exceptions under less pressure of time than would be the case if the report were held up until the fall.

Despite all my efforts at simplification, the report will be a long one, due to the size and complex character of the record; and anything that can be done to ease the process of its digestion by counsel should be of benefit to all concerned, including ultimately your Court.

The objection to this course is that the parties would physically receive the report in advance of its receipt by the members of the Court, and that the press would likewise have access to the report and would make comments upon it before it had been officially received by the Justices. On the other hand, the possibility of some leakage occurring during the summer months must be reckoned with, remote as it may be.

If upon balance you should deem it appropriate to direct the Clerk to release the report upon its being filed with him, I shall have ready and shall submit with the report in a separate document a very short printed abstract, modeled upon that which Charles Evans Hughes prepared in connection with his report as Special Master in 1929 in the dispute over the diversion of water from Lake Michigan by the Chicago Sanitary District. This abstract, in addition to being of some aid to the Court, may serve to clarify for the press the nature of the case and the principal conclusions in the report.

The Honorable Fred M. Vinson May 26, 1950

I expect to be in Washington, working closely with the printer in an effort to expedite the completion of the job, from Monday, May 29th through Wednesday, May 31st. If you would care to ask me any questions about the report while I am in Washington, I should be happy to see you; I can be reached at our Washington office at Republic 2353. I shall in any event be in touch with Mr. Cropley, who will let me know what the Court's wishes are when you have had a chance to consider the matter.

Respectfully yours,

Lloyd K. Garrison

LKG:LS

June 6, 1950

Mr. Lloyd K. Garrison,
Paul, Weiss, Wharton & Garrison,
61 Broadway,
New York 6, New York.

Dear Mr. Garrison:

Thank you for your letter of May 26th.

The Court entered an order yesterday in the case of Georgia v. Pennsylvania Railroad Company, et al, authorizing the Clerk to release your report when it is filed, and ordering that acceptances and objections of the parties, if any, be filed within 90 days thereafter. The Court was of the opinion that this was the way to handle the matter as it would save time in the adjudication of the case.

I am sorry that I wasn't able to see you while you were here, but it was during the home stretch of the Term, and we were very busy. I didn't need any additional information in regard to the report, but I would have been happy to have had the opportunity of visiting with you.

Hope you have a pleasant summer.

Sincerely,

(Signed) Fred M. Vinson

FMV:McH

October 2, 1950

For conference

MEMORANDUM FOR THE CONFERENCE:

Re: Status of two cases on the Original Docket

No. 5 Orig. - New Jersey v. New York - This was an original action brought by New Jersey against New York to prevent further diversion of the waters of the Delaware River. This Court decided in favor of New York, 283 US 336 (1931), but limited New York to 440,000,000 gallons of water daily from the Delaware or its tributaries. New York was also required to construct a sewage plant, and to maintain certain levels of water. New Jersey and Pennsylvania were given power to inspect the dams, reservoirs, etc., of New York at any time. The decree was entered in 1931, 283 US 805. No further action was taken on the case. Apparently, the dams have been constructed, and everything is functioning smoothly. Jurisdiction was retained by this Court, 283 US at 807, and the decree was without prejudice to the U.S. to subject the river to the paramount authority of itself over navigable waters. The case, however, is definitely in an inactive status, and can be dropped from the regular docket.

No. 7 Orig. - Texas v. Florida - The early proceedings in this case can be found in 300 US 643 (1937); 301 US 671 (1937); 302 US 662 (1938); 305 US 570 (1939). This was, in effect, a controversy among four states as to where one Green was domiciled at the time of his death for the purpose of taxation. This Court [opinion by Stone; Frankfurter, Black dissenting] held that he was domiciled in Mass. 306 US 398 (1939).

The decree was entered, retaining jurisdiction "for such further action as may be necessary and proper and the parties or any of them may at any time hereafter apply for relief as they may be advised." 307 US 612 (1939). No further action has been taken in this case, and it is difficult to imagine that could be taken. The issue was a single question of law and fact which this Court expressly decided. The Clerk's Office informs me that several years ago letters were written to the various parties inquiring if there would be objection to striking the case from the docket. Apparently not all the parties responded, but there was no objection among those who did answer. I believe the case should be dropped from the docket.

The Chief Justice.

OFFICE OF THE CLERK,

Supreme Court of the United States,

Washington 13, D. C.

November 22, 1948.

My dear Mr. Chief Justice:

Pursuant to your direction of Saturday, I submit to you herewith a brief synopsis of each Original case upon the docket, showing its status.

I see no reason for maintaining on the docket Nos. 5 Original and 7 Original. With the entry of the decree and settlement of the compensation and expenses of the Special Master, I should think that No. 10 Original also would be concluded.

The remaining nine cases, for various reasons, probably will have to be carried for the time being.

Yours very sincerely,

Charles Elmore Cropley

Clerk

Honorable Fred M. Vinson,
Chief Justice of the United States,
Washington.

