

E. G. W. 10/30/45

SUPREME COURT OF THE UNITED STATES.

No. 39.—OCTOBER TERM, 1945.

May Department Stores Company, doing business as Famous-Barr Company, Petitioner, vs. National Labor Relations Board.	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
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Mr. Justice REED delivered the opinion of the Court.

This writ of certiorari brings here for review the decree of the Circuit Court of Appeals enforcing an order of the National Labor Relations Board which was entered after the Board found upon hearings that petitioner had violated Sections 8(1) and 8(5) of the National Labor Relations Act.¹ On account of different treatments in circuit courts of appeals of Labor Board orders to cease and desist, which restrain other kinds of acts than those found by the Board to be unfair, a dispute over the proper scope of the cease and desist order made it important for us to grant the writ. See note 8 *infra*. The writ also presents issues (1) as to whether two small related departments with thirty to forty employees may be an appropriate bargaining unit when the department store of which they are a part has around three hundred and fifty departments and approximately five thousand employees; (2) as to whether the Board could properly place the name of a Joint Labor Council on the ballot for the employees' bargaining representative when none of the employees

¹ 49 Stat. 452-53. "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(5) The refusal to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Opinion of the C. C. A., *National Labor Relations Board v. May Dept. Stores Co.*, 146 F. 2d 66; *determination of National Labor Relations Board*, 53 N. L. R. B. 1366.

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were members of the Council but only of a local union which was associated with others in the Council; and (3) as to whether seeking authority from the National War Labor Board to increase wages without taking up the increase with a certified bargaining agent may be an unfair labor practice under Section 8(1) of the Labor Act.

Appropriate Unit. After a hearing in which the employer, the petitioner here, the May Department Stores Company, doing business as Famous-Barr Company, a St. Louis department store, took part, the Labor Board, on June 16, 1943, found that all non-supervisory employees of the Company, then 28 in number, working in the main and basement men's busheling rooms constituted an appropriate unit for collective bargaining within the meaning of Section 9(b)² of the Labor Act. An election was ordered. It resulted in the choice and designation of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, C.I.O., as the representative for collective bargaining of the employees of the unit.

The Company contended that a store-wide unit of its five thousand employees was the most appropriate and at any rate that employees in the women's alteration and the fur alteration departments belonged in the appropriate unit. As there is no provision for direct review of the determination and certification of the bargaining representative, the Company, in order to secure judicial review of the finding as to the unit, awaited this proceeding which sought a decree directing it to bargain collectively with the representative. See *Inland Empire Dist. Council, etc. v. Millis*, 325 U. S. —.

A few months before this proceeding a determination that all employees of the Company were the appropriate unit for collective bargaining had been sought by the C.I.O. This was dismissed for failure of the C.I.O. to make a substantial showing of membership in the suggested store-wide unit. 46 N. L. R. B. 305. That prior application is not a bar to this. It determined nothing. The Board was careful to note in this proceeding that a larger unit might be fixed as appropriate if self-organization

² 49 Stat. 453, Sec. 9. "(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

The Company objected because no sufficient showing of representation was made and because it took exception to the exclusion of certain employees from the proposed unit.

petition

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stated
exceptions

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developed. Other departments of the store had members of this and other unions as employees. This presence throughout the enterprise was a matter for consideration in deciding upon the appropriate unit but was not decisive. Compare *Pittsburgh Plate Glass Co. v. Board*, 313 U. S. 146, 156. No labor organization claimed to represent the entire body of employees. Therefore the Board determined to approve this unit as appropriate so that collective bargaining might start for these employees without waiting until more employees might be organized into a larger unit. Compare *Board v. Hearst Publications*, 322 U. S. 111, 134.

Under Section 9(b) the Board is delegated the authority to determine the unit. The judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion but to "guarantee against arbitrary action by the Board."³ The Board had before it the business of the company, the numbers of employees, the treatment of the employees as a unit by management with reference to sick leave, hospitalization, employee privileges, vacations, et cetera. Evidence was presented that a large proportion of employees in the proposed unit were members of the same union. It had testimony as to similarity and dissimilarity in tailoring and altering between the men's and women's alteration rooms. There was evidence that those who work on men's clothing, speaking generally, belong to a different union organization than those who work on women's clothes. The Board considered the interchange of workers between the two groups. We think that there was ample testimony to support the Board's conclusion that the employees of the two busheling rooms were an appropriate unit, since these employees had a stage of self-organization and a special trade which sufficiently differentiated them from other employees.

Form of Ballot. Petitioner objects to the certification because the ballot contained the name of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees, as a candidate for bargaining representative from the unit. This was the organization which was certified. It had filed the petition for determination of the representative. The Council claimed that more than 51% of the employees in the suggested unit had

³ S. Rep. No. 573, 74th Cong., 1st Sess., p. 14.

designated it as their collective bargaining representative. The Board directs what names go on the ballot. Unless there is a showing of a substantial number of employees in the proposed unit who have become members of and selected the petitioner as their bargaining representative, the Board does not ordinarily order an election.⁴ This is an administrative policy of the Board. In this case on the Joint Council's petition for certification, the Board found that the Council had a majority of the employees. As a matter of fact it was a local union which the employees had selected and joined. The Board pointed out in its finding of facts on the petition for an election that the Joint Council represented this local and similar locals in other stores.

The Company says that some employees may have been misled by the ballot into thinking that the Joint Council had a substantial number of the unit's employees as members because elections are not ordinarily called unless that situation exists. Even so, it is difficult to grasp what standing the employer has to object to placing a name on the ballot which has no members in the proposed unit. The name was that of the petitioner for the election. The local was represented by the Joint Council. Cf. *National Labor Relations Board v. Franks Bros. Co.*, 137 F. 2d 989, 992, affirmed on other grounds *Franks Bros. Co. v. Labor Board*, 321 U. S. 702. The Joint Council was chosen by a majority of the employees of the unit and certified. In the circumstances of this election, we see no basis for the Company's objection to the certified representative on the ground of possible confusion of the employees.

Action on Wages. The Board found that the Company interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act in seeking the approval on August 30, 1943, of the National War Labor Board for an upward wage adjustment for a large proportion of its employees, including the employees of the unit here involved, without bargaining collectively on the subject of the wages with the certified union. A letter accompanied the request to the War Labor Board which explained that certain craft employees, not here involved, were excluded from the application for authority to increase wages because they were covered by collective bargaining agreements. The letter went on to say:

⁴ In the matter of Houston Shipbuilding Corporation, 41 N. L. R. B. 638; In the matter of American Manufacturing Company, 41 N. L. R. B. 995.

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"The St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, C.I.O., . . . has been certified by the National Labor Relations Board, but we do not regard this as an appropriate unit and have consistently taken that position and have so notified all parties concerned. It is our intention to submit that question to the Courts, if and when the occasion arises. We have not recognized this Union and have not bargained with it for the employees in Departments 280 or 281 and no negotiations with that Union are pending. It is intended, however, that the employees in Departments 280 and 281 shall be included in this application.

"We do not believe that any of the organizations named in the application, nor the organization named above, have any interest whatever in the enclosed application. However, if the organization named above should object to the inclusion of the employees of Departments 280 and 281 in the application, you are advised that said application may be considered as having been amended so as to exclude those employees from the application."

The next morning the employees were told over the store address system of the application for a wage increase for all employees, except higher paid executives and those "employees whose salaries have been fixed by closed shop agreements." A short time later another reference to the application was made over the address system. A similar announcement appeared in the September 3 issue of the store paper. The conditional offer to exclude the employees of the unit was not referred to in the announcements. Upon these facts the Board found a violation of Section 8(1).

The Company urges that its request for authority, without negotiation with the certified union as to the application to the War Labor Board, was not an unfair practice under Section 8(1) but only a necessary result of its position on non-recognition of the certified representative because the Company did not agree with the Board's determination of the appropriate unit for the selection of representatives. To maintain this position, the Company says, it could give no recognition to the certified agent.

We have in preceding divisions of this opinion stated our conclusion that the Joint Council was a properly certified bargaining representative. Therefore at the time of the request to the War Labor Board for authority to increase wages, the Joint Council must be considered as a properly certified bargaining agent. Company action in regard to it must be judged in that light even

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though its attitude toward the certification made its choice difficult.

The Joint Council was certified on July 12, 1943. Meanwhile, after the election, the Council had requested a conference with the Company for negotiating a contract to cover wages, hours and working conditions. This request was declined on July 19th with the statement that the Company did not agree with the decision of the Board and desired to preserve its full rights to question the result as it "may see fit." The application to the War Labor Board followed on August 30th.

It is settled law that the Wagner Act makes it an employer's duty to bargain collectively only with the duly recognized or accredited representative of the employees. Disregard of this duty violates Section 8(1) of the Act. Section 9(a). *Medo Corp. v. Labor Board*, 321 U. S. 678, 683-84. Any other conclusion would infringe an essential principle of collective bargaining. See *J. I. Case Co. v. Labor Board*, 321 U. S. 332, 338. Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities. In requiring signed and written agreements under the Labor Act, we said, "Contrasted with the unilateral statement by the employer of his labor policy, the signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife." *H. J. Heinz Co. v. Labor Board*, 311 U. S. 514, 524.

Two national labor groups had each separately sought for months to organize the Company. One effort to secure the designation of a unit had failed. The present designation was made over the protests of the Company. It had urged:

"There are two competing labor organizations seeking to organize the employees in this store. By this decision one of them is granted an election in the unit composed of two departments. There are some 350 departments in this store and if this Employer is to be confronted with elections and separate bargaining for each one or two departments it will be an endless and intolerable interference with store operations, which should not be permitted."

By going ahead with wage adjustments without negotiation with the bargaining agent, it took a step which justified the conclusion of the Board as to the violation of Section 8(1). Such unilateral

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action, in the circumstances of this case, minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent. If successful in securing approval for the proposed increase of wages, it might well, as the Board points out, block the bargaining representative in securing further wage adjustments.

Breadth of Order. Petitioner complains here of the refusal of the Court to modify paragraph 1(b) of the Board's order to the extent which petitioner explicitly asked for below in its petition for rehearing.⁵ That paragraph, together with another which enjoins refusal to bargain, is set out below.⁶ Petitioner argues

⁵Section 10(e) of the National Labor Relations Act, 49 Stat. 454, precludes the consideration by the Circuit Court of any objection not raised before the Board, unless such failure is excusable because of "extraordinary circumstances." This Court therefore is authorized, *sua sponte*, to appraise the record to determine the power of the Circuit Court to review paragraph 1(b) of the Board's order. *Board v. Bradford Dyeing Assn.*, 310 U. S. 318, 341.

In this proceeding the paragraph first appeared in the intermediate report of the Board's examiner (R. 55). The petitioner excepted specifically to paragraph 1(b) of the proposed order as "not supported or justified by the record" (R. 41). This was the only objection made to the paragraph in question in the record of the proceedings before the Board. The examiner's recommendation was adopted by the Board in its order (R. 45)). Unless this objection was sufficiently specific to apprise the Board of the question now presented, the Circuit Court had no power to consider it. *Marshall Field & Co. v. Board*, 318 U. S. 253. In the *Marshall Field* case we declined to consider an issue as to the power of the Board to grant a back pay order which was construed as barring the deduction of unemployment compensation from the award, although the question was raised by answer and decided by the Circuit Court of Appeals, *National Labor Relations Board v. Marshall Field & Co.*, 129 F. 2d 169. Our reason for refusing review was that the only objection to the Board's power was error by the examiner "in making each and every recommendation." The remedy recommended by the examiner was the usual back pay less earnings without any word in the report as to the unemployment compensation. This was too general to apprise the Board of an intention to bring up the question of the deductibility of the compensation and of the necessity for findings.

Although it falls short of desirable specificity, we think the objection was sufficient in the present case. No further findings are needed. The paragraph in issue is a standard form of order frequently used by the Board; the same question with respect to an almost identical order was considered by this Court in *Labor Board v. Express Pub. Co.*, 312 U. S. 426, and has been a frequent subject of dispute in the Circuit Courts (see n. 8 *infra*). These circumstances coupled with an objection that the order was "not supported or justified by the record" put the Board on notice of the issue now presented.

⁶Decreed that May Department Stores Company, etc., shall cease and desist from 1. (a) "Refusing to bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated

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that the broad, blanket provisions of 1(b) are invalid. The language of the prohibition covers interferences with all the rights of employees which are covered by section 7 of the Labor Act, while at the most, petitioner urges, the Board has found and the Circuit Court sustained only two unfair labor practices by petitioner, "(1) a refusal to bargain and (2) the store-wide salary increase." Both of these, it is asserted, are but incidents in petitioner's effort to obtain judicial review of the Board's certification. As the Board's selection of an appropriate unit to choose the employees' bargaining representative and the Board's subsequent certification of the representative chosen, section 9, is not judicially reviewable directly, petitioner takes the position that it committed the unfair labor practice of refusing to bargain with an accredited union, merely to open the way for judicial review of the certification.⁷ Consequently petitioner urges the cease and desist order should be no broader than the refusal to bargain which is covered by paragraph 1(a), note 6 *supra*, with the addition of "or from any other acts in any manner interfering with the representative's efforts to negotiate." The suggested addition is taken from the *Express Publishing Company* case 312 U. S. at 438. Thus the breadth of paragraph 1(b) of the Board's order is sharply challenged as being beyond the power of the Board in view of the evidence and findings in this case.

In support of its objection to the breadth of the order, petitioner again relies upon *Express Publishing Company* case which decided that where the Labor Board found a violation of subsection 8(5) of the statute, it could not on that finding alone rightly enjoin violation of all the other provisions:

with the Congress of Industrial Organizations, as the exclusive representative of all its employees at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees in these departments, but excluding the two foremen and all other employees of the respondent;

"(b) In any other manner interfering with, restraining, or coercing its employees who are referred to in paragraph 1(a) in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act."

⁷ See *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401; *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146; *Inland Empire Dist. Council etc. v. Millis*, 325 U. S. — [65 S. Ct. 1316].

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"To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." P. 437.

The paragraph under attack in that case was substantially like the paragraph here attacked.⁸

Under the ruling of this case, it cannot be said that restraining orders of the breadth of 1(b), here in controversy, are always or are never justified when the Board properly determines that a

⁸ The problem of the scope of injunction dealt with in *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426, has recently received careful consideration by judges and writers. 41 *Columbia L. Rev.* 911; 29 *Georgetown L. J.* 1026; 53 *Harvard L. Rev.* 472; 23 *Boston University L. Rev.* 447; 54 *Yale L. J.* 141.

Illustrative of the decisions in the Circuit Court are the following cases:

1. *National Labor Relations Board*(a) *Upholding a general § 8(1) order on the basis of a single unfair labor practice (the nature of the unfair practices is given in brackets):*

Labor Board v. Highland Park Mfg. Co., 110 F. 2d 632 (C. C. A. 4) [§ 8(5)]; *Art Metal Const. Co. v. Board*, 110 F. 2d 148 (C. C. A. 2) [§ 8(5)]; *Wilson & Co. v. Board*, 124 F. 2d 845 (C. C. A. 7) [§ 8(3)]; *Labor Board v. Sunbeam El. Mfg. Co.*, 133 F. 2d 856 (C. C. A. 7) [§ 8(1)]; *Labor Board v. Standard Oil Co.*, 138 F. 2d 885 (C. C. A. 2) [§ 8(2)].

(b) *Upholding a general § 8(1) order where there was more than one unfair practice:*

Labor Board v. Boss Mfg. Co., 107 F. 2d 574 (C. C. A. 7) [§§ 8(1), 8(3), 8(5)]; *Labor Board v. Reed & Prince Mfg. Co.*, 118 F. 2d 874 (C. C. A. 1), cert. den. 313 U. S. 595 [§§ 8(1), 8(3), 8(5)]; *F. W. Woolworth Co. v. Board*, 121 F. 2d 658 (C. C. A. 2) [§§ 8(1), 8(3)]; *Board v. Algoma Net Co.*, 124 F. 2d 730 (C. C. A. 7), cert. den. 316 U. S. 706 [§§ 8(1), 8(3)]; *Labor Board v. Baldwin Locomotive Works*, 128 F. 2d 39 (C. C. A. 3) [§§ 8(1), 8(2), 8(3), 8(4)]; *Labor Board v. Brezner Tanning Co.*, 141 F. 2d 62 (C. C. A. 1) [§§ 8(1), 8(3)]; *Idaho Potato Growers v. Board*, 144 F. 2d 295 (C. C. A. 9), cert. den. 323 U. S. 769 [§§ 8(3), 8(5)].

(c) *Limiting a § 8(1) order based on a single unfair labor practice to acts specifically condemned:*

Globe Cotton Mills v. Board, 103 F. 2d 91 (C. C. A. 5) [§ 8(5)]; *Labor Board v. Swift & Co.*, 108 F. 2d 988 (C. C. A. 7) [§ 8(2)]; *McQuay-Norris Mfg. Co. v. Board*, 119 F. 2d 1009 (C. C. A. 7), cert. den. 313 U. S. 565 [§ 8(5)]; *Labor Board v. Newark Morning Ledger Co.*, 120 F. 2d 262 (C. C. A. 3), cert. den. 314 U. S. 693 [§ 8(3)]; *Labor Board v. Burry Biscuit Co.*, 123 F. 2d 540 (C. C. A. 7) [§ 8(2)]; *Labor Board v. Stone et al.*, 125 F. 2d 752 (C. C. A. 7), cert. den. 317 U. S. 649 [§ 8(1)]; *Commonwealth Edison Co. v. Board*, 135 F. 2d 891 (C. C. A. 7) [§ 8(2)]; *Consolidated Aircraft Co. v. Board*, 141 F. 2d 785 (C. C. A. 9) [§ 8(1)]; *Labor Board v. Lipshutz*, 149 F. 2d 141 (C. C. A. 5) [§ 8(1)]; *Labor Board v. Walt Disney Productions*, 146 F. 2d 44 (C. C. A. 9), cert. den. 324 U. S. 877 [§ 8(3)].

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single unfair labor practice has been committed by the employer. Each case calls for the expert appraisal of the Board. To the Board is given exclusive power to prevent unfair labor practices by cease and desist orders. Sections 10(a) and (c). The test of the validity of a broad cease and desist order is whether the Board might have reasonably concluded from the evidence before it that such an order was necessary to prevent the employer before it "from engaging in any unfair labor practice affecting commerce." Section 10(a).⁹ So long as there is substantial evidence to justify the Board's conclusion as to the need for a broad or general cease or desist order in the language of Section 7 or other proper definition of unfair practices, the courts of review should not refuse enforcement of or modify the Board's order.

(d) *Limiting a § 8(1) order where there was more than one unfair labor practice:*

Press Co., Inc. v. Board, 118 F. 2d 937 (C. C. A. D. C.), cert. den. 313 U. S. 595 [§§ 8(1), 8(3)]; Labor Board v. Grower-Shipper Vegetable Assn., 122 F. 2d 368 (C. C. A. 3) [§§ 8(1), 8(3)]; Wilson & Co. v. Board, 123 F. 2d 411 (C. C. A. 8) [§§ 8(1), 8(2), 8(3)]; Labor Board v. Servel, Inc., 149 F. 2d 542 (C. C. A. 7) [§§ 8(1), 8(3)].

2. Office of Price Administration

A similar situation prevails with respect to the use of injunctions to restrain violations of regulations issued under the Emergency Price Control Act, 56 Stat. 23.

(a) *Granting or sustaining general injunctions on the basis of particular violations of a regulation:*

Bowles v. Montgomery Ward & Co., 143 F. 2d 38 (C. C. A. 7) [preliminary injunction against violation of any price regulation granted for violation of several provisions of one regulation]. Cf. Bowles v. May Hardwood Co., 140 F. 2d 914 (C. C. A. 7).

(b) *Sustaining limited injunctions:*

Bowles v. Town Hall Grill, 145 F. 2d 680 (C. C. A. 1) [violation of restaurant ceiling prices on poultry, lobster, gin items; injunction limited to such items sustained]; Bowles v. Sacker, 146 F. 2d 186 (C. C. A. 2) [sustaining injunction limited to particular type of violation proved].

3. Federal Trade Commission

(a) *Enforcing or affirming order broader than specific acts complained of:*

Ostler Cowdy Co. v. F. T. C., 106 F. 2d 962 (C. C. A. 10), cert. den. 309 U. S. 675; Hershey Chocolate Co. v. F. T. C., 121 F. 2d 968 (C. C. A. 3); E. B. Muller & Co. v. F. T. C., 142 F. 2d 511 (C. C. A. 6); Eugene Dietzgen Co. v. F. T. C., 142 F. 2d 321 (C. C. A. 7).

(b) *Limiting orders to specific acts:*

F. T. C. v. Beechnut Packing Co., 257 U. S. 441; F. T. C. v. A. McLean & Son, 84 F. 2d 910 (C. C. A. 7); Helen Ardelle, Inc. v. F. T. C., 101 F. 2d 718 (C. C. A. 9).

⁹ Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 461; Union Pacific R. Co. v. United States, 313 U. S. 450, 470; United States v. Bausch & Lomb Co., 321 U. S. 707, 724.

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If there is not such evidence, the court must protect the person charged with the unfair practice from the threat of contempt proceedings from future violations. While contempt proceedings can be instituted only by the Board and in the public interest,¹⁰ the possibility of contempt penalties by the court for future Labor Act violations adds sufficient additional sanctions to make material the difference between enjoined and non-enjoined employers in their relations with their employees.¹¹

Courts examine evidence which is adduced before the Board to determine whether it has substance enough to support a finding of an unfair labor practice.¹² The determination of the evidence necessary to justify the broader order calls for the same type of judicial appraisal.

Equity has long been accustomed in other fields to reach conclusions as to the scope of orders which are necessary to prevent interferences with the rights of those who seek the courts' protection.¹³ By legislation the generality of this power has sometimes been curbed as in the Clayton and Norris-LaGuardia Acts.¹⁴ Statutes of the United States, which utilize this well-established power to effectuate the object which the particular legislation seeks to secure, have been enacted in the light of the existing equity power as it has been used by the courts. This is true as to the enforcement provisions of the National Labor Relations Act.¹⁵

Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish

¹⁰ *Amalgamated Workers v. Edison Co.*, 309 U. S. 261, 269.

¹¹ See for business operations under contempt orders 41 *Columbia L. Rev.* at 913.

¹² See *Labor Board v. Greyhound Lines*, 303 U. S. 261, 270-71; *Edison Co. v. Labor Board*, 305 U. S. 197, 229.

¹³ *Hecht Co. v. Bowles*, 321 U. S. 321, 328; *Wyoming v. Colorado*, 286 U. S. 494, 508.

¹⁴ 38 Stat. 738, § 19; 47 Stat. 70, § 9.

¹⁵ S. Rep. No. 573, 74th Cong., 1st Sess., p. 14:

"Section 10. *Procedure before the Board.*—This is the most important procedural section. Despite the wide-spread charges that the bill invokes novel procedure and vests unusual powers in an administrative agency, the bill is modeled closely upon numerous Federal Statutes setting up administrative regulatory bodies of a quasi-judicial character. The common procedure is so well known that the committee deems it unnecessary in substantiation of this statement to refer to any analogous statutes save the Federal Trade Commission Act, section 5."

See also H. Rep. No. 1147, 74th Cong., 1st Sess., p. 23.

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the purposes of the act.¹⁶ We think that the Board has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that *nisi prius* courts have in other litigation. The Board's orders are subject to review under Section 10 to keep them within the bounds of the discretion which Congress has reposed in the Board. Since Congress by Section 10(a) has made the power of the Board to prevent unfair labor practices exclusive and not to be affected by any other means of prevention, it evidently was the intention of Congress, as was shown by the committee reports, "to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law

¹⁶ Sherman Act—Standard Oil Co. v. United States, 221 U. S. 1, 77:

"It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift v. United States*, 196 U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies."

"So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had been transferred, § 6 of the decree enjoined them from in any way conspiring or combining to violate the act or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act." P. 79.

"We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining from, by any device whatever, recreating directly or indirectly the illegal combination which the decree dissolved." P. 81.

Local 167 v. United States, 291 U. S. 293, 299:

"Appellants seek elimination of the provision of the decree that enjoins them from using any of the offices or positions in Local 167 or the shoctim union 'for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers thereof.' The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators. *Warner & Co. v. Lilly & Co.*, 265 U. S. 526, 532. . . . When regard is had to the evidence disclosing the numerous purposes of the conspiracy and the acts of coercion customarily employed by defendants, it is plain that the clause referred to cannot be condemned as unnecessary or without warrant."

See *Amer. Foundries v. Tri-City Council*, 257 U. S. 184, 194.

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regarding collective bargaining."¹⁷ Consequently the discretion which is reposed in the Board, as to the type of cease and desist order which is needed to prevent future violations of the Labor Act, should be upheld by the courts unless its exercise is plainly beyond statutory or constitutional limits. There is no rigid scheme of remedies in the Wagner Act, any more than there is a rigid delimitation of unfair labor practices. Compare *Republic Aviation Corporation v. National Labor Relations Board*, 324 U. S. 793, 798.

When the *Express Publishing Company* case came to this Court, the Circuit Court of Appeals for the Fifth Circuit had struck from the Board orders all provisions for enforcement except that which directed the Publishing Company to bargain collectively with the Guild. This eliminated the general cease and desist paragraph, so similar to the one here in question. 312 U. S. at 430. It held violation of Section 8(5) refusal to bargain was sufficiently proven. The Court of Appeals also held that the record, which contained certain further statements which were charged to violate Section 8(1), did not justify the Board's further finding that Section 8(1) had also been violated. 111 F. 2d 588. No review was sought by the Board here of this latter ruling. Its petition for certiorari never mentioned the ruling and its brief distinctly disclaimed any contention in regard to it. The attack was focused on the refusal to enforce the general order on the finding of a violation only of Section 8(5) by a refusal to bargain.¹⁸ Therefore, this Court, as appears from the opinion, reached its conclusion that the paragraph in question was too broad, solely on consideration of the refusal to bargain. See 312 U. S. 429, 432, 433, 434.

In the present case a different situation presents itself. ~~It is a~~ *The narrow* differences ~~are~~ significant when examined in the light of the statement in the Publishing Company case, pages 437-38, that persistent attempt by varying methods to interfere with the right of self-organization may justify the general type of cease

¹⁷ S. Rep. No. 573, 74th Cong., 1st Sess., p. 15; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 23.

¹⁸ In its brief the Board said: "While we think the court's holding that the statement did not violate the Act is erroneous, we do not seek review of its decision in that respect, since it turns on facts peculiar to this case and since, in the view we take, the refusal to bargain is sufficient alone to support the Board's order in its entirety."

For months the Company had contested the efforts of the C.I.O. to organize this store. See page 2, *supra*. It not only refused to bargain but sought unilaterally to make wage changes in violation, as we have said, of Section 8(1).

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and desist order. We think that it is not so important as to whether there is one or more instances of unfair labor practices but whether the situation as a whole is of such a character that the Board may fairly say—The broad type of order is necessary to attain the objects of the Labor Act. In this case there was evidence enough before the Board to justify it in reaching that conclusion. See discussion under Action on Wages, *supra*.

Affirmed.

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This writ of certiorari brings here for review the decree of the Circuit Court of Appeals enforcing an order of the National Labor Relations Board which was entered after the Board found upon hearings that petitioner had violated Sections 8(1) and 8(5) of the National Labor Relations Act.¹ On account of different treatments in circuit courts of appeals of Labor Board orders to cease and desist, which restrain other kinds of acts than those found by the Board to be unfair, a dispute over the proper scope of the cease and desist order made it important for us to grant the writ. See note 8 *infra*. The writ also presents issues (1) as to whether two small related departments with thirty to forty employees may be an appropriate bargaining unit when the department store of which they are a part has around three hundred and fifty departments and approximately five thousand employees; (2) as to whether the Board could properly place the name of a Joint Labor Council on the ballot for the employees' bargaining representative when none of the employees

the petition
for the writ
presented

"Sec. 8. It shall be an unfair labor practice for an employer—

"(5) The refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Opinion of the C. C. A., National Labor Relations Board v. May Dept. Stores Co., 146 F. 2d 66; determination of National Labor Relations Board, 53 N. L. R. B. 1366.

2 *May Department Stores Co. vs. Nat'l Labor Relations Bd.* 2

were members of the Council but only of a local union which was associated with others in the Council; and (3) as to whether seeking authority from the National War Labor Board to increase wages without taking up the increase with a certified bargaining agent may be an unfair labor practice under Section 8(1) of the Labor Act.

Appropriate Unit. After a hearing in which the employer, the petitioner here, the May Department Stores Company, doing business as Famous-Barr Company, a St. Louis department store, took part, the Labor Board, on June 16, 1943, found that all non-supervisory employees of the Company, then 28 in number, working in the main and basement men's busheling rooms constituted an appropriate unit for collective bargaining within the meaning of Section 9(b)² of the Labor Act. An election was ordered. It resulted in the choice and designation of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, C.I.O., as the representative for collective bargaining of the employees of the unit.

The Company contended that a store-wide unit of its five thousand employees was the most appropriate and at any rate that employees in the women's alteration and the fur alteration departments should be added to the employees in the men's busheling rooms to form the unit. As there is no provision for direct review of the determination and certification of the bargaining representative, the Company, in order to secure judicial review of the finding as to the unit, awaited this proceeding which sought a decree directing it to bargain collectively with the representative. See *Inland Empire Dist. Council, etc. v. Millis*, 325 U. S. —.

A few months before this proceeding a determination that all employees of the Company subject to stated exceptions were the appropriate unit for collective bargaining had been sought by the C.I.O. The Company objected because no sufficient showing of representation was made and because it took exception to the exclusion of certain employees from the proposed unit. This petition was dismissed for failure of the C.I.O. to make a substantial showing

² 49 Stat. 453, Sec. 9. "(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

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of membership in the suggested store-wide unit. 46 N. L. R. B. 305. That prior application is not a bar to this. It determined nothing. The Board was careful to note in this proceeding that a larger unit might be fixed as appropriate if self-organization developed. Other departments of the store had members of this and other unions as employees. This presence of union members throughout the enterprise was a matter of consideration in deciding upon the appropriate unit but was not decisive. Compare *Pittsburgh Plate Glass Co. v. Board*, 313 U. S. 146, 156. No labor organization claimed to represent the entire body of employees. Therefore the Board determined to approve this unit as appropriate so that collective bargaining might start for these employees without waiting until more employees might be organized into a larger unit. Compare *Board v. Hearst Publications*, 322 U. S. 111, 134.