STATUS OF ORIGINAL CASES ON DOCKET

No. 1. New Mexico v. Colorado (filed October 29, 1919)

Subject: Boundary dispute.

By decree entered April 23, 1925, (268 U.S. 108), the boundary was fixed and a commissioner appointed to run the true boundary, construct monuments, and file a report. In a letter dated December 19, 1946, Mr. Kidder, the boundary commissioner, states that the whole length of the boundary to be marked is three hundred and thirty-five miles. At the time his letter was written, two hundred and forty miles of the boundary marking was completed, leaving ninety-five miles to be done. Failure of the States to make necessary appropriations has been the main factor in the delay in completing the project but weather and war conditions have also been a contributing factor.

Nos. 2, 3, and 4. Wisconsin, Michigan, New York, et al. v. Illinois and Sanitary District of Chicago, et al. (filed July 14, 1922, March 8, 1926, and October 22, 1926)

Subject: Diversion of water from Lake Michigan.

By decree entered April 21, 1930, (281 U.S. 696), the amount of water to be withdrawn was limited and the Sanitary District of Chicago directed to report semi-annually as to progress made in the construction of sewage treatment plants. The final report of the Sanitary District, filed January 3, 1939, showed completion of the projects.

The decree further provided that "this Court retains jurisdiction of the above-entitled suits for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy."

In 1939, the State of Illinois filed a petition seeking temporary modification of the decree so as to permit an increase of the diversion of water from the Great Lakes. The matter was referred to a Special Master and his report recommending dismissal of the petition filed by Illinois was confirmed, (313 U.S. 547). No later proceedings.

No. 5. New Jersey v. New York and City of New York (filed May 22, 1929)

Subject: Diversion of water from the Delaware River.

By decree entered May 25, 1931, (283 U.S. 805), a limitation was placed on the amount of water which might be diverted and such diversion conditioned upon the construction of a sewage treatment plant. The Court "retains jurisdiction of the suit for the purpose of any order or direction or modification of this decree, or any supplemental decree that it may deem at any time proper in relation to the subject matter in controversy." No report required or made. No subsequent proceedings.

No. 6. Nebraska v. Wyoming, et al. (filed October 15, 1934)

Subject: Apportionment of water of the North Platte River.

Decree of apportionment entered October 8, 1945, (325 U.S. 665), provides under paragraph XIII: "The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy."

No. 7. Texas v. Florida, et al. (filed March 15, 1937)

Subject: Determination of the true domicile of a decedent as the basis of rival claims of four states for death taxes.

The decree entered May 15, 1939, (306 U.S. 435), provides: "3. The cause will be retained upon the docket for such further action as may be necessary and proper and the parties or any of them may at any time hereafter apply for relief as they may be advised." Under date of December 13, 1946, the Assistant Attorney General of Massachusetts informed this office that so far as Massachusetts was concerned, there appeared to be no reason why this case should not be stricken from the docket. Since this Court decreed that the domicile of Green at the time of his death was in Massachusetts, it appears that the other parties to this litigation would not be concerned whether the case was retained on the docket. No subsequent proceedings.

No. 8. Kansas v. Missouri (filed May 27, 1940)

Subject: Boundary.

Final decree entered June 5, 1944, provided: "Both states having requested postponement of entry of an order directing the placing of suitable monuments or markers on the above designated boundary until they have had opportunity to consider exchanging certain lands and to make such exchanges, jurisdiction of this cause is retained for the purpose of entering such order at an appropriate time."

Appropriate resolutions have been adopted by the state legislatures and at their request for further time for consideration, an order was entered October 8, 1945, extending the time for marking the boundary until further order of the Court.

No. 9. Illinois v. Indiana, et al. (filed October 18, 1943)

Subject: Pollution of waters of Lake Michigan.

The Third Special and Third Interim Reports of the Special Master were approved by the Court October 25, 1948.

No. 10. United States v. Wyoming and Ohio Oil Co. (filed October 9, 1944)

Subject: Suit to establish title to certain lands located in Park County, Wyoming.

Supplemental report of Special Master proposing final decree received September 18, 1948.

No. 11. Georgia v. The Pennsylvania Railroad Company, et al. (filed March 26, 1945)

Subject: Railroad freight rates - alleged violation of Sherman Anti-Trust Law.

Final arguments before Special Master have been held and report is to be filed.

No. 12. United States v. California (filed October 22, 1945)

Subject: Title to bed of ocean within three mile belt adjacent to California coast line.

Honorable D. Lawrence Groner appointed Special Master on July 2,

1948, to make inquiry and to hold hearings as to what particular portions of boundary call for precise determination.

November 22, 1948.

October 19, 1950

MEMORANDUM FOR THE CONFERENCE:

Re: No. 8, Original - State of Kansas v. State of Missouri

I am transmitting herewith, for consideration at the Conference on Saturday, October 21st, copy of a proposed Order and Amended Decree in the above-styled case.

The Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 8, Original, October Term, 1950.

The State of Kansas,
Complainant,

vs.

The State of Missouri

ORDER AND AMENDED DECREE

Upon consideration of the joint motion of counsel for the parties in this case to amend the decree of this Court (322 U. S. 654), it is ordered that the joint motion be, and it is hereby, granted and the decree is amended to read as follows:

This cause was argued by counsel at the October Term, 1943, upon the pleadings and exceptions to the Report of the Special Master. On June 5, 1944, this Court entered a decree establishing a boundary between the States. Since the entry of the decree the States of Kansas and Missouri through their legislatures have agreed upon a boundary and such agreement has been ratified by joint resolution of the Congress of the United States and the resolution approved by the President of the United States. Public Law 637, approved August 3, 1950. Therefore, in order to conform this Court's decree to the agreement of the parties as ratified by the Congress of the United States,

It is Ordered, Adjudged, and Decreed that the boundary line between the States of Kansas and Missouri, which extends from the intersection of the Missouri River with the 40th parallel, north latitude, southward to the middle of the mouth of the Kaw or Kansas River, be and it is hereby established as the middle line of the main navigable channel of the Missouri River as said river flows throughout its entire course from its intersection with the 40th parallel, north latitude, southward to the middle of the mouth of the Kaw or Kansas River, subject only to changes which may occur by the natural processes of accretion and reliction, but not by avulsion.

The costs of this suit are equally divided between the two States, Complainant and Defendant.

October , 1950.

October 19, 1950

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The costs of this suit are equally divided between the two States, Complainant and Defendant.

October , 1950.

October 9, 1950

Dear Judge Gardner:

While it wasn't necessary for me to have any further information in regard to the handling of the case entitled Luria Steel and Trading Corporation v. Ford, and the complaint of Mr. Schoen of Chicago, I really enjoyed receiving your letter and the very comprehensive statement of Judge Donohoe .

I can well understand the irritation that Judge Donohoe feels in connection with the complaint, but the record presented here indicates that Mr. Schoen is without a leg to stand on. It may be that Mr. Schoen "forgot" that he had withdrawn from the case.

It was a genuine pleasure for me to receive the copy of the letter that Judge Donohoe wrote you in regard to the handling of the case.

With the kindest of personal regards and every good wish,

Sincerely,

[Signed] Fred M. Vinson

FMV:McH

Honorable Archibald K. Gardner,
Chief Judge,
United States Court of Appeals
for the Eighth Circuit,
Huron, South Dakota.

Copy to: Honorable James A. Donohoe,

September 26, 1950

Honorable Archibald K. Gardner,
Chief Judge,
United States Court of Appeals,
Huron, South Dakota.

Re: Luria Steel & Trading Corporation v. E. J. Ford and Barton Ford d/b/a E. J. Ford Co., Civil Action No. 106-49 - Omaha Division, District of Nebraska.

My dear Judge Gardner:

I have just returned to my desk this morning and my first attention I am devoting to the complaint lodged by one Edgar J. Schoen of 1550 First National Bank Building, Chicago 3, Illinois, with the Chief Justice of the Supreme Court in connection with the above entitled cause which is pending on our docket here.

It is needless for me to tell you I have been astonished at the charges that this man has made and I might use some ugly terms in connection with his statements; however, I will let the record speak for me in refutation of his charges.

Following is a copy of the pertinent docket entries:

August 2, 1949 - Filed complaint.

August 22, 1949 - Filed Order granting defendant ten days further time to answer or otherwise plead.

August 31, 1949 - Filed request of W. C. Fraser and W. W. Wenstrand for Order allow-

ing them to withdraw their appearance as attorneys for the defendants.

August 31, 1949 - Filed order granting withdrawal.

September 3, 1949 - Filed Order granting defendants until September 9, 1949, to answer. Appearances of Gross & Welch, attorneys for defendants, noted.

September 9, 1949 - Filed Answer and Counter-Claim of defendants with demand for jury trial.

September 30, 1949 - Filed Answer of plaintiff to Counter-Claim.

October 11, 1949 - Filed sealed Deposition in behalf of plaintiff.

October 13, 1949 - Filed Motion for Partial Summary Judgment.

November 17, 1949 - Filed memorandum in support of Order overruling Motion of plaintiff for Summary Judgment.

May 29, 1950 - Pre-trial Investigation had and Report filed.

May 31, 1950 - Hearing had on Motion for Partial Judgment on behalf of plaintiff, and the issues having been duly presented to the Court by Jack W. Marer, Attorney for plaintiff, and Daniel J. Gross, Attorney for Defendants, and the Court being fully advised in the premises, IT IS ORDERED that Counsel file Memorandum briefs by next Wednesday, June 7, 1950. Official Court Reporter Shorthand Notes on file pertaining to the above hearing.

June 6, 1950 - Filed Withdrawal of Jack W. Marer as attorney for plaintiff, showing proof of service.