Under Section 9(b) the Board is delegated the authority to determine the unit. The judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion but to "guarantee against arbitrary action by the Board."³ The Board had before it the business of the company, the numbers of employees, the treatment of all employees as a unit by management with reference to sick leave, hospitalization, employee privileges, vacations, et cetera. Evidence was presented that a large proportion of employees in the proposed unit were members of the same union. It had testimony as to similarity and dissimilarity in tailoring and altering between the men's and women's alteration rooms. There was evidence that those who work on men's clothing, speaking generally, belong to a different union organization than those who work on women's clothes. The Board considered the interchange of workers between the two groups. We think that there was ample testimony to support the Board's conclusion that the employees of the two busheling rooms were an appropriate unit, since these employees had a stage of self-organization and a special trade which sufficiently differentiated them from other employees.

Form of Ballot. Petitioner objects to the certification because the ballot contained the name of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees, as a candidate for bargaining representative from the unit. This was

³ S. Rep. No. 573, 74th Cong., 1st Sess., p. 14.

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the organization which was certified. It had filed the petition for determination of the representative. The Council claimed that more than 51% of the employees in the suggested unit had designated it as their collective bargaining representative. The Board directs what names go on the ballot. Unless there is a showing of a substantial number of employees in the proposed unit who have become members of and selected the petitioner as their bargaining representative, the Board does not ordinarily order an election.⁴ This is an administrative policy of the Board. In this case on the Joint Council's petition for certification, the Board found that the Council had a majority of the employees. As a matter of fact it was a local union which the employees had selected and joined. The Board pointed out in its finding of facts on the petition for an election that the Joint Council represented this local and similar locals in other stores.

The Company says that some employees may have been misled by the ballot into thinking that the Joint Council had a substantial number of the unit's employees as members because elections are not ordinarily called unless that situation exists. Even so, it is difficult to grasp what standing the employer has to object to placing a name on the ballot which has no members in the proposed unit. The name was that of the petitioner for the election. The local was represented by the Joint Council. Cf. *National Labor Relations Board v. Franks Bros. Co.*, 137 F. 2d 989, 992, affirmed on other grounds *Franks Bros. Co. v. Labor Board*, 321 U. S. 702. The Joint Council was chosen by a majority of the employees of the unit and certified. In the circumstances of this election, we see no basis for the Company's objection to the certified representative on the ground of possible confusion of the employees.

Action on Wages. The Board found that the Company interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, under the circumstances herein detailed, in seeking the necessary approval (56 Stat. 765; Executive Order 9250, 7 Fed. Reg. 7871) on August 30, 1943, of the National War Labor Board for an upward wage adjustment for a large proportion of its employees, including the employees of the unit here involved, without bargaining collectively on the

⁴ In the matter of Houston Shipbuilding Corporation, 41 N. L. R. B. 638; In the matter of American Manufacturing Company, 41 N. L. R. B. 995.

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subject of the wages with the certified union. A letter accompanied the request to the War Labor Board which explained that certain craft employees, not here involved, were excluded from the application for authority to increase wages because they were covered by collective bargaining agreements. The letter went on to say:

"The St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, C.I.O., . . . has been certified by the National Labor Relations Board, but we do not regard this as an appropriate unit and have consistently taken that position and have so notified all parties concerned. It is our intention to submit that question to the Courts, if and when the occasion arises. We have not recognized this Union and have not bargained with it for the employees in Departments 280 or 281 and no negotiations with that Union are pending. It is intended, however, that the employees in Departments 280 and 281 shall be included in this application.

"We do not believe that any of the organizations named in the application, nor the organization named above, have any interest whatever in the enclosed application. However, if the organization named above should object to the inclusion of the employees of Departments 280 and 281 in the application, you are advised that said application may be considered as having been amended so as to exclude those employees from the application."

The next morning the employees were told over the store address system of the application for a wage increase for all employees, except higher paid executives and those "employees whose salaries have been fixed by closed shop agreements." A short time later another reference to the application was made over the address system. A similar announcement appeared in the September 3 issue of the store paper. The conditional offer to exclude the employees of the unit was not referred to in the announcements. Upon these facts the Board found a violation of Section 8(1).

The Company urges that its request for authority, without negotiation with the certified union as to the application to the War Labor Board, was not an unfair practice under Section 8(1) but only a necessary result of its position on non-recognition of the certified representative because the Company did not agree with the Board's determination of the appropriate unit for the selection of representatives. To maintain this position, the Company says, it could give no recognition to the certified agent.

We have in a preceding division of this opinion stated our conclusion that the Joint Council was a properly certified bargaining representative. Therefore at the time of the request to the War Labor Board for authority to increase wages, the Joint Council must be considered as a properly certified bargaining agent. Company action in regard to it must be judged in that light even though its attitude toward the certification made its choice difficult.

The Joint Council was certified on July 12, 1943. Meanwhile, after the election, the Council had requested a conference with the Company for negotiating a contract to cover wages, hours and working conditions. This request was declined on July 19th with the statement that the Company did not agree with the decision of the Board and desired to preserve its full rights to question the result as it "may see fit." The application to the War Labor Board followed on August 30th.

It is settled law that the Wagner Act makes it an employer's duty to bargain collectively only with the duly recognized or accredited representative of the employees. Disregard of this duty violates Section 8(1) of the Act. Section 9(a). *Medo Corp. v. Labor Board*, 321 U. S. 678, 683-84. Any other conclusion would infringe an essential principle of collective bargaining. See *J. I. Case Co. v. Labor Board*, 321 U. S. 332, 338. Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities. The fact that the application to the War Labor Board was not the actual increase of wages but a necessary preliminary does not make unilateral action, accompanied by publication of the step taken to the employees, any the less objectionable. The application to the War Labor Board marked a unilateral determination by the Company that the employees of this unit should have the specific increase deemed due them by the Company or none at all, if the bargaining agent should object in accordance with the letter quoted above. The employer was not getting into position to negotiate with the agent. He declared the contrary and proposed that he, as employer, would make the increase if permission were granted. In requiring signed and written agreements under the Labor Act, we said, "Contrasted with the unilateral statement by the employer of his labor

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enjoins refusal to bargain, is set out below.⁶ Petitioner argues that the broad, blanket provisions of 1(b) are invalid. The language of the prohibition covers interferences with all the rights of employees which are covered by section 7 of the Labor Act, while at the most, petitioner urges, the Board has found and the Circuit Court sustained only two unfair labor practices by petitioner, "(1) a refusal to bargain and (2) the store-wide salary increase." Both of these, it is asserted, are but incidents in petitioner's effort to obtain judicial review of the Board's certification. As the Board's selection of an appropriate unit to choose the employees' bargaining representative and the Board's subsequent certification of the representative chosen, section 9, is not judicially reviewable directly, petitioner takes the position that it committed the unfair labor practice of refusing to bargain with an accredited union, merely to open the way for judicial review of the certification.⁷ Consequently petitioner urges the cease and desist order should be no broader than the refusal to bargain which is covered by paragraph 1(a), note 6 *supra*, with the addition of "or from any other acts in any manner interfering with the representative's efforts to negotiate." The suggested addition is taken from the *Express Publishing Company* case, 312 U. S. at 438. Thus the breadth of paragraph 1(b) of

graph in issue is a standard form of order frequently used by the Board; the same question with respect to an almost identical order was considered by this Court in *Labor Board v. Express Pub. Co.*, 312 U. S. 426, and has been a frequent subject of dispute in the Circuit Courts (see n. 8 *infra*). These circumstances coupled with an objection that the order was "not supported or justified by the record" put the Board on notice of the issue now presented.

⁶ Decreed that May Department Stores Company, etc., shall cease and desist from 1. (a) "Refusing to bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all its employees at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees in these departments, but excluding the two foremen and all other employees of the respondent;

"(b) In any other manner interfering with, restraining, or coercing its employees who are referred to in paragraph 1(a) in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act."

⁷ See *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401; *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146; *Inland Empire Dist. Council etc. v. Millis*, 325 U. S. — [65 S. Ct. 1316].

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the Board's order is sharply challenged as being beyond the power of the Board in view of the evidence and findings in this case.

In support of its objection to the breadth of the order, petitioner again relies upon *Express Publishing Company* case which decided that where the Labor Board found a violation of subsection 8(5) of the statute, it could not on that finding alone rightly enjoin violation of all the other provisions:

"To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." P. 437.

The paragraph under attack in that case was substantially like the paragraph here attacked.⁸

⁸ The problem of the scope of injunction dealt with in *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426, has recently received careful consideration by judges and writers. 41 Columbia L. Rev. 911; 29 Georgetown L. J. 1026; 53 Harvard L. Rev. 472; 23 Boston University L. Rev. 447; 54 Yale L. J. 141.

Illustrative of the decisions in the Circuit Court are the following cases:

1. National Labor Relations Board

(a) Upholding a general § 8(1) order on the basis of a single unfair labor practice (the nature of the unfair practices is given in brackets):

Labor Board v. Highland Park Mfg. Co., 110 F. 2d 632 (C. C. A. 4) [§ 8(5)]; *Art Metal Const. Co. v. Board*, 110 F. 2d 148 (C. C. A. 2) [§ 8(5)]; *Wilson & Co. v. Board*, 124 F. 2d 845 (C. C. A. 7) [§ 8(3)]; *Labor Board v. Sunbeam El. Mfg. Co.*, 133 F. 2d 856 (C. C. A. 7) [§ 8(1)]; *Labor Board v. Standard Oil Co.*, 138 F. 2d 885 (C. C. A. 2) [§ 8(2)].

(b) Upholding a general § 8(1) order where there was more than one unfair practice:

Labor Board v. Boss Mfg. Co., 107 F. 2d 574 (C. C. A. 7) [§§ 8(1), 8(3), 8(5)]; *Labor Board v. Reed & Prince Mfg. Co.*, 118 F. 2d 874 (C. C. A. 1) [§§ 8(1), 8(3), 8(5)]; *F. W. Woolworth Co. v. Board*, 121 F. 2d 658 (C. C. A. 2) [§§ 8(1), 8(3)]; *Board v. Algoma Net Co.*, 124 F. 2d 730 (C. C. A. 7) [§§ 8(1), 8(3)]; *Labor Board v. Baldwin Locomotive Works*, 128 F. 2d 39 (C. C. A. 3) [§§ 8(1), 8(2), 8(3), 8(4)]; *Labor Board v. Brezner Tanning Co.*, 141 F. 2d 62 (C. C. A. 1) [§§ 8(1), 8(3)]; *Idaho Potato Growers v. Board*, 144 F. 2d 295 (C. C. A. 9) [§§ 8(3), 8(5)].

(c) Limiting a § 8(1) order based on a single unfair labor practice to acts specifically condemned:

Globe Cotton Mills v. Board, 103 F. 2d 91 (C. C. A. 5) [§ 8(5)]; *Labor Board v. Swift & Co.*, 108 F. 2d 988 (C. C. A. 7) [§ 8(2)]; *McQuay-Norris Mfg. Co. v. Board*, 119 F. 2d 1009 (C. C. A. 7), cert. den. 313 U. S. 565 [§ 8(5)]; *Labor Board v. Newark Morning Ledger Co.*, 120 F. 2d 262 (C. C. A. 3) [§ 8(3)]; *Labor Board*

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Under the ruling of this case, it cannot be said that restraining orders of the breadth of 1(b), here in controversy, are always or are never justified when the Board properly determines that a single unfair labor practice has been committed by the employer. Each case calls for the expert appraisal of the Board. To the Board is given exclusive power to prevent unfair labor practices by cease and desist orders. Sections 10(a) and (c). The test of the validity of a broad cease and desist order is whether the Board might have reasonably concluded from the evidence before it that such an order was necessary to prevent the employer before it "from engaging in any unfair labor practice affecting com-

v. Burry Biscuit Co., 123 F. 2d 540 (C. C. A. 7) [§ 8(2)]; *Labor Board v. Stone et al.*, 125 F. 2d 752 (C. C. A. 7) [§ 8(1)]; *Commonwealth Edison Co. v. Board*, 135 F. 2d 891 (C. C. A. 7) [§ 8(2)]; *Consolidated Aircraft Co. v. Board*, 141 F. 2d 785 (C. C. A. 9) [§ 8(1)]; *Labor Board v. Lipshutz*, 149 F. 2d 141 (C. C. A. 5) [§ 8(1)]; *Labor Board v. Walt Disney Productions*, 146 F. 2d 44 (C. C. A. 9) [§ 8(3)].

(d) *Limiting a § 8(1) order where there was more than one unfair labor practice:*

Press Co., Inc. v. Board, 118 F. 2d 937 (App. D. C.) [§§ 8(1), 8(3)]; *Labor Board v. Grower-Shipper Vegetable Assn.*, 122 F. 2d 368 (C. C. A. 9) [§§ 8(1), 8(3)]; *Wilson & Co. v. Board*, 123 F. 2d 411 (C. C. A. 8) [§§ 8(1), 8(2), 8(3)]; *Labor Board v. Servel, Inc.*, 149 F. 2d 542 (C. C. A. 7) [§§ 8(1), 8(3)].

2. Office of Price Administration

A similar situation prevails with respect to the use of injunctions to restrain violations of regulations issued under the Emergency Price Control Act, 56 Stat. 23.

(a) *Granting or sustaining general injunctions on the basis of particular violations of a regulation:*

Bowles v. Montgomery Ward & Co., 143 F. 2d 38 (C. C. A. 7) [preliminary injunction against violation of any price regulation granted for violation of several provisions of one regulation]. Cf. *Bowles v. May Hardwood Co.*, 140 F. 2d 914 (C. C. A. 7).

(b) *Sustaining limited injunctions:*

Bowles v. Town Hall Grill, 145 F. 2d 680 (C. C. A. 1) [violation of restaurant ceiling prices on poultry, lobster, gin items; injunction limited to such items sustained]; *Bowles v. Sacher*, 146 F. 2d 186 (C. C. A. 2) [sustaining injunction limited to particular type of violation proved].

3. Federal Trade Commission

(a) *Enforcing or affirming order broader than specific acts complained of:*

Ostler Cowdy Co. v. F. T. C., 106 F. 2d 962 (C. C. A. 10); *Hershey Chocolate Co. v. F. T. C.*, 121 F. 2d 968 (C. C. A. 3); *E. B. Muller & Co. v. F. T. C.*, 142 F. 2d 511 (C. C. A. 6); *Eugene Dietzgen Co. v. F. T. C.*, 142 F. 2d 321 (C. C. A. 7).

(b) *Limiting orders to specific acts:*

F. T. C. v. Beechnut Packing Co., 257 U. S. 441; *F. T. C. v. A. McLean & Son*, 84 F. 2d 910 (C. C. A. 7); *Helen Ardelle, Inc. v. F. T. C.*, 101 F. 2d 718 (C. C. A. 9).

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merce." Section 10(a).⁹ So long as there is substantial evidence to justify the Board's conclusion as to the need for a broad or general cease or desist order in the language of Section 7 or other proper definition of unfair practices, the courts of review should not refuse enforcement of or modify the Board's order. If there is not such evidence, the court must protect the person charged with the unfair practice from the threat of contempt proceedings from future violations. While contempt proceedings can be instituted only by the Board and in the public interest,¹⁰ the possibility of contempt penalties by the court for future Labor Act violations adds sufficient additional sanctions to make material the difference between enjoined and non-enjoined employers in their relations with their employees.¹¹

Courts examine evidence which is adduced before the Board to determine whether it has substance enough to support a finding of an unfair labor practice.¹² The determination of the evidence necessary to justify the broader order calls for the same type of judicial appraisal.

Equity has long been accustomed in other fields to reach conclusions as to the scope of orders which are necessary to prevent interferences with the rights of those who seek the courts' protection.¹³ By legislation the generality of this power has sometimes been curbed as in the Clayton and Norris-LaGuardia Acts.¹⁴ Statutes of the United States, which utilize this well-established power to effectuate the object which the particular legislation seeks to secure, have been enacted in the light of the existing equity power as it has been used by the courts. This is true as to the enforcement provisions of the National Labor Relations Act.¹⁵

11 — *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 461; *Union Pacific R. Co. v. United States*, 313 U. S. 450, 470; *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 724.

8 — *Amalgamated Workers v. Edison Co.*, 309 U. S. 261, 269.

9 — See for business operations under contempt orders 41 *Columbia L. Rev.* at 913.

12 — See *Labor Board v. Greyhound Lines*, 303 U. S. 261, 270-71; *Edison Co. v. Labor Board*, 305 U. S. 197, 229.

12 — *Hecht Co. v. Bowles*, 321 U. S. 321, 328; *Wyoming v. Colorado*, 286 U. S. 494, 508.

14 38 Stat. 738, § 19; 47 Stat. 70, § 9.

15 S. Rep. No. 573, 74th Cong., 1st Sess., p. 14.

"Section 10. *Procedure before the Board*—This is the most important procedural section. Despite the wide-spread charges that the bill invokes

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Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act.¹⁶ We think that the Board has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation. The Board's orders are subject to review under Section 10 to keep them within the bounds of the Congressional delegation of authority. The Board's discretion must conform to the same limitation. Since Congress by Section 10(a) has made the power of the Board to prevent

novel procedure and vests unusual powers in an administrative agency, the bill is modeled closely upon numerous Federal Statutes setting up administrative regulatory bodies of a quasi-judicial character. The common procedure is so well known that the committee deems it unnecessary in substantiation of this statement to refer to any analogous statutes save the Federal Trade Commission Act, section 5."

See also H. Rep. No. 1147, 74th Cong., 1st Sess., p. 23.

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¹⁶ *Sherman Act—Standard Oil Co. v. United States*, 221 U. S. 1, 77:

"It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift v. United States*, 196 U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies."

"So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had been transferred, § 6 of the decree enjoined them from in any way conspiring or combining to violate the act or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act." P. 79.

"We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining from, by any device whatever, recreating directly or indirectly the illegal combination which the decree dissolved." P. 81.

Local 167 v. United States, 291 U. S. 293, 299:

"Appellants seek elimination of the provision of the decree that enjoins them from using any of the offices or positions in Local 167 or the shoctim union 'for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers thereof.' The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators. *Warner & Co. v. Lilly & Co.*, 265 U. S. 526, 532. . . . When regard is had to the evidence disclosing the numerous purposes of the conspiracy and the acts of coercion customarily employed by defendants, it is plain that the clause referred to cannot be condemned as unnecessary or without warrant."

See *Amer. Foundries v. Tri-City Council*, 257 U. S. 184, 194.

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unfair labor practices exclusive and not to be affected by any other means of prevention, it evidently was the intention of Congress, as was shown by the committee reports, "to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining."¹⁷ Consequently the discretion which is reposed in the Board, as to the type of cease and desist order which is needed to prevent future violations of the Labor Act, should be upheld by the courts unless its exercise is plainly beyond statutory or constitutional limits. There is no rigid scheme of remedies in the Wagner Act, any more than there is a rigid delimitation of unfair labor practices. Compare *Republic Aviation Corporation v. National Labor Relations Board*, 324 U. S. 793, 798.

When the *Express Publishing Company* case came to this Court, the Circuit Court of Appeals for the Fifth Circuit had struck from the Board orders all provisions for enforcement except that which directed the Publishing Company to bargain collectively with the Guild. This eliminated the general cease and desist paragraph, so similar to the one here in question. 312 U. S. at 430. It held violation of Section 8(5), refusal to bargain, was sufficiently proven. The Court of Appeals also held that the record, which contained certain further statements which were charged to violate Section 8(1), did not justify the Board's further finding that Section 8(1) had also been violated. 111 F. 2d 588, 589-90. No review was sought by the Board here of this latter ruling. Its petition for certiorari never mentioned the ruling and its brief distinctly disclaimed any contention in regard to it. The attack was focused on the refusal to enforce the general order on the finding of a violation only of Section 8(5) by a refusal to bargain.¹⁸ Therefore, this Court, as appears from the opinion, reached its conclusion that the paragraph in question was too broad, solely on consideration of the refusal to bargain. See 312 U. S. 429, 432, 433, 434.

¹⁷ S. Rep. No. 573, 74th Cong., 1st Sess., p. 15; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 23.

¹⁸ In its brief the Board said: "While we think the court's holding that the statement did not violate the Act is erroneous, we do not seek review of its decision in that respect, since it turns on facts peculiar to this case and since, in the view we take, the refusal to bargain is sufficient alone to support the Board's order in its entirety."

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In the present case a different situation presents itself. For months the Company had contested the efforts of the C.I.O. to organize this store. See page 2, *supra*. It not only refused to bargain but sought unilaterally to make wage changes in violation, as we have said, of Section 8(1). The differences are significant when examined in the light of the statement in the Publishing Company case, pages 437-38, that persistent attempts by varying methods to interfere with the right of self-organization may justify the general type of cease and desist order. We think that it is not so important as to whether there is one or more instances of unfair labor practices but whether the situation as a whole is of such a character that the Board may fairly say—The broad type of order is necessary to attain the objects of the Labor Act. In this case there was evidence enough before the Board to justify it in reaching that conclusion. See discussion under Action on Wages, *supra*.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mammy.

I had to take two of your
pages to make complete sets.
The Justice says you may use
his until one is returned. He.

③ E.W. 11/21/45

SUPREME COURT OF THE UNITED STATES.

No. 39.—OCTOBER TERM, 1945.

May Department Stores Company, doing business as Famous-Barr Company, Petitioner, <i>vs.</i> National Labor Relations Board.	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
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[]

Mr. Justice REED delivered the opinion of the Court.

This writ of certiorari brings here for review the decree of the Circuit Court of Appeals enforcing an order of the National Labor Relations Board which was entered after the Board found upon hearings that petitioner had violated Sections 8(1) and 8(5) of the National Labor Relations Act.¹ The petition for the writ presented issues (1) as to whether two small related departments with thirty to forty employees may be an appropriate bargaining unit when the department store of which they are a part has around three hundred and fifty departments and approximately five thousand employees; (2) as to whether the Board could properly place the name of a Joint Labor Council on the ballot for the employees' bargaining representative when none of the employees were members of the Council but only of a local union which was associated with others in the Council; (3) as to whether seeking authority from the National War Labor Board to increase wages without taking up the increase with a certified bargaining agent may be an unfair labor practice under Section

¹ 49 Stat. 452-53. "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(5) The refusal to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Opinion of the C. C. A., National Labor Relations Board v. May Dept. Stores Co., 146 F. 2d 66; determination of National Labor Relations Board, 53 N. L. R. B. 1366.

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8(1) of the Labor Act; and (4) as to the propriety of a Board order to cease and desist generally from unfair labor practices instead of an order to cease and desist only from the type or types of unfair practices which the Board found the employer committed. As these issues presented important problems in the administration of the National Labor Relations Act, certiorari was granted. 324 U. S. 838.

Appropriate Unit. After a hearing in which the employer, the petitioner here, the May Department Stores Company, doing business as Famous-Barr Company, a St. Louis department store, took part, the Labor Board, on June 16, 1943, found that all non-supervisory employees of the Company, then 28 in number, working in the main and basement men's busheling rooms constituted an appropriate unit for collective bargaining within the meaning of Section 9(b)² of the Labor Act. An election was ordered. It resulted in the choice and designation of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, C.I.O., as the representative for collective bargaining of the employees of the unit.

The Company contended that a store-wide unit of its five thousand employees was the most appropriate and at any rate that employees in the women's alteration and the fur alteration departments should be added to the employees in the men's busheling rooms to form the unit. As there is no provision for direct review of the determination and certification of the bargaining representative, the Company, in order to secure judicial review of the finding as to the unit, awaited this proceeding which sought a decree directing it to bargain collectively with the representative. See *Inland Empire Dist. Council, etc. v. Millis*, 325 U. S. —.

A few months before this proceeding a determination that all employees of the Company subject to stated exceptions were the appropriate unit for collective bargaining had been sought by the C.I.O. The Company objected because no sufficient showing of representation was made and because it took exception to the exclusion of certain employees from the proposed unit. This petition was dismissed for failure of the C.I.O. to make a substantial showing

² 49 Stat. 453, Sec. 9. "(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

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of membership in the suggested store-wide unit. 46 N. L. R. B. 305. That prior application is not a bar to this. It determined nothing. The Board was careful to note in this proceeding that a larger unit might be fixed as appropriate if self-organization developed. Other departments of the store had members of this and other unions as employees. This presence of union members throughout the enterprise was a matter or consideration in deciding upon the appropriate unit but was not decisive. Compare *Pittsburgh Plate Glass Co. v. Board*, 313 U. S. 146, 156. No labor organization claimed to represent the entire body of employees. Therefore the Board determined to approve this unit as appropriate so that collective bargaining might start for these employees without waiting until more employees might be organized into a larger unit. Compare *Board v. Hearst Publications*, 322 U. S. 111, 134.

Under Section 9(b) the Board is delegated the authority to determine the unit. The judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion but to "guarantee against arbitrary action by the Board."³ The Board had before it the business of the company, the numbers of employees, the treatment of all employees as a unit by management with reference to sick leave, hospitalization, employee privileges, vacations, et cetera. Evidence was presented that a large proportion of employees in the proposed unit were members of the same union. It had testimony as to similarity and dissimilarity in tailoring and altering between the men's and women's alteration rooms. There was evidence that those who work on men's clothing, speaking generally, belong to a different union organization than those who work on women's clothes. The Board considered the interchange of workers between the two groups. We think that there was ample testimony to support the Board's conclusion that the employees of the two busheling rooms were an appropriate unit, since these employees had a stage of self-organization and a special trade which sufficiently differentiated them from other employees.

Form of Ballot. Petitioner objects to the certification because the ballot contained the name of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees, as a candidate for bargaining representative from the unit. This was

³ S. Rep. No. 573, 74th Cong., 1st Sess., p. 14.

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the organization which was certified. It had filed the petition for determination of the representative. The Council claimed that more than 51% of the employees in the suggested unit had designated it as their collective bargaining representative. The Board directs what names go on the ballot. Unless there is a showing of a substantial number of employees in the proposed unit who have become members of and selected the petitioner as their bargaining representative, the Board does not ordinarily order an election.⁴ This is an administrative policy of the Board. In this case on the Joint Council's petition for certification, the Board found that the Council had a majority of the employees. As a matter of fact it was a local union which the employees had selected and joined. The Board pointed out in its finding of facts on the petition for an election that the Joint Council represented this local and similar locals in other stores.

The Company says that some employees may have been misled by the ballot into thinking that the Joint Council had a substantial number of the unit's employees as members because elections are not ordinarily called unless that situation exists. Even so, it is difficult to grasp what standing the employer has to object to placing a name on the ballot which has no members in the proposed unit. The name was that of the petitioner for the election. The local was represented by the Joint Council. Cf. *National Labor Relations Board v. Franks Bros. Co.*, 137 F. 2d 989, 992, affirmed on other grounds *Franks Bros. Co. v. Labor Board*, 321 U. S. 702. The Joint Council was chosen by a majority of the employees of the unit and certified. In the circumstances of this election, we see no basis for the Company's objection to the certified representative on the ground of possible confusion of the employees.

Action on Wages. The Board found that the Company interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, under the circumstances herein detailed, in seeking the necessary approval (56 Stat. 765; Executive Order 9250, 7 Fed. Reg. 7871) on August 30, 1943, of the National War Labor Board for an upward wage adjustment for a large proportion of its employees, including the employees of the unit here involved, without bargaining collectively on the

⁴ In the matter of *Houston Shipbuilding Corporation*, 41 N. L. R. B. 638; In the matter of *American Manufacturing Company*, 41 N. L. R. B. 995.

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subject of the wages with the certified union. A letter accompanied the request to the War Labor Board which explained that certain craft employees, not here involved, were excluded from the application for authority to increase wages because they were covered by collective bargaining agreements. The letter went on to say:

"The St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, C.I.O., . . . has been certified by the National Labor Relations Board, but we do not regard this as an appropriate unit and have consistently taken that position and have so notified all parties concerned. It is our intention to submit that question to the Courts, if and when the occasion arises. We have not recognized this Union and have not bargained with it for the employees in Departments 280 or 281 and no negotiations with that Union are pending. It is intended, however, that the employees in Departments 280 and 281 shall be included in this application.

"We do not believe that any of the organizations named in the application, nor the organization named above, have any interest whatever in the enclosed application. However, if the organization named above should object to the inclusion of the employees of Departments 280 and 281 in the application, you are advised that said application may be considered as having been amended so as to exclude those employees from the application."

The next morning the employees were told over the store address system of the application for a wage increase for all employees, except higher paid executives and those "employees whose salaries have been fixed by closed shop agreements." A short time later another reference to the application was made over the address system. A similar announcement appeared in the September 3 issue of the store paper. The conditional offer to exclude the employees of the unit was not referred to in the announcements. Upon these facts the Board found a violation of Section 8(1).

The Company urges that its request for authority, without negotiation with the certified union as to the application to the War Labor Board, was not an unfair practice under Section 8(1) but only a necessary result of its position on non-recognition of the certified representative because the Company did not agree with the Board's determination of the appropriate unit for the selection of representatives. The Company says it could not give recognition to the certified agent and maintain this position.

We have in a preceding division of this opinion stated our conclusion that the Joint Council was a properly certified bargaining representative. Therefore at the time of the request to the War Labor Board for authority to increase wages, the Joint Council must be considered as a properly certified bargaining agent. Company action in regard to it must be judged in that light even though its attitude toward the certification made its choice difficult.

The Joint Council was certified on July 12, 1943. Meanwhile, after the election, the Council had requested a conference with the Company for negotiating a contract to cover wages, hours and working conditions. This request was declined on July 19th with the statement that the Company did not agree with the decision of the Board and desired to preserve its full rights to question the result as it "may see fit." The application to the War Labor Board followed on August 30th.