June 6, 1950 - Filed Appearance of Alexander McKie, Jr. and Barton H. Kuhns, as counsel for plaintiff, showing proof of service.

June 14, 1950 - Filed Withdrawal of Counsel Edgar J. Schoen, showing proof of service by mail.

June 20, 1950 - Filed Order granting plaintiff leave to file its amended answer to the defendant's counter-claim.

July 28, 1950 - Filed Motion of plaintiff for Order requiring defendants to produce and permit plaintiff to inspect and copy certain documents, showing Notice of hearing of Motion, and proof of service by mail.

August 2, 1950 - Filed Order that defendants produce documents set forth in plaintiff's Motion within five days from date hereof, and permit plaintiff to inspect and make copies of same.

August 14, 1950 - Filed Amended Answer to defendants' Counter-Claim, showing proof of service.

August 14, 1950 - Filed Motion of plaintiff for Summary Judgment, showing proof of service.

From the foregoing record, you will observe that I had partially heard counsel on the law pertaining to the Motion for Partial Summary Judgment, on May 31, 1950. On the following day, Mr. Marer appeared alone and presented additional autborities in support of his motion. Mr. Gross, representing the defendants, requested an additional day or two to enable him to

examine the cases and be prepared to present his contentions. The Court had fixed June 7, 1950, as the time when the case would be finally submitted.

Court was not in session on Saturday, June 3, 1950, and on that day, Mr. Jack Marer called me at my home and advised me that he was withdrawing from the case and that there would be no further hearing, in as far as he was concerned, on Wednesday, the 7th of June.

You will note the following, which I quote from the Pre-Trial hearing, which was had on May 26, 1950, and filed on May 29, 1950:

> "BY THE COURT: In as far as the documentary evidence is concerned, there is no occasion to proceed further along that line.
>
> "MR. SCHOEN: That is what I was driving at at the tail end of this morning's session, because it seems to me that this thing —
>
> "BY THE COURT: The evidence in the case will be oral.
>
> "MR. SCHOEN: Oral testimony of two men. The defendant has already testified there was no one else present in the room at the time he made this agreement; that he made the agreement with Mr. Erman; and it seems to me the testimony in this case domes down actually to Mr. Ford's testimony that he made an agreement, and Mr. Erman's testimony that he didn't make an agreement.
>
> "I don't see why, on that state of facts, we can't try the case in a morning's time.
>
> "BY THE COURT: We will have no jury now until September. I had expected to call the jury back on a case, which from the latest report has gone over, and we will not have a jury at this time."
>
> (The Kimball Laundry case, which would have required about three weeks for trial).

"MR. SCHOEN: We are in a very awkward position. The Government, as I mentioned this morning, has levied a lien on these properties and we would like to get that rather simple issue to trial. This case has been pending now for very close to a year.

"BY THE COURT: The cost to the Government of the jury would be about as much as is involved in your lawsuit. There is no money now appropriated and there won't be until after the first of July. We are over-drawn. The treasury, as far as this department is concerned, is now dry.

"MR. SCHOEN: I have a further very selfish matter. I am taking Sabbatical leave from the practice of law. Mrs. Schoen and I are sailing on the Queen Elizabeth on September 21st and we are going around the world. I expect that trip to take me from anywhere ten to fifteen months. I and Mrs. Schoen enjoy traveling.

"BY THE COURT: That being so, you should be in a mood to settle.

"MR. SCHOEN: May we have a partial judgment for the amount not in dispute. The law provides for it.

"MR. GROSS: I don't think so.

"MR. SCHOEN: I want one thing in this record. I certainly haven't done anything except try to get this case before the jury. What Mr. Marer did and what the Court did, I don't know. As far as the Chicago part is concerned, we have been more than diligent in trying to get this case before a jury."

(At the Call of the Docket on April 3, 1950, it was reported in open Court by counsel for plaintiff (Mr. Marer) that they were negotiating settlement).

"BY THE COURT: It isn't going to do any good to talk about it now. The jury is gone and will not be back.

"MR. SCHOEN: I would like to make, and I will make before I leave town, a written motion for a partial judgment. I would like a specific ruling of the Court on that and the Court may then make whatever ruling the Court desires. I would like to have my record preserved in accordance with the rules.

"BY THE COURT: There is nothing preventing you from doing so, is there?

"MR. SCHOEN: No.

"BY THE COURT: Proceed then and protect your record. I am not denying you any right.

"MR. SCHOEN: It does seem to me you are being rather harsh with us in not permitting us to have a partial judgment on what is not in dispute; particularly when a concern is in the position where its affairs are so much in jeopardy that the Government has already levied a lien on its properties.

"MR. GROSS: That isn't in this case.

"BY THE COURT: I have ruled on this matter and that settles it."