It is settled law that the Wagner Act makes it an employer's duty to bargain collectively only with the duly recognized or accredited representative of the employees. Disregard of this duty violates Section 8(1) of the Act. Section 9(a). *Medo Corp. v. Labor Board*, 321 U. S. 678, 683-84. Any other conclusion would infringe an essential principle of collective bargaining. See *J. I. Case Co. v. Labor Board*, 321 U. S. 332, 338. Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities. The fact that the application to the War Labor Board was not the actual increase of wages but a necessary preliminary does not make unilateral action, accompanied by publication of the step taken to the employees, any the less objectionable. The application to the War Labor Board marked a unilateral determination by the Company that the employees of this unit should have the specific increase deemed due them by the Company or none at all, if the bargaining agent should object in accordance with the letter quoted above. The employer was not getting into position to negotiate with the agent. He declared the contrary and proposed that he, as employer, would make the increase if permission were granted. In requiring signed and written agreements under the Labor Act, we said, "Contrasted with the unilateral statement by the employer of his labor

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policy, the signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife." *H. J. Heinz Co. v. Labor Board*, 311 U. S. 514, 524.

Two national labor groups had each separately sought for months to organize the Company. One effort to secure the designation of a unit had failed. The present designation was made over the protests of the Company. It had urged in its motion for reconsideration of the order of election:

"There are two competing labor organizations seeking to organize the employees in this store. By this decision one of them is granted an election in the unit composed of two departments. There are some 350 departments in this store and if this Employer is to be confronted with elections and separate bargaining for each one or two departments it will be an endless and intolerable interference with store operations, which should not be permitted."

By going ahead with wage adjustments without negotiation with the bargaining agent, it took a step which justified the conclusion of the Board as to the violation of Section 8(1). Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent. If successful in securing approval for the proposed increase of wages, it might well, as the Board points out, block the bargaining representative in securing further wage adjustments.

It may be that the company sought only to preserve its opportunity to contest the certification of the unit. It is pointed out that the increases for which approval was sought covered several thousand employees and that it is hardly conceivable that a general increase for so many would be sought to injure so few. But the Board's contention is not that the application, as a whole, was for the purpose of undermining the Council. Its conclusion was that the manner of presenting and publicizing the application had the effect of coercing the employees. Instead of taking up the increase of this unit's wages with the Council, filing a joint application, with reservation of the Company's legal right to challenge the certification of the bargaining agent when any complaint might be filed for refusal to bargain collectively, or, omitting the employees of the questioned unit, if the Council would not join in such an application, the Company chose to ignore the properly certified

agent. Certainly whatever the consequences were to the employees of the unit from this action, the Company intended. Nor can we agree that if, under the procedure suggested, the employees in this unit had been omitted from the employees who received increases, there would have been danger that the National Labor Relations Board would have considered such omission an unfair labor practice. Whatever weight an omission might have under other circumstances, under these it would have followed an effort to avoid injury to the employees and could not properly be held an interference with their rights.

We find no basis for eliminating the announcements or the publication from consideration on the ground that they were an exercise of the right of free expression, secured by the First Amendment. They are a part of the totality of Company activities and were properly received by the Board as evidence of the unilateral action of the Board. *Labor Board v. Virginia Power Co.*, 314 U. S. 469, 477.

Breadth of Order. Petitioner complains here of the refusal of the Court to modify paragraph 1(b) of the Board's order to the extent which petitioner explicitly asked for below in its petition for rehearing.⁵ That paragraph, together with another which

⁵Section 10(e) of the National Labor Relations Act, 49 Stat. 454, precludes the consideration by the Circuit Court of any objection not raised before the Board, unless such failure is excusable because of "extraordinary circumstances." This Court therefore is authorized, *sua sponte*, to appraise the record to determine the power of the Circuit Court to review paragraph 1(b) of the Board's order. *Board v. Bradford Dyeing Assn.*, 310 U. S. 318, 341.

In this proceeding the paragraph first appeared in the intermediate report of the Board's examiner. The petitioner excepted specifically to paragraph 1(b) of the proposed order as "not supported or justified by the record." This was the only objection made to the paragraph in question in the record of the proceedings before the Board. The examiner's recommendation was adopted by the Board in its order. Unless this objection was sufficiently specific to apprise the Board of the question now presented, the Circuit Court had no power to consider it. *Marshall Field & Co. v. Board*, 318 U. S. 253. In the *Marshall Field* case we declined to consider an issue as to the power of the Board to grant a back pay order which was construed as barring the deduction of unemployment compensation from the award, although the question was raised by answer and decided by the Circuit Court of Appeals, *National Labor Relations Board v. Marshall Field & Co.*, 129 F. 2d 169. Our reason for refusing review was that the only objection to the Board's power was error by the examiner "in making each and every recommendation." The remedy recommended by the examiner was the usual back pay less earnings without any word in the report as to the unemployment compensation. This was too general to apprise the Board of an intention to bring up the question of the deductibility of the compensation and of the necessity for findings.

Although it falls short of desirable specificity, we think the objection was sufficient in the present case. No further findings are needed. The para-

as modified
by the ct.
below

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enjoins refusal to bargain, is set out below.⁶ Petitioner argues that the broad, blanket provisions of 1(b) are invalid, even though, of course, restricted to the few employees in the affected unit. The language of the prohibition covers interferences with all the rights of these employees which are secured by section 7 of the Labor Act, while at the most, petitioner urges, the Board has found and the Circuit Court sustained only two unfair labor practices by petitioner, "(1) a refusal to bargain and (2) the store-wide salary increase." Both of these, it is asserted, are but incidents in petitioner's effort to obtain judicial review of the Board's certification. As the Board's selection of an appropriate unit to choose the employees' bargaining representative and the Board's subsequent certification of the representative chosen, section 9, is not judicially reviewable directly, petitioner takes the position that it committed the unfair labor practice of refusing to bargain with an accredited union, merely to open the way for judicial review of the certification.⁷ Consequently petitioner urges the cease and desist order should be no broader than the refusal to bargain which is covered by paragraph 1(a), note 6 *supra*, with the addition of "or from any other acts in any manner interfering with the representative's efforts to negotiate." The suggested addition is taken from the *Express Publishing Company*

graph in issue is a standard form of order frequently used by the Board; the same question with respect to an almost identical order was considered by this Court in *Labor Board v. Express Pub. Co.*, 312 U. S. 426, and has been a frequent subject of dispute in the Circuit Courts (see n. 8 *infra*). These circumstances coupled with an objection that the order was "not supported or justified by the record" put the Board on notice of the issue now presented.

⁶ Decreed that May Department Stores Company, etc., shall cease and desist from 1. (a) "Refusing to bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all its employees at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees in these departments, but excluding the two foremen and all other employees of the respondent;

"(b) In any other manner interfering with, restraining, or coercing its employees who are referred to in paragraph 1(a) in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act."

⁷ See *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401; *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146; *Inland Empire Dist. Council etc. v. Millis*, 325 U. S. — [65 S. Ct. 1316].

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case, 312 U. S. at 438. Thus the breadth of paragraph 1(b) of the Board's order is sharply challenged as being beyond the power of the Board in view of the evidence and findings in this case.

The scope of injunctions which follow National Labor Board determinations is important to employer and employee. While contempt proceedings can be instituted only by the Board and in the public interest,⁸ the possibility of contempt penalties by the court for future Labor Act violations adds sufficient additional sanctions to make material the difference between enjoined and non-enjoined employer activities.⁹ The decision in the *Express Publishing Company* case emphasized this issue.¹⁰ The paragraph under attack in that case was substantially like the paragraph here attacked.

⁸ *Amalgamated Workers v. Edison Co.*, 309 U. S. 261, 269.

⁹ See for business operations under contempt orders 41 *Columbia Law. R.* at 913.

¹⁰ The problem of the scope of injunction dealt with in *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426, has recently received careful consideration by judges and writers. 41 *Columbia L. Rev.* 911; 29 *Georgetown L. J.* 1026; 53 *Harvard L. Rev.* 472; 23 *Boston University L. Rev.* 447; 54 *Yale L. J.* 141.

Illustrative of the decisions in the Circuit Court are the following cases:

1. National Labor Relations Board

(a) *Upholding a general § 8(1) order on the basis of a single unfair labor practice (the nature of the unfair practices is given in brackets):*

Labor Board v. Highland Park Mfg. Co., 110 F. 2d 632 (C. C. A. 4) [§ 8(5)]; *Art Metal Const. Co. v. Board*, 110 F. 2d 148 (C. C. A. 2) [§ 8(5)]; *Wilson & Co. v. Board*, 124 F. 2d 845 (C. C. A. 7) [§ 8(3)]; *Labor Board v. Sunbeam El. Mfg. Co.*, 133 F. 2d 856 (C. C. A. 7) [§ 8(1)]; *Labor Board v. Standard Oil Co.*, 138 F. 2d 885 (C. C. A. 2) [§ 8(2)].

(b) *Upholding a general § 8(1) order where there was more than one unfair practice:*

Labor Board v. Boss Mfg. Co., 107 F. 2d 574 (C. C. A. 7) [§§ 8(1), 8(3), 8(5)]; *Labor Board v. Reed & Prince Mfg. Co.*, 118 F. 2d 874 (C. C. A. 1) [§§ 8(1), 8(3), 8(5)]; *F. W. Woolworth Co. v. Board*, 121 F. 2d 658 (C. C. A. 2) [§§ 8(1), 8(3)]; *Board v. Algoma Net Co.*, 124 F. 2d 730 (C. C. A. 7) [§§ 8(1), 8(3)]; *Labor Board v. Baldwin Locomotive Works*, 128 F. 2d 39 (C. C. A. 3) [§§ 8(1), 8(2), 8(3), 8(4)]; *Labor Board v. Brezner Tanning Co.*, 141 F. 2d 62 (C. C. A. 1) [§§ 8(1), 8(3)]; *Idaho Potato Growers v. Board*, 144 F. 2d 295 (C. C. A. 9) [§§ 8(3), 8(5)].

(c) *Limiting a § 8(1) order based on a single unfair labor practice to acts specifically condemned:*

Globe Cotton Mills v. Board, 103 F. 2d 91 (C. C. A. 5) [§ 8(5)]; *Labor Board v. Swift & Co.*, 108 F. 2d 988 (C. C. A. 7) [§ 8(2)]; *McQuay-Norris Mfg. Co. v. Board*, 119 F. 2d 1009 (C. C. A. 7)

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The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it "from engaging in any unfair labor practice affecting commerce." Section 10(a).¹¹ Equity has long been accustomed in other fields to reach conclusions as to the scope of orders which are necessary to prevent interferences with the rights of those who

[§ 8(5)]; *Labor Board v. Newark Morning Ledger Co.*, 120 F. 2d 262 (C. C. A. 3) [§ 8(3)]; *Labor Board v. Burry Biscuit Co.*, 123 F. 2d 540 (C. C. A. 7) [§ 8(2)]; *Labor Board v. Stone et al.*, 125 F. 2d (C. C. A. 7) [§ 8(1)]; *Commonwealth Edison Co. v. Board*, 135 F. 2d 891 (C. C. A. 7) [§ 8(2)]; *Consolidated Aircraft Co. v. Board*, 141 F. 2d 785 (C. C. A. 9) [§ 8(1)]; *Labor Board v. Lipshutz*, 149 F. 2d 141 (C. C. A. 5) [§ 8(1)]; *Labor Board v. Walt Disney Productions*, 146 F. 2d 44 (C. C. A. 9) [§ 8(3)].

(d) *Limiting a § 8(1) order where there was more than one unfair labor practice:*

Press Co., Inc. v. Board, 118 F. 2d 937 (App. D. C.) [§§ 8(1), 8(3)]; *Labor Board v. Grower-Shipper Vegetable Assn.*, 122 F. 2d 368 (C. C. A. 9) [§§ 8(1), 8(3)]; *Wilson & Co. v. Board*, 123 F. 2d 411 (C. C. A. 8) [§§ 8(1), 8(2), 8(3)]; *Labor Board v. Serval, Inc.*, 149 F. 2d 542 (C. C. A. 7) [§§ 8(1), 8(3)].

2. Office of Price Administration

A similar situation prevails with respect to the use of injunctions to restrain violations of regulations issued under the Emergency Price Control Act, 56 Stat. 23.

(a) *Granting or sustaining general injunctions on the basis of particular violations of a regulation:*

Bowles v. Montgomery Ward & Co., 143 F. 2d 38 (C. C. A. 7) [preliminary injunction against violation of any price regulation granted for violation of several provisions of one regulation]. Cf. *Bowles v. May Hardwood Co.*, 140 F. 2d 914 (C. C. A. 7).

(b) *Sustaining limited injunctions:*

Bowles v. Town Hall Grill, 145 F. 2d 680 (C. C. A. 1) [violation of restaurant ceiling prices on poultry, lobster, gin items; injunction limited to such items sustained]; *Bowles v. Sacher*, 146 F. 2d 186 (C. C. A. 2) [sustaining injunction limited to particular type of violation proved].

3. Federal Trade Commission

(a) *Enforcing or affirming order broader than specific acts complained of:*

Ostler Cowdy Co. v. F. T. C., 106 F. 2d 962 (C. C. A. 10); *Hershey Chocolate Co. v. F. T. C.*, 121 F. 2d 968 (C. C. A. 3); *E. B. Muller & Co. v. F. T. C.*, 142 F. 2d 511 (C. C. A. 6); *Eugene Dietzgen Co. v. F. T. C.*, 142 F. 2d 321 (C. C. A. 7).

(b) *Limiting orders to specific acts:*

F. T. C. v. Beechnut Packing Co., 257 U. S. 441; *F. T. C. v. A. McLean & Son*, 84 F. 2d 910 (C. C. A. 7); *Helen Ardelle, Inc. v. F. T. C.*, 101 F. 2d 718 (C. C. A. 9).

¹¹ *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 461; *Union Pacific R. Co. v. United States*, 313 U. S. 450, 470; *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 724.

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seek the courts' protection.¹² Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act.¹³ We think that the Board has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation.

That power of the Board is subject to review under Section 10. While the Board has been delegated initially the exclusive authority to prevent unfair labor practices,¹⁴ courts, which are called upon to enforce such orders by their own decrees, may examine its scope to see whether on the evidence they go so beyond the

¹² *Hecht Co. v. Bowles*, 321 U. S. 321, 328; *Wyoming v. Colorado*, 286 U. S. 494, 508.

¹³ *Sherman Act—Standard Oil Co. v. United States*, 221 U. S. 1, 77:

"It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift v. United States*, 196 U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies."

"So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had been transferred, § 6 of the decree enjoined them from in any way conspiring or combining to violate the act or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act." P. 79.

"We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining from, by any device whatever, recreating directly or indirectly the illegal combination which the decree dissolved." P. 81.

Local 167 v. United States, 291 U. S. 293, 299:

"Appellants seek elimination of the provision of the decree that enjoins them from using any of the offices or positions in Local 167 or the shoetim union 'for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers thereof.' The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators. *Warner & Co. v. Lilly & Co.*, 265 U. S. 526, 532. . . . When regard is had to the evidence disclosing the numerous purposes of the conspiracy and the acts of coercion customarily employed by defendants, it is plain that the clause referred to cannot be condemned as unnecessary or without warrant."

See *Amer. Foundries v. Tri-City Council*, 257 U. S. 184, 194.

¹⁴ S. Rep. No. 573, 74th Cong., 1st Sess., p. 15; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 23.

13 May Department Stores Co. vs. Nat'l Labor Relations Bd. 13

authority of the Board as to require modification as a matter of law before enforcement. Section 10(a) and (e). The *Express Publishing Company* case declared:

"To justify an order restricting other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." P. 497.