From and after June 3, 1950, when Mr. Marer advised me he was withdrawing from the case, I heard nothing whatever about the matter until Mr. McKie appeared before me on the morning of the 25th of August, 1950, and asked for a date for hearing on a Motion for Partial Summary Judgment. I advised Mr. McKie that I had been designated

to hold a term of court in California throughout the month of September; that I expected to leave on the following Sunday morning for California and could not give the matter my attention until I returned; that Judge Delehant would be in charge of the work of the district and suggested that if there was anything urgent that he take the matter up with Judge Delehant and I was sure it would be taken care of.

You will particularly note that Mr. Schoen withdrew his appearance from this case on the 14th of June, and I am at a loss to understand what interest, if any, he had in the litigation on the 31st of August, the date he wrote the letter to Chief Justice Vinson.

Judge Delehant has been kind enough to supply me with a copy of his letter addressed to you under date of September 20th, in which he has, in greater detail, reported the conditions as they prevail here, pertaining not only to this case, but to all other business on the docket. In connection with our work, I may say that Judge Delehant and I have been meticulous about taking care of the work promptly, and this statement will be readily verified from the records of the various divisions. It is somewhat annoying, therefore, to be confronted with a reckless, irresponsible charge such as this filed with the Chief Justice of the Supreme Court of the United States.

Yours very sincerely,

(S) J A Donohoe

September 28, 1950

Honorable Archibald K. Gardner,
Chief Judge,
United States Court of Appeals
for the Eighth Circuit,
Huron, South Dakota.

Dear Judge Gardner:

I am in receipt of your letter of September 22nd, with which you enclosed a letter from Judge Delehant relative to the case entitled Luria Steel and Trading Corporation v. Ford, et al. I read both your letter and the one from Judge Delehant with a great deal of interest.

I enjoyed the association with you at the session of the Judicial Conference of the United States.

With every good wish,

Sincerely,

(Signed) Fred M. Vinson

November 3, 1950.

MEMORANDUM for the Chief Justice.

Luther Ely Smith, Esquire, Special Master in the case of Illinois v. Indiana, No. 9, Original, October Term, 1950, has been awarded compensation to date as follows:

From March 7, 1944, to Sept. 7, 1946.....	$15,000
From Sept. 8, 1946, to Sept. 7, 1947.....	$ 6,000
From Sept. 8, 1947, to Sept. 7, 1948.....	$ 6,000
From Sept. 8, 1948, to Sept. 7, 1949.....	$ 6,000
	$33,000

The largest fee granted a Special Master by this Court was the sum of $45,000 awarded to Michael J. Doherty, Esquire, in Nebraska v. Wyoming, 325 U. S. 589, June 11, 1945. Mr. Doherty reported that over a period of 5⅓ years he had devoted not less than 600 days to the case.

In the Great Lakes case the Court awarded Chief Justice Hughes $30,000. It will be noted that the order quoted below was entered at a date when Mr. Hughes was Chief Justice:

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HAROLD B. WILLEY.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARCHIBALD K. GARDNER
CHIEF JUDGE

Huron, S. Dak.
Sept. 29, 1950

Hon. Fred M. Vinson
The Chief Justice
U. S. Supreme Court
Washington 13, D.C.

My dear Mr. Chief Justice:

I hesitate to make further reference to the complaint of Mr. Edgar J. Schoen, of Chicago, with reference to the alleged delay in hearing the case pending in the District Court of Nebraska entitled Luria Steel and Trading Corporation vs. Ford, et al.

Judge Donohoe, having but recently returned to the district, has written me further on the subject under date September 26th, and I am taking the liberty of enclosing you copy of his letter herewith. I call particular attention to one or two matters: Under date May 29, 1950, pre-trial investigation was had and report filed. On June 6, 1950, withdrawal of Jack W. Marer as attorney for plaintiff, filed. Then appears the following docket entry:

> "June 14, 1950 - Filed Withdrawal of Counsel Edgar J. Schoen, showing proof of service by mail."

At the pre-trial hearing I note that Mr. Schoen, among others, made the following statement:

> "I have a further very selfish matter. I am taking Sabbatical leave from the practice of law. Mrs. Schoen and I are sailing on the Queen Elizabeth on September 21st and we are going around the world. I expect that trip to take me from anywhere ten to fifteen months. I and Mrs. Schoen enjoy traveling."

#10 orig.

Memo. for the Chief Justice:

Herewith proposed final order in Georgia v. Pennsylvania R.R., No. 10 Orig.

Georgia has made deposits with us totalling $18,100. As I read the motions she does not expect to get this back but it is agreed that she will not have to pay more. The expenses of the Master having been satisfied from the advanced payments of Georgia and the defendants there remains only the Master's fee and clerk's fees. The latter will amount to approximately $350 and we have a balance on deposit of $266.13.

Willey

#2

I am advising Judge Donohoe that copy of his letter is being forwarded to you.

With personal regards, I remain

Very sincerely yours,

Archibald K Gardner

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT

ARCHIBALD K. GARDNER
CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

ARCHIBALD K. GARDNER
CHIEF JUDGE

St. Louis, Mo.
Sept. 22, 1950

Hon. Fred M. Vinson
Chief Justice
United States Supreme Court
Washington 13, D. C.

My dear Chief Justice:

Again referring to the case entitled Luria Steel and Trading Corporation vs. Ford, et al., concerning which I wrote you under date September 20th, I am now in receipt of a very exhaustive report from Judge Delehant which to my mind clearly indicates that there is no basis for Mr. Schoen's complaint. I am taking the liberty of enclosing Judge Delehant's letter herewith as he has sent me an extra copy for my file. I trust this report may be found satisfactory.

Sincerely yours,

Archibald K. Gardner

OK receipt
Read it with
great interest
Enjoyed the association
with you at the Judicial
conference
With very good wishes
Sincerely

UNITED STATES DISTRICT COURT

DISTRICT OF NEBRASKA

JUDGES:
JAMES A. DONOHOE
OMAHA, NEBRASKA
JOHN W. DELEHANT
LINCOLN, NEBRASKA

September 20, 1950

Honorable Archibald K. Gardner, Chief Judge
United States Court of Appeals
Huron, South Dakota

Re: Luria Steel & Grading Corporation
v. E. J. Ford and Barton Ford
d/b/a/ E. J. Ford Co., Civil Action
No. 106-49 - Omaha Division
District of Nebraska

My dear Judge Gardner:

Following the transmittal of my very brief letter (written from Norfolk Sunday night) of acknowledgment of your communication of September 14th enclosing a copy of your letter of that date to Judge Donohoe, I have finished the work of the Norfolk session and returned to my desk at Lincoln. In the meantime, I have examined verbatim the file in the case.

Because it has been handled entirely by Judge Donohoe, I shall not presume to discuss it at great length. But in the persuasion that a partial factual recital of its history may be somewhat helpful, I do presume to offer that.

First of all, I have had my secretary prepare, and I now hand you herewith, a copy of the index sheet's memorandum of filings from which the general course of the case is roughly indicated.

It appears from that index that the complaint was filed on August 2, 1949, and that in the intervening period of slightly more than a year the representation of the parties themselves by their counsel has entirely changed. One firm of Omaha attorneys originally entered an appearance for the defendants, but, on August 31, 1949, requested and obtained authority to withdraw such appearance, shortly after which another firm of Omaha attorneys entered the case in behalf of the defendants, which still carries the defendants' representation. Then, in June, 1950 the plaintiff's two attorneys, one from Chicago, the other from Omaha, severally withdrew and another Omaha firm entered upon the presentation of its case.

Although the plaintiff recently filed an amended pleading in the nature of a reply, the issues were originally made up rather promptly, the answer to counterclaim having been filed on September 30, 1949, approximately two months after the institution of the action. However, it would seem to be clear that the case was not then actually ready for trial or disposition because depositions were shortly under way which were taken and thereafter, and on October 11, 1949, duly filed in the case. Two days later a motion for a partial summary judgment or limitation of the issues was filed. It appears to have been heard quite seasonably because by November 17, 1949 Judge Donohoe had considered it and filed a memorandum announcing his decision and an order denying the motion. The action seems from that point, (although I speak only upon the basis of the file) to have been somewhat dormant until May 29, 1950 when a pretrial conference was had, a stenographic report of which forms a part of the record. Some little controversy between counsel seems to have arisen then about a possible trial date.

Beyond what is in the files, I have no recollection as to what occurred then. Judge Donohoe on his return and his examination of the files will undoubtedly want to make some observations to you in that connection.

I do have this information touching the availability in the Omaha division of a jury for trial work in May, 1950 and during the interval from that time until the end of the 1950 fiscal year. I had been working in late March and part of April in the trial of jury cases in the McCook division. Thereafter, and on May 1, I went into Omaha and during two weeks tried civil jury cases. That session was expected to continue for five or six weeks. Judge Donohoe was contemporarily trying, and for some weeks before I went into Omaha had been trying, criminal cases. And he had in view proceeding from them into the trial of civil jury cases, and especially one long condemnation case. Sometime in mid-May at a date which I do not now exactly recall, the local United States Attorney's office, acting under directions from Washington, and the Marshal's office, presented to Judge Donohoe a request for the termination of the jury's service because of the exhaustion of available appropriated funds in certain essential accounts. Judge Donohoe, as I recall, felt that he could not disregard the demand and I concurred in his view. The jury was thereupon excused. I do not recall the exact date of its excuse. That is a matter of record and detail. I may add, however, that upon urgent demands from the same source I unwillingly deferred non-jury trial work in at least one of the outlying divisions of the district beyond the opening of the 1951 fiscal year, and in

consequence spent a week of harvest hand hours in the Chadron division in July, 1950 trying contested non-jury cases. You will understand, therefore, that the action of the judges in terminating the service of the jury in Omaha was taken only upon strong official representations of its necessity and with frankly expressed reluctance on the part of both of the judges.