We think that ~~here~~, although there is a violation of Section 8(1) as well as 8(5), the violation of 8(1) is so intertwined with the refusal to bargain that the decree ~~should~~ ^{must} not enjoin Company actions which are not motivated by its position on the appropriateness of the unit. ~~determined by the Board to be~~ #

This conclusion requires a modification of the decree. There should be added to paragraph 1(a) of the decree, note 6 *supra*, the following clause, "or from any other acts in any manner interfering with the representative's efforts to negotiate for or represent the above named employees as bargaining agent." Paragraph 1(b) should be stricken. Textual corrections should be made to conform to these changes. As thus modified, the decree is

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

motivated by hostility to the purposes of the Act,

collective bargaining, as such,

unless without fixed opposition

to collective bargaining

in the circumstances of this proceeding

without a specific determination by the Board of an attitude of fixed opposition to

On Writ of Certiorari to
the Supreme Court of
the State of Nebraska.

[]

Mr. Justice REED delivered the opinion of the Court.

This writ of certiorari brings before us the judgment of the Supreme Court of Nebraska which affirmed a judgment of a district court which dismissed the petition for habeas corpus for want of merit and failure to state a cause of action. 14 S. C. J. 24 (Nebr.); *Hawk v. Olson*, 16 N. W. 2d 181.¹ The writ was granted because a substantial federal question as to the denial of a constitutional right seemed to be presented by the petition for certiorari and the response. 324 U. S. 839.

As no evidence was received in the district court, we accept as true all well pleaded allegations of the petition and, in the exercise of the duty which lies on us as well as the Nebraska courts to safeguard the federal constitutional rights of petitioner, examine for ourselves whether under the facts stated the petitioner is entitled to a hearing on the claimed violations of the due process clause of the Fourteenth Amendment in his conviction for murder in the first degree. *Lisenba v. California*, 314 U. S. 219, 237; *Williams v. Kaiser*, 323 U. S. 471.

¹ The opinion of the Supreme Court of Nebraska does not deal with an alternate ground of the district court judgment. This was that previous petitions for habeas corpus had "fully and finally adjudicated" the present petitions. Compare *Salinger v. Loisel*, 265 U. S. 224, 230; *Ex parte Hawk*, 321 U. S. 114, 118. We do not consider this issue.

The following reported cases show the efforts of petitioner to secure release. There are other proceedings not reported. *Hawk v. O'Grady*, 137 Neb. 639 (appeal from denial of writ in state District Court), cert. den. 311 U. S. 645; *Hawk v. Olson*, 130 F. 2d 910 (appeal from denial of writ in District Court), cert. den. 317 U. S. 697; 318 U. S. 746 (original); 321 U. S. 114 (original).

In its opinion the Supreme Court of Nebraska carefully considers a number of claims of denial of due process. It is said that some of the grounds for release are pleaded in the form of conclusions and that Nebraska procedure requires in habeas corpus proceedings that the applicant must set forth the facts from which it must appear that he will be entitled to discharge. *Hawk v. Olson*, 16 N. W. 2d 181, 183, l.c. We assume, since an allegation appears in the petition, that one of these pretermitted grounds is that "conviction was obtained by the use of perjured testimony knowingly used by the prosecuting officials and the trial court." See *Ex parte Hawk*, 321 U. S. 114, 116. Whatever Nebraska may require in the way of further specification may be furnished, if available, and permissible under the law of Nebraska (see *Hawk v. Olson*, *supra*, 183, r.c.), by petitioner on a new hearing. Cf. *Tomkins v. Missouri*, 323 U. S. 485, 487. On the issues of the sufficiency of the evidence and the interference with the right of appeal, we accept the decision of Nebraska that the first cannot be raised by habeas corpus and that the second is not supported by the facts stated by petitioner. Other objections to the judgment have been made which are not discussed herein but which we have looked into and which we do not consider merit further attention.

Petitioner contends that his conviction violates the Fourteenth Amendment because of denial at his trial of an opportunity to examine the charge, subpoena witnesses, consult counsel and prepare a defense. Denial of effective assistance of counsel does violate due process. *Powell v. Alabama*, 287 U. S. 45, 58; *House v. Mayo*, 324 U. S. 42, 45; compare *White v. Ragen*, 324 U. S. 760, 764.

Since *Frank v. Mangum*, 237 U. S. 309, 329, this Court has recognized that habeas corpus in the federal courts by one convicted of a criminal offense is a proper procedure "to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution," even though the events which were alleged to infringe did not appear upon the face of the record of his conviction. This opportunity for an examination into the "very truth and substance of the causes of his detention" was said in the *Frank* case to have come from the adoption in 1867 of a statute which empowered federal courts to examine into restraints of liberty in violation of

the Constitution of the United States. 14 Stat. 385, Chap. XXVIII.² The legislation enlarged for the federal courts the "bare legal review" previously afforded by habeas corpus.³ *Johnson v. Zerbst*, 304 U. S. 458, 465-67. See also *In re Neagle*, 135 U. S. 1, 69-76; *McNally v. Hill*, Warden, 293 U. S. 131.

This liberalization of habeas corpus permitted federal courts to examine whether a conviction was by a state court which had lost jurisdiction of the defendant in the course of a trial by domination of a mob. *Frank v. Mangum*, *supra*, 327, 331, 335, dissent 347. The rule was applied a few years later to examine a state conviction under alleged community coercion and this Court said that if the facts set out were true, the trial was "absolutely void." *Moore v. Dempsey*, 261 U. S. 86, 92. In *Mooney v. Holohan*, 294 U. S. 103, 113, it was declared that the knowing use of material perjured testimony by a state prosecutor would make the trial a pretense and in *Johnson v. Zerbst*, *supra*, 467, 468, that a federal court would lose jurisdiction to convict if it failed to provide counsel for an accused who has not intelligently waived this constitutional guaranty. *Walker v. Johnston*, 312 U. S. 275, 286, reiterated that a denial of the same constitutional right would justify

² This statute was reenacted as R. S. §§ 752-761. See 28 U. S. C. § 453:

"The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The section had its origin in a bill [No. 605] reported by the Judiciary Committee of the House in response to a resolution directing that committee to inquire and report to the House by bill or otherwise "what legislation is necessary to enable the courts of the United States . . . to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery." See Cong. Globe, 39th Cong., 1st Sess., 87, 3001, 4151. The debates on the bill in the House and Senate, while mostly concerned with incidental matters, indicated that jurisdiction to issue the writ of habeas corpus was not intended to be limited merely to violations of the Thirteenth Amendment. See Cong. Globe, 39th Cong., 1st Sess., 4150, 4151, 4229; Cong. Globe, 39th Cong., 2d Sess., 730, 790.

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the release of a prisoner from the discharge of a commitment on a sentence which was obtained after such denial. Compare *Waley v. Johnson*, 316 U. S. 101, 104. In *House v. Mayo*, 324 U. S. 42, this rule as to denial of a constitutional right was extended to a situation where the prisoner had been forced to plead without the aid and advice of counsel whose presence he requested. Loss of jurisdiction is used as a means of saying the judgment is void. It will be noted that in all of the cases in this paragraph the writ was sought in the federal courts and that therefore the extent of their power in habeas corpus was the traditional power of courts plus the extension of that power to those in custody in violation of the Constitution and other situations which are covered by 28 U. S. C. § 453. See note 2, *supra*.

In *Smith v. O'Grady*, 312 U. S. 329, the writ was filed in a state court and came here by certiorari. It raised the question whether a person held in a state prison "pursuant to a court judgment rendered in violation of rights guaranteed him by the federal Constitution" must be released. The charge was that the prisoner, an ignorant layman not represented by counsel, was tricked into pleading guilty to a serious offense. The federal question was raised in the state court but the application was dismissed without a hearing. We held that, "These allegations, if true, undermine and invalidate the judgment upon which petitioner's imprisonment rests." They "are wholly irreconcilable with the constitutional safeguards of due process." Page 334.

In *Williams v. Kaiser*, 323 U. S. 472, a person pleaded guilty to robbery by means of a deadly weapon. In his habeas corpus petition in a state court, reviewed here on certiorari, he alleged he requested counsel which was not furnished and was compelled to plead guilty, since he was incapable adequately of making his own defense, although he did not waive his right to counsel. We reversed the state court's dismissal of the petition for failure to state a cause of action, on the ground that "the right to counsel in cases of this type is a right protected by the Fourteenth Amendment of the federal Constitution." Page 473. See also *Tomkins v. Missouri*, 323 U. S. 485; *Cochran v. Kansas*, 316 U. S. 255. Thus the federal public policy against restraint of persons convicted in violation of the federal Constitution, made effective by 28 U. S. C. § 453 finds application through the due process clause of the Fourteenth Amendment to wholly state proceedings, when persons

similarly convicted are denied corrective judicial process. Acts, violative of the federal Constitution when done by federal officers, may or may not be violative of the due process clause of the Fourteenth Amendment when done under state authority. *Betts v. Brady*, 316 U. S. 455, 461, and cases cited. It is a violation of a constitutional right to restrain convicted persons who have been forced to trial in such a way as to deprive them of the effective assistance of counsel (*Ex parte Hawk*, 321 U. S. 114; *House v. Mayo*, 324 U. S. 42) and, we think, it is also a denial of ~~the~~ due process of the Fourteenth Amendment. *Powell v. Alabama*, *supra*, 52, 58.

under Petitioner set out the following allegations in his petition. On March 16, 1936, at 4:15 p.m., the petitioner, who had previously had a preliminary hearing, was brought to Omaha from the federal penitentiary at Leavenworth, Kansas. He was held incommunicado in the Omaha jail except for a visit of fifteen minutes that evening, 11 to 11:15 p.m., by the Public Defender and his assistant. These officials tried to intimidate the petitioner to plead guilty. This petitioner refused to do, ". . . at which time the two Public Officials left your Petitioner and at the time said they would have nothing to do with Petitioner's trial scheduled for trial the following morning." The next day petitioner was arraigned and was read an information charging the murder to which he pleaded "not guilty,"⁴ and "forthwith moved the Trial Court orally for a continuance of twenty-four (24) hours for the purpose of consulting counsel, examine the charge, subpoena witnesses and prepare a defense, and forthwith the Trial Court overruled the motion for a continuance and ordered the trial to proceed at which time the Clerk of the Court began to impanel the trial jury and had called two or three jurymen, when Joseph M. Lovely, a Public Official (Public Defender) and John N. Baldwin, his assistant stepped forward and entered the case, without ever having consulted your Petitioner, and without ever having been assigned by the Trial Court to represent your Petitioner.

⁴ Petitioner does not allege whether or not he had previously received a copy of the indictment in conformity with the requirement of Revised Statutes of Nebraska § 29-1802 which provides: "that within 24 hours after the filing of the indictment for a felony, the clerk shall deliver to the sheriff, the defendant or his counsel a copy of the indictment and the sheriff on receiving the copy shall serve the same on the defendant. No one may be arraigned or called on to answer an indictment until one day shall have elapsed after receiving it in person or by counsel."

"Your Petitioner had no consultation whatsoever with either of the aforesaid Public Officials regarding his defense, they picked the jury and testimony was adduced and a continuance or recess taken until the following morning March 18 (Wednesday), 1936." Petitioner claimed the protection of the Fourteenth Amendment. The record is ~~neither~~ either silent or not inconsistent with these allegations. Cf. *Tomkins v. Missouri*, 323 U. S. 485, 487.

These facts, if true, we think, set out a violation of the Fourteenth Amendment. They are not too vague and entitle the petitioner to a hearing. The charge upon which petitioner was convicted was murder in the first degree. He had no advice of counsel prior to the beginning of the trial. Homicide has degrees in Nebraska. Comp. Stat. Neb. 1921, §§ 28, 401, 403. There are difficulties in the application of the rules. *In re App. of Cole*, 103 Neb. 802, 805; *Bourne v. State*, 116 Neb. 141. The defendant needs counsel and counsel needs time. Cf. *Tomkins v. Missouri*, 323 U. S. 485, 488.

Petitioner carries the burden in a collateral attack on a judgment. Regularity of the proceedings is presumed, if the record does not show the contrary. He must prove his allegations but he is entitled to a hearing. *Johnson v. Zerbst*, *supra*, 468; *Walker v. Johnson*, *supra*, 286; *Williams v. Kaiser*, *supra*, 474.

Reversed and remanded.

② EBN 11/2/45

No. 17.—OCTOBER TERM, 1945.

Henry Hawk, Petitioner, <i>vs.</i> Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska.	}	On Writ of Certiorari to the Supreme Court of the State of Nebraska.
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Mr. Justice REED delivered the opinion of the Court.

This writ of certiorari brings before us the judgment of the Supreme Court of Nebraska which affirmed a judgment of a district court which dismissed the petition for habeas corpus for want of merit and failure to state a cause of action. 14 S. C. J. 24 (Nebr.); *Hawk v. Olson*, 16 N. W. 2d 181.¹ The writ was granted because a substantial federal question as to the denial of an asserted constitutional right seemed to be presented by the petition for certiorari and the response. 324 U. S. 839.

As no evidence was received in the district court, we accept as true all well pleaded allegations of the petition and, in the exercise of the duty which lies on us as well as the Nebraska courts to safeguard the federal constitutional rights of petitioner, examine for ourselves whether under the facts stated the petitioner is entitled to a hearing on the claimed violations of the due process clause of the Fourteenth Amendment in his conviction for murder in the first degree. *Lisenba v. California*, 314 U. S. 219, 237; *Williams v. Kaiser*, 323 U. S. 471.

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Petitioner contends that his conviction violates the Fourteenth Amendment because of denial at his trial of an opportunity to examine the charge, subpoena witnesses, consult counsel and prepare a defense. Denial of effective assistance of counsel does violate due process. *Powell v. Alabama*, 287 U. S. 45, 58; *House v. Mayo*, 324 U. S. 42, 45; compare *White v. Ragen*, 324 U. S. 760, 764.

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similarly convicted are denied corrective judicial process. Acts, violative of the federal Constitution when done by federal officials, may or may not be violative of the due process clause of the Fourteenth Amendment when done under state authority. *Betts v. Brady*, 316 U. S. 455, 461, and cases cited. It is a violation of a constitutional right to convict persons who have been forced to trial in such a way as to deprive them of the effective assistance of counsel (*Ex parte Hawk*, 321 U. S. 114; *House v. Mayo*, 324 U. S. 42) and, we think, it is also a denial of the due process of the Fourteenth Amendment. *Powell v. Alabama*, *supra*, 52, 58.

Glasser

Bowen v. Johnson

Petitioner set out the following allegations in his petition. On March 16, 1936, at 4:15 p.m., the petitioner, who had previously had a preliminary hearing, was brought to Omaha from the federal penitentiary at Leavenworth, Kansas. He was held incommunicado in the Omaha jail except for a visit of fifteen minutes that evening, 11 to 11:15 p.m., by the Public Defender and his assistant. These officials tried to intimidate the petitioner to plead guilty. This petitioner refused to do, ". . . at which time the two Public Officials left your Petitioner and at the time said they would have nothing to do with Petitioner's trial scheduled for trial the following morning." The next day petitioner was arraigned and was read an information charging the murder to which he pleaded "not guilty,"⁴ and "forthwith moved the Trial Court orally for a continuance of twenty-four (24) hours for the purpose of consulting counsel, examine the charge, subpoena witnesses and prepare a defense, and forthwith the Trial Court overruled the motion for a continuance and ordered the trial to proceed at which time the Clerk of the Court began to impanel the trial jury and had called two or three jurymen, when Joseph M. Lovely, a Public Official (Public Defender) and John N. Baldwin, his assistant stepped forward and entered the case, without ever having consulted your Petitioner, and without ever having been assigned by the Trial Court to represent your Petitioner.