No jury has been called into service at Omaha since the excuse of the jury which was serving in May. But it would hardly have been expected that one would have been empaneled at any time between July 1 and the opening of the September term. And the action in discharging the jury in mid-May, which I have just reported, was naturally operative until July 1.

The nearest I ever came to having any contact with the Luria case, so far as I can recall, was its inclusion, by a mere summary reference to its title and number, on a list of cases in the division triable to a jury which was handed me when I reached Omaha for the May, 1950 jury session. I have that list before me as I write. It contains, and when handed to me contained, a typewritten notation opposite the title to the case indicating that at the time in question negotiations for the settlement of the controversy were pending. Upon what authority that information was noted on the case list I have no knowledge. However, before making mention of this point, I have taken the precaution of calling an attorney involved in the suit who advises me that according to his understanding such negotiations were pending at the time in question. In any event, after an informal review with the clerk of the prospective work of the jury and an inquiry into the supposed status of each particular case, I made myself a check mark in ink upon the case list calculated to suggest to me that the case in question would probably not be available for jury work at the time of the session. That mark was no more than a suggestion to me touching my probable trial program. If, during that May, 1950 session of court or at any other time, any attorney involved in the suit mentioned it to me, I have forgotten and do not recall the incident. I readily concede that some inquiry touching it may have been made, for during the period counsel mentioned many cases to me.

But it is to be observed, further, that at this time the case which has prompted this correspondence seems not to be ready for trial to a jury. The matter presently pending in it is a motion for summary judgment, supported by a large number of exhibits in the way of copies of business documents and affidavits. So far as

appears from the record, that motion for summary judgment has not been noticed by counsel for hearing or submission. As a matter of fact, it is at least possible that to the extent, if any, to which the defendants may desire to controvert factual statements contained in the many affidavits submitted in support of the motion for summary judgment, an opportunity and time may be demanded by the defendants for the submission of a countershowing. I do not know that such a demand will be made. I merely appraise it as possible.

Another point is quite obvious. The motion for summary judgment was filed on August 14, 1950, only after Judge Donohoe's assignment to San Francisco was under way and probably actually made, although I do not know whether the order for it had then been signed. In any event, Judge Donohoe knew at the time that he was going to San Francisco. Besides, it is rare that matters of the present sort are pressed for hearing in August.

So, what has immediately to be done is to obtain a hearing on the motion for summary judgment, after determination of which, if it should be denied either wholly or in part, the case should be ready for trial, presumably to a jury.

There is reason to support the thought that Judge Donohoe should hear the motion for summary judgment. He has already heard and made a ruling upon a motion for the limitation and narrowing of the issues which, in large part, is bottomed upon the same factual setting as the motion for summary judgment. To be sure the latter motion is supported by more material. But in substantial measure the earlier pleading covered much the same ground. So, it would be appropriate that the judge who heard and ruled on the former motion should act in respect of the now pending motion. Another judge ought not unnecessarily to be confronted with the conceivable necessity of ruling in different manner upon like issues from that followed by one of the judges in a previous phase of the same case. If such departure be indicated, the judge first ruling should have the opportunity to take it.

I shall now outline the immediate program of the court in our district. The Omaha divisional docket is to be opened for the fall term on next Monday, September 25th. In Judge Donohoe's absence, I shall call the docket on that date, undertake to dispose of as many pending motions and preliminary matters as shall be ready, handling all of them so far as may be possible, set the cases for trial in an appropriate order, including both jury and non-jury cases,

and then await Judge Donohoe's return to the district for the prescription of the date for the opening of the jury trials.

You correctly understand the manner in which we uniformly manage the dockets in this district. Judge Donohoe lives in Omaha. I live in Lincoln. I handle the Lincoln docket in its entirety, except as to cases in which there is a real disqualification for, or a conceivable embarrassment in, their trial by me. Then, Judge Donohoe takes them over. I also handle the greater number of the sessions in the six outlying divisions, although Judge Donohoe goes into those areas quite frequently, and consistently does considerable trial work, especially at North Platte and Grand Island. It is entirely appropriate that the judge resident at Lincoln should handle the larger portion of the work in the outlying divisions because of the proportionately heavier volume of work, both civil and especially criminal, in the Omaha division. The judge resident at Omaha has virtually a full time job within his division, including for Judge Donohoe as Chief Judge, the administrative work.

As occasion seems to suggest, Judge Donohoe invites me to come into Omaha, sometimes to try cases in which it seems appropriate that I should preside rather than he, but also to work concurrently with him in the trial of pending cases generally.

You must understand that the relations between Judge Donohoe and myself are thoroughly cordial and genuinely affectionate. I have the highest regard for his fidelity to his office, his industry, ability and judicial integrity, and I hold him personally in high esteem. And I am confident of his own similar respect for me.

Your quotations from Mr. Schoen's letter prompt me to certain observations. While I do not volunteer any unneeded defense of Judge Donohoe's handling of this case, and prefer to leave the discussion of that subject to his own much more closely informed recollection, I can see in the record of the case no possible foundation of the personal attack upon the judge made in rather sinister fashion through the office of the Chief Justice. I shall say no more about that because I prefer not to express any opinion of it. It is to be noted, however, that the man who wrote the letter is not now, and for more than three months has not been, an attorney of record in the pending case. By way of understatement, I venture to express grave doubt whether the attorneys who now represent the plaintiff either would have made, or do in any wise approve, the representations which Mr. Schoen presumed to urge.

The gentleman's letter seems gratuitously to offer a criticism of Judge Donohoe's assignment to San Francisco. Such assignment was and is only indirectly a matter of my concern. I unhesitatingly say, however, that I consider it to have been entirely proper. As I recall, before it occurred Judge Donohoe had almost, if not entirely, completed the decision of all submitted cases before him. The first half of September is not ordinarily a busy season in the courts in this part of the country, either state or federal. And so far as the latter half of the month is concerned such loose ends as might accumulate could easily be brought up on the judge's return to his desk. So, the assignment by the Chief Justice was neither improper, imprudent nor untimely.

Finally, there is a presumptuous suggestion by the letterwriter that a judge be sent into this district to take care of its accumulated work. That offering is completely unwarranted. To eliminate any question of my own position upon it, I unhesitatingly say that there is no present need nor any discernible likelihood of reasonably early future need of assistance from any source, either within the circuit or beyond its borders, in the maintenance of the proper position of the docket within this district. The work is simply not too heavy for the two judges. They should be expected to do it and should on their own motion and responsibility discharge its burden. If there are cases at issue for whose early trial there is any demand or desire, all that need be done is to signify such wish. Either or both of the judges will carry it into effect, saving only instances in which for some compelling reason delay may be imperative and haste oppressive.

I am sending a copy of this letter to Judge Donohoe and I am also delivering an additional copy to you.

Very respectfully yours,

John W. Delehant

JAMES A. DONOHOE
CHIEF JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA
OMAHA 1

October 11, 1950

RECEIVED
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CHAMBERS OF THE
CHIEF JUSTICE

My dear Chief Justice Vinson:

I want to thank you for your letter under date of October 9th, addressed to Honorable Archibald K. Gardner, Chief Judge of this Circuit, copy of which I have in my mail this morning.

With my very best personal regards, I am,

Very sincerely yours,

Honorable Fred M. Vinson,
Chief Justice,
Supreme Court of the United States,
Washington 13, D. C.

OFFICE OF THE CLERK,

Supreme Court of the United States,

Washington 13, D. C.

November 3, 1950.

MEMORANDUM for the Chief Justice.

Luther Ely Smith, Esquire, Special Master in the case of Illinois v. Indiana, No. 9, Original, October Term, 1950, has been awarded compensation to date as follows:

From March 7, 1944, to Sept. 7, 1946.....	$15,000
From Sept. 8, 1946, to Sept. 7, 1947.....	$ 6,000
From Sept. 8, 1947, to Sept. 7, 1948.....	$ 6,000
From Sept. 8, 1948, to Sept. 7, 1949.....	$ 6,000
	$33,000

The largest fee granted a Special Master by this Court was the sum of $45,000 awarded to Michael J. Doherty, Esquire, in Nebraska v. Wyoming, 325 U. S. 589, June 11, 1945. Mr. Doherty reported that over a period of 5½ years he had devoted not less than 600 days to the case.

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> April 21, 1930. "The Court having considered the suggestions of the several parties does now, in view of its established practice, fix the compensation of Charles Evans Hughes as Master upon the original and supplemental references in these cases at thirty thousand dollars ($30,000)."

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HAROLD B. WILLEY.

CJ:
Re: unions and counsel in Nos. 85, 108, 313 and 393

All of the unions involved in these cases are AFL unions. In Nos. 85 and 108, the unions are the petitioners. As between the two counsel, I think No. 108 would probably present the best argument. The union is the respondent in No. 393, Denver, and I would guess that counsel here was the best of the three. No union is a party in No. 313, since this is a fight between the NLRB, which is in all four cases, and the company. I think 313 should be granted, at least on the summary docket, since this is the only case where a company will be able to present argument on the point. In sum, I would recommend the following line-up for argument:

No. 85 ----- hold
No. 108 ----- grant/summary
No. 313 ------ grant/summary
No. 393 ------ grant/summary

MLS

No. 147 - Motion for leave to argue amicus curiae by State of Illinois

GRANT	DENY
Burton	Black
	Douglas
	Frankfurter *
	Jackson

Reed will do anything Chief Justice wants to do

Minton not too much in favor of granting but will talk to Chief Justice

* Is sending in written memo - suggests maybe some sort of conditional arrangement could be given to Illinois