"Your Petitioner had no consultation whatsoever with either of the aforesaid Public Officials regarding his defense, they picked the jury and testimony was adduced and a continuance or recess

⁴ Petitioner does not allege whether or not he had previously received a copy of the indictment in conformity with the requirement of Revised Statutes of Nebraska § 29-1802 which provides: "that within 24 hours after the filing of the indictment for a felony, the clerk shall deliver to the sheriff, the defendant or his counsel a copy of the indictment and the sheriff on receiving the copy shall serve the same on the defendant. No one may be arraigned or called on to answer an indictment until one day shall have elapsed after receiving it in person or by counsel."

3

SUPREME COURT OF THE UNITED STATES.

No. 17.—OCTOBER TERM, 1945.

Henry Hawk, Petitioner,	}	On Writ of Certiorari to	
vs.			the Supreme Court of
Neil Olson, Warden of the Nebraska			the State of Nebraska.
State Penitentiary at Lancaster,			
Lancaster County, Nebraska.			

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Mr. Justice REED delivered the opinion of the Court.

This writ of certiorari brings before us the judgment of the Supreme Court of Nebraska which affirmed a judgment of a district court dismissing a petition for habeas corpus to inquire into petitioner's detention for want of merit and failure to state a cause of action. 14 S. C. J. 24 (Neb.); *Hawk v. Olson*, 16 N. W. 2d 181.¹ Petitioner was in the penitentiary after conviction for murder. The writ was granted because a substantial federal question as to restraint without due process of law under the Fourteenth Amendment seemed to be presented by the petition for certiorari and the response. 324 U. S. 839.

As no response was filed or received in the district court, we accept as true all well pleaded allegations of the petition and, in the exercise of the duty which lies on us as well as the Nebraska courts to safeguard the federal constitutional rights of petitioner, examine for ourselves whether under the facts stated the petitioner is now entitled to a hearing on the claimed violations of the due process clause in his conviction for murder in the first degree. *Lisenba v. California*, 314 U. S. 219, 237; *White v. Ragen*, 324 U. S. 760.

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The following reported cases show the efforts of petitioner to secure release. There are other proceedings not reported. *Hawk v. O'Grady*, 137 Neb. 639 (appeal from denial of writ in state District Court), cert. den. 311 U. S. 645; *Hawk v. Olson*, 130 F. 2d 910 (appeal from denial of writ in District Court), cert. den. 317 U. S. 697; 318 U. S. 746 (original); 321 U. S. 114 (original).

evidence

In its opinion the Supreme Court of Nebraska carefully considers a number of claims of denial of due process. It is said that some of the grounds for release are pleaded in the form of conclusions and that Nebraska procedure requires in habeas corpus proceedings that the applicant must set forth the facts from which it must appear that he will be entitled to discharge. *Hawk v. Olson*, 16 N. W. 2d 181, 183, l.c. We assume, since such grounds appear in the petition, that one of these pretermitted grounds is that "conviction was obtained by the use of perjured testimony knowingly used by the prosecuting officials and the trial court." See *Ex parte Hawk*, 321 U. S. 114, 116. Whatever Nebraska may require in the way of further specification may be furnished, if available, and permissible under the law of Nebraska (see *Hawk v. Olson*, *supra*, 183, r.c.), by petitioner on a new hearing. Cf. *Tomkins v. Missouri*, 323 U. S. 485, 487. On the issues of the sufficiency of the evidence and the interference with the right of appeal, we accept the decision of Nebraska that the first cannot be raised by habeas corpus (*Hawk v. Olson*, 16 N. W. 2d 181, 183) and that the second is not supported by the facts stated by petitioner.² Other objections to the judgment have been made which are not discussed herein but which we have looked into and which we do not consider merit further attention.

Petitioner contends that his conviction violates the Fourteenth Amendment because of denial at his trial of an opportunity to examine the charge, subpoena witnesses, consult counsel and prepare a defense. Denial of effective assistance of counsel does violate due process. *Powell v. Alabama*, 287 U. S. 45, 58; *House v. Mayo*, 324 U. S. 42, 45; compare *White v. Ragen*, 324 U. S. 760, 764.

Since *Frank v. Mangum*, 237 U. S. 309, 329, this Court has recognized that habeas corpus in the federal courts by one convicted of a criminal offense is a proper procedure "to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution," even though the events which were alleged to infringe did not

² Lack of counsel and wrongful withholding by judicial officers of the necessary record from the substance of this claim. The opinion of the Supreme Court of Nebraska disposes of this by pointing out that petitioner never alleged a request to the Public Defender for assistance on appeal and that a mandamus [for the record] was denied. We assume the denial was proper as petitioner makes no complaint as to it. On the present record the failure to seek review from the conviction was without excuse. 16 N. W. 2d 181, 183.

appear upon the face of the record of his conviction. This opportunity for an examination into the "very truth and substance of the causes of his detention" was said in the *Frank* case to have come from the adoption in 1867 of a statute which empowered federal courts to examine into restraints of liberty in violation of the Constitution of the United States. 14 Stat. 385, Chap. XXVIII.³ The legislation enlarged for the federal courts the "bare legal review" of the authority under which a petitioner was held which had been previously afforded by habeas corpus.⁴ *Johnson v. Zerbst*, 304 U. S. 458, 465-67. See also *In re Neagle*, 135 U. S. 1, 69-76; *McNally v. Hill, Warden*, 293 U. S. 131.

This liberalization of habeas corpus required federal courts, when the issue was presented, to examine whether a conviction was by a state court which had lost "jurisdiction" of the defendant in the course of a trial by domination of a mob. *Frank v. Mangum, supra*, 327, 331, 335, dissent 347. The power was called into play a few years later to examine a state conviction under alleged community coercion and this Court said that if the facts set out were true, the trial was "absolutely void." *Moore v. Dempsey*, 261 U. S. 86, 92. In *Mooney v. Holohan*, 294 U. S. 103, 113, it was declared that the knowing use of material perjured testimony by a state prosecutor would make a trial a pretense.

When the absence of counsel at a trial was urged as a ground for a federal writ of habeas corpus, we held that in federal courts a felony conviction without benefit of counsel is void because a violation of the accused's constitutional right to the services of

³ This statute was reenacted as R. S. §§ 752-761. The provision now appears in 28 U. S. C. § 453:

"The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is . . . in custody in violation of the Constitution or of a law or treaty of the United States; . . ."

The section had its origin in a bill [No. 605] reported by the Judiciary Committee of the House in response to a resolution directing that committee to inquire and report to the House by bill or otherwise "what legislation is necessary to enable the courts of the United States . . . to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery." See Cong. Globe, 39th Cong., 1st Sess., 87, 4151. The debates on the bill in the House and Senate, while mostly concerned with incidental matters, indicated that jurisdiction to issue the writ of habeas corpus was not intended to be limited merely to violations of the Thirteenth Amendment. See Cong. Globe, 39th Cong., 1st Sess., 4150, 4151, 4229; Cong. Globe, 39th Cong., 2d Sess., 730, 790.

⁴ See *Ex parte Watkins*, 3 Pet. 193, 202, cited in the *Frank* case, and 4 Bacon's Abridgement 563, *et seq.*, Johnson Edition 1856; Viner's Abridgement, (2d Ed.), 212(d) and (f)(2).

an attorney unless he has intelligently waived that privilege. *Johnson v. Zerbst*, *supra*, 467-68; *Walker v. Johnston*, 312 U. S. 275, 286.

In state prosecutions a conviction on a plea of guilty, obtained by a trick, *Smith v. O'Grady*, 312 U. S. 329, 334, or, after refusal of a proper request for counsel, because of the accused's incapacity to adequately defend himself, *Williams v. Kaiser*, 323 U. S. 472, will not support imprisonment. Such procedure violates the Fourteenth Amendment to the Constitution. See *Tomkins v. Missouri*, 323 U. S. 485; *Cochran v. Kansas*, 316 U. S. 255. That Amendment is violated also when a defendant is forced by a state to trial in such a way as to deprive him of the effective assistance of counsel. *Powell v. Alabama*, *supra*, 52, 58; *House v. Mayo*, 324 U. S. 42. Compare *Ex parte Hawk*, 321 U. S. 114; *Glasser v. United States*, 215 U. S. 60, 69-70. When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. *White v. Ragen*, 324 U. S. 760. When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings. *Williams v. Kaiser*, 323 U. S. 472; *Tomkins v. Missouri*, *supra*.

Petitioner, a layman, set out the following allegations in his petition. On March 16, 1936, at 4:15 p.m., the petitioner, who had previously had a preliminary hearing, was brought to Omaha from the federal penitentiary at Leavenworth, Kansas. He was held incommunicado in the Omaha jail except for a visit of fifteen minutes that evening, 11 to 11:15 p.m., by the Public Defender and his assistant. These officials tried to intimidate the petitioner to plead guilty. This petitioner refused to do, "... at which time the two Public Officials left your Petitioner and at the time said they would have nothing to do with Petitioner's trial scheduled for trial the following morning." The next day petitioner was arraigned and was read an information charging the murder to which he pleaded "not guilty,"⁵ and "forthwith moved the Trial Court orally for a con-

⁵ Petitioner does not allege whether or not he had previously received a copy of the indictment in conformity with the requirement of Revised Statutes of Nebraska § 29-1802 which provides: "that within 24 hours after the filing of the indictment for a felony, the clerk shall deliver to the sheriff, the defendant or his counsel a copy of the indictment and the sheriff on receiving the copy shall serve the same on the defendant. No one may be arraigned or called on to answer an indictment until one day shall have elapsed after receiving it in person or by counsel."

tinuance of twenty-four (24) hours for the purpose of consulting counsel, examine the charge, subpoena witnesses and prepare a defense, and forthwith the Trial Court overruled the motion for a continuance and ordered the trial to proceed at which time the Clerk of the Court began to impanel the trial jury and had called two or three jurymen, when Joseph M. Lovely, a Public Official (Public Defender) and John N. Baldwin, his assistant stepped forward and entered the case, without ever having consulted your Petitioner, and without ever having been assigned by the Trial Court to represent your Petitioner.

"Your Petitioner had no consultation whatsoever with either of the aforesaid Public Officials regarding his defense, they picked the jury and testimony was adduced and a continuance or recess taken until the following morning March 18 (Wednesday), 1936." Petitioner claimed the protection of the Fourteenth Amendment. The record is either silent on or not inconsistent with anything material in these allegations. Cf. *Tompkins v. Missouri*, 323 U. S. 485, 487. There is no allegation or suggestion of ignorance of or unfamiliarity with procedural or substantive law or sub-normal mentality.

These facts, if true, we think, set out a violation of the Fourteenth Amendment. They are not conclusions of law. They are not too vague. The charge upon which petitioner was convicted was murder in the first degree. He had no advice of counsel prior to the calling of the jury. His motion for continuance to examine the charge and consult counsel was made without assistance. Homicide has degrees in Nebraska. Comp. Stat. Neb. 1921, §§ 28, 401, 403. There are difficulties in the application of the rules. *In re Application of Cole*, 103 Neb. 802, 805; *Bourne v. State*, 116 Neb. 141. The defendant needs counsel and counsel needs time. Cf. *Tompkins v. Missouri*, 323 U. S. 485, 488.

Was it the type of violation which Nebraska may require to be asserted on review of the conviction or to be forever barred? The Supreme Court of Nebraska did not take that position. It says (16 N. W. 2d 181, 184):

"The petitioner does not set forth any facts to establish his innocence that he was prevented from establishing which, if continuance had been granted, he could have presented."

We assume that petitioner could have presented the grounds of his motion for continuance by bill of exception. See *Cooper v. State*,

120 Neb. 598, 600-601; *Cockeram v. State*, 121 Neb. 757, 758-59; *Smith v. State*, 123 Neb. 17, 18-20. He offers no legal excuse for his failure to appeal. Here there is a situation where the State plainly afforded corrective judicial process by appeal from the conviction for the alleged error in denying a constitutional right. See *Dorsey v. Gill*, 148 F. 2d 857, 872-75. No element of interference, of ignorance or of excusable neglect appears. Compare *Waley v. Johnston*, 316 U. S. 101, 104. Since, however, Nebraska took cognizance of petitioner's allegations that he was denied a fair trial because of the refusal of the motion for continuance on the merits and did not refuse consideration of the complaint (*Hawk v. Olson*, 16 N. W. 2d 181, 184), we do not have before us the question of the constitutional validity under the Fourteenth Amendment of a state's refusal on a petition for habeas corpus to give another judicial remedy to an accused who had, without excuse, failed to take advantage of the remedy which the state offered by way of appeal. This issue of denial of continuance therefore is judged by this Court as though it was here on a review of the final judgment of the Supreme Court of Nebraska, sustaining the original conviction. But we think there was an allegation that no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the calling of the jury. Continuance may or may not have been useful to the accused but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect. ~~Regardless of a showing of injury or of failure to ask review,~~ we hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment.

Petitioner states a good cause of action when he alleges facts which support his contention that through denial of asserted constitutional rights he has had an unfair trial in a state court within the meaning of the due process clause of the Fourteenth Amendment. Unsupported verified allegations of the petitioner which are credible are sufficient, if the facts make a prima facie case, to challenge the presumption of regularity inherent in the record of the trial, unless the assertions of the petition are contradicted by the incontrovertible statements⁶ of the record. This, of course, does not mean that uncontradicted evidence of a witness must be accepted as true on the hearing. Credibility is for the trier of facts.

⁶ *Walker v. Johnston*, 312 U. S. 275, 284.

The evidence may show that the indictment was served upon petitioner well in advance of the trial (Rev. Stat. Neb. § 29-1802), and that he had ample opportunity to consult with counsel and secure any needed witnesses. He may have intelligently waived his constitutional rights. *Adams v. United States ex rel. McCann*, 317 U. S. 269, 275.

Petitioner carries the burden in a collateral attack on a judgment.⁷ He must prove his allegations "but he is entitled to an opportunity.

Reversed and remanded.

⁷ *Johnson v. Zerbst*, *supra*, 468; *Walker v. Johnson*, *supra*, 286; *Williams v. Kaiser*, *supra*, 474.

SUPREME COURT OF THE UNITED STATES.

Nos. 56 and 197.—OCTOBER TERM, 1945.

Kirby Petroleum Company, Petitioner, 56 <i>vs</i> Commissioner of Internal Revenue.	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
Commissioner of Internal Reve- nue, Petitioner, 197 <i>vs.</i> Anna Vickers Crawford.	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Justice REED delivered the opinion of the Court.

The writ of certiorari in *Kirby Petroleum Co. v. Commissioner* brings here for review the judgment of the Circuit Court of Appeals for the Fifth Circuit, 148 F. 2d 80, reversing the decision of the Tax Court, 2 T. C. 1258, which had sustained the taxpayer's position. The narrow issue is the deductibility under Sections 23(m) and 114(b)(3)¹ of the Internal Revenue Code of the depletion allowance of 27½ per centum of gross income from prop-

¹ Internal Revenue Code:

“SEC. 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

“(m) *Depletion*.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. . . . In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. . . .”

“SEC. 114. Basis for Depreciation and Depletion.

“(b) *Basis for Depletion.*—

“(3) *Percentage depletion for oil and gas wells.*—In the case of oil and gas wells the allowance for depletion under section 23(m) shall be 27½ per centum of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property”

2 *Kirby Petroleum Co. vs. Commissioner of Internal Revenue.* 2

erty, permitted by those sections from the taxpayer's gross income for 1940 from certain oil leases.

The taxpayer owned the fee simple title to certain Texas lands, except for a minor mineral interest which is not here involved. It leased the lands to two companies for the production of oil, gas and other minerals for a cash bonus, a royalty in the usual form and an agreement, executed contemporaneously with the lease and as part consideration therefor, that the taxpayer should receive twenty per cent of the net money profits realized by the lessees from their operations under the lease.

The same narrow issue is in *Commissioner v. Crawford*. In this latter case, the taxpayer owned an interest in fee in certain real estate in California. She, together with her co-owners, entered into several leases for portions of the property for the production of oil, gas and other minerals. For an understanding of the issues here presented, it is unnecessary to analyze the leases further than to say that they were given in consideration of bonuses, royalties in the usual form and additional payments from the net profits of the operation.² The Commissioner assessed a deficiency because of the denial of a claimed depletion allowance for 1938, 1939 and 1940. The Tax Court supported the taxpayer's position. ~~T. Ct.~~ The Circuit Court of Appeals affirmed. 148 F. 2d 776.

In both cases, the Commissioner concedes that the depletion allowance of Sections 23(m) and 114(b)(3) is applicable to the bonuses and royalties.³ The statutory provisions are identical for all years. The 27½ per cent of Section 114(b)(3) was therefore properly deducted from these bonuses and royalties by the taxpayers. In each of these years there was also income to these taxpayers from the lease provisions for the lessors to share in the net profits from the oil extracted from the leased lands. The taxpayers claim the right to deduct the 27½ per cent depletion from these receipts also. These are the deductions which the Commissioner disallowed. On account of the conflicting decisions

² The following clause of one lease will illustrate the type of arrangement which produced the additional payments:

"When, and as soon as the 'Income Credits' of said account shall exceed the 'Operating Charges' of the Lessee, the Lessor shall be entitled to a secondary and additional royalty, the amount thereof to be one-half of such difference between the 'Operating Charges' and 'Income Credits' of said account." The leases defined methods of computation.

³ *Burnet v. Harmel*, 287 U. S. 103, 111; *Palmer v. Bender*, 287 U. S. 551, 557. See *Anderson v. Helvering*, 310 U. S. 404, 409.

3 *Kirby Petroleum Co. vs. Commissioner of Internal Revenue.* 3

of the Circuits in these cases on the point, certiorari was granted by us. — U. S. —; — U. S. —.

The present provisions for depletion allowances have been worked out so as to give the holder of an economic interest in the oil or other natural resource an allowance for depletion.⁴ In theory the aggregate sum allowed for depletion would equal the value of the natural resource at the time of its acquisition by the taxpayer, so that at the exhaustion of the resource the taxpayer would have recovered exactly his investment. The administrative difficulties in oil and gas production in view of the uncertainties of quantities and time of acquisition, that is at the instant of purchase of the property or discovery of oil or gas, finally have brought Congress to the arbitrary allowance of 27½ per cent now embodied in Section 114(b)(3).⁵ Thus a taxpayer's capital is returned to him by the depletion allowance and the rest of the proceeds of the natural asset becomes gross income. *Anderson v. Helvering*, 310 U. S. 404, 407-8. It follows from this theory that only a taxpayer with an economic interest in the asset, here the oil, is entitled to the depletion. *Palmer v. Bender*, 287 U. S. 551, 557; *Thomas v. Perkins*, 301 U. S. 655, 659. The technical title to the oil in place is not important. Title in a case of a lease may depend upon the law of the state in which the deposit lies. *Burnet v. Harmel*, 287 U. S. 103, 109-10. The test of the right to depletion is whether the taxpayer has a capital investment in the oil in place which is necessarily reduced as the oil is extracted. See *Anderson v. Helvering*, 310 U. S. 404, 407.

The taxpayers here involved were lessors. Under the leases and our previous decisions, these taxpayers had an economic interest,

⁴ Treasury Regulation 103, Sec. 19.23(m)-1, as amended by T. D. 5413, 1944 Cum. Bull. 124, 129:

"Under such provisions, the owner of an economic interest in mineral deposits or standing timber is allowed annual depletion deductions. An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the severance and sale of the mineral or timber, to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from production. Thus, an agreement between the owner of an economic interest and another entitling the latter to purchase the product upon production or to share in the net income derived from the interest of such owner does not convey a depletable economic interest."

⁵ For the background of the present provisions, see *Helvering v. Twin Bell Oil Syndicate*, 293 U. S. 312.

4 *Kirby Petroleum Co. vs. Commissioner of Internal Revenue.* 4

a capital investment, in so much of the extracted oil as was used by the lessee to pay to the taxpayers the royalties and bonuses. See note 3, *supra*. The taxpayer lessors were entitled to the depletion allowance on these royalties and bonuses whether they were paid to them in oil or cash, the proceeds of the oil. *Helvering v. Twin Bell Oil Syndicate*, 293 U. S. 312, 321.

If the additional payment in these leases had been a portion of the gross receipts from the sale of the oil extracted by the lessees instead of a portion of the net profits, there would have been no doubt as to the economic interest of the lessors in such oil. The lessors' economic interest in the oil is no less when their right is to share a net profit. In both situations the lessors' possibility of return depends upon oil extraction and ends with the exhaustion of the supply. Economic interest does not mean title to the oil in place but the possibility of profit dependent solely upon its extraction and sale.⁶

The depletion allowance, in the aggregate, is always the same amount, 27½ per cent of the "gross income from the property,"⁷ "In the case of leases the deductions shall be equitably apportioned between the lessor and lessee." Section 23(m). An equitable apportionment is obtained by excluding from the lessee's gross income "an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property." Section 114(b)(3).⁸ We think these taxpayers had an economic interest, sufficient to support depletion in the extracted oil, which the lessees sold to earn that portion of "net profit" due to the taxpayer lessors under the contracts.

If we assume that the only payment for the privilege of oil extraction made to the taxpayer lessors by the lessees was the portion of "net income" paid under the leases, it would be clear that such payment of "net income" would be rent or royalty paid by the lessees for the privilege of extraction. Since

⁶ While the reservation of royalties shows an economic interest in the oil necessary for the satisfaction of the royalties, such reservation would not show an economic interest in oil not necessary for the payment of the royalties. But see *Estate of Jophet*, 3 T. C. 86.

⁷ Sec. 114(b)(3). The gross income refers only to oil and gas. *Helvering v. Twin Bell Oil Syndicate*, 293 U. S. 312, 320-21; *Anderson v. Helvering*, 310 U. S. 404, 408.

⁸ See *Helvering v. Twin Bell Oil Syndicate*, 293 U. S. 312, 322.

Section 114(b)(3) would require the lessee to deduct this rent or royalty from their gross incomes from the sale of oil from the property before taking the lessees' depletion, a gross receipt from oil sold equal to the amount of the "net income" paid to the taxpayer lessors would not be subject to depletion, unless the taxpayer lessors are permitted to apply depletion to this payment. This would be contrary to the purpose of the depletion statute, which is to allow to the lessor and lessee together a depletion of 27½ per cent of the gross sale price of the oil. On the other hand if depletion on the "net income" payments is allowed to the lessors, the lessees are allowed depletion on the gross income from oil sales less the net payment and the entire allowable depletion is allocated between the lessors and lessees.

Reference is made to a sentence in *Anderson v. Helvering*, 310 U. S. 404, 409, as indicating that this Court had determined that "net profit" payments were not subject to depletion. It reads as follows:

"A share in the net profits derived from development and operation, on the contrary, does not entitle the holder of such interest to a depletion allowance even though continued production is essential to the realization of such profits."

This was said in setting out the series of cases dealing with depletion. No net income was involved in the *Anderson* case. The statement was supported by the citation of *Helvering v. O'Donnell*, 303 U. S. 370, and *Helvering v. Elbe Oil Land Development Co.*, 303 U. S. 372. In the *O'Donnell* case, the taxpayer, who received the "net income" from an oil operation was a stranger to the lease, who had contracted for a share of its net profits as consideration for his stock in a corporation which was the owner of the lease. "The question is whether respondent had an interest, that is, a capital investment, in the oil and gas in place As a mere owner of shares in the San Gabriel Company, respondent had no such interest." Page 371. In the *Elbe Oil Land* case, there was a specific provision that consideration other than the "net profit" payment should result in "full ownership" to the buyer. The transaction which included the clause for "net profit" was a sale of all the right, title and interest in the property. This Court said this specific provision made the transaction an "absolute sale" which deprived the owner of any investment or economic interest in the oil. Thus the *Anderson* case correctly stated that a share in "net profits" does not entitle the holder to a

6 *Kirby Petroleum Co. vs. Commissioner of Internal Revenue.* 6

depletion allowance. But when the holder of such share, as here, continues his economic interest in the oil and receives the "net profit" in ~~whole or~~ partial payment for the oil, such a lessor is entitled to his depletion allowance.

In our view, the "net profit" payments in these cases flow directly from the taxpayers' economic interest in the oil and partake of the quality of rent ~~for the privilege of extraction~~ rather than of a sale price. Therefore, the capital investment of the lessors is reduced by the extraction of the oil and the lessors should have depletion.

No. 56 is reversed.

No. 197 is affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES.

Nos. 56 and 197.—OCTOBER TERM, 1945.

Kirby Petroleum Company, Petitioner, 56 <i>vs</i> Commissioner of Internal Revenue.	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
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2 Kirby Petroleum Co. vs. Commissioner of Internal Revenue. 2

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The taxpayer owned the fee simple title to certain Texas lands, except for a minor mineral interest which is not here involved. It leased the lands to two companies for the production of oil, gas and other minerals for a cash bonus, a royalty in the usual form and an agreement, executed contemporaneously with the lease and as part consideration therefor, that the taxpayer should receive twenty percent of the net money profits realized by the lessees from their operations under the lease.

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~~T. C.~~ The Circuit Court of Appeals affirmed. — F. 2d —. In both cases, the Commissioner concedes that the depletion allowance of Sections 23(m) and 114(b)(3) is applicable to the bonuses and royalties.³ The provisions are identical for all years. The 27½ per cent of Section 114(b)(3) was therefore properly deducted from these receipts by the taxpayers. In each of these years there was also income to these taxpayers from the lease provisions for the lessors to share in the net profits from the oil extracted from the leased lands. The taxpayers claim the right to deduct the 27½ per cent depletion from these receipts also. These are the deductions which the Commissioner disallowed. On account of the conflicting decisions of the Circuits in these cases on the point, certiorari was granted by us. — U. S. —; — U. S. —.

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3 Kirby Petroleum Co. vs. Commissioner of Internal Revenue. 3

The present provisions for depletion allowances have been worked out so as to give the holder of an economic interest in the oil or other natural resource an allowance for depletion.⁴ In theory the aggregate sum allowed for depletion would equal the value of the natural resource at the time of its acquisition by the taxpayer, so that at the exhaustion of the resource the taxpayer would have recovered exactly his investment. The administrative difficulties in oil and gas production in view of the uncertainties of quantities and time of acquisition, that is at the instant of purchase of the property or discovery of oil or gas, finally have brought us to the arbitrary allowance of 27½ per cent now embodied in Section 114(b)(3).⁵ Thus the taxpayers' capital is returned to him by the depletion allowance and the rest of the proceeds of the natural asset becomes gross income. *Anderson v. Helvering*, 310 U. S. 404, 407-8. It follows from this theory that only a taxpayer with an economic interest in the asset, here the oil, are entitled to the depletion. *Palmer v. Bender*, 287 U. S. 551, 557; *Thomas v. Perkins*, 301 U. S. 655, 659. The ownership of the oil in place is not important. Title in case of a lease may depend upon the law of the state in which the deposit lies. *Burnet v. Harmel*, *supra*, 109-10. The test of the right to depletion is whether the taxpayer has a capital investment in the oil in place which is necessarily reduced as the oil is extracted. See *Anderson v. Helvering*, 310 U. S. 404, 407.

The taxpayers here involved were lessors. Under the leases and our previous decisions, these taxpayers had an economic interest, a capital investment, in so much of the extracted oil as was used by the lessee to pay to the taxpayers the royalties and bonuses.

⁴ Treasury Regulation 103, Sec. 19.23(m)-1, as amended by T. D. 5413, 1944 Cum. Bull. 124, 129:

"Under such provisions, the owner of an economic interest in mineral deposits or standing timber is allowed annual depletion deductions. An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the severance and sale of the mineral or timber, to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from production. Thus, an agreement between the owner of an economic interest and another entitling the latter to purchase the product upon production or to share in the net income derived from the interest of such owner does not convey a depletable economic interest."

⁵ For the background of the present provisions, see *Helvering v. Twin Bell Oil Syndicate*, 293 U. S. 312.

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4 Kirby Petroleum Co. vs. Commissioner of Internal Revenue. 4

See note 3, *supra*. The taxpayer lessors were entitled to the depletion allowance on these royalties and bonuses whether they were paid to them in oil or cash, the proceeds of the oil. *Helvering v. Twin Bell Oil Syndicate*, 293 U. S. 312, 321. The depletion allowance, in the aggregate, is always the same amount, 27½ per cent of the "gross income from the property."⁶ "In the case of leases the deductions shall be equitably apportioned between the lessor and lessee." Section 23(m). An equitable apportionment is obtained by excluding from the lessee's gross income "an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property." Section 114(b)(3).⁷ We think these taxpayers had an economic interest, sufficient to support depletion in the extracted oil, which the lessees sold to earn that portion of "net profit" allocated to the taxpayer lessors by the contracts.

This economic interest remains in the taxpayers rather than passing to the lessees because there was not a divestment by the taxpayers of ~~all~~ their interest in the oil but merely the grant of the privilege of extraction to the lessees upon their agreement to pay to the taxpayer lessors a part of the profits from the sale of the extracted oil. If we assume that the only payment for the privilege of oil extraction made to the taxpayer lessors by the lessees was the portion of "net income" paid under the leases, it would be clear that such payment of "net income" would be rent or royalty paid by the lessees for the privilege of extraction. Since Section 114(b)(3) would require the lessee to deduct this rent or royalty from their gross incomes from the sale of oil from the property before taking the lessees' depletion, a gross receipt from oil sold equal to the amount of the "net income" paid to the taxpayer lessors would not be subject to depletion, unless the taxpayer lessors are permitted to apply depletion to this payment. This would be contrary to the purpose of the depletion statute, which is to allow to the lessor and lessee together a depletion of 27½ per cent of the gross sale price of the oil. On the other hand if depletion on the "net income" payments is allowed to the lessors, the lessees are allowed depletion on the gross income from oil sales less the net payment and the entire allowable depletion is allocated between the lessors and lessees.

⁶ Sec. 114(b)(3). The gross income refers only to oil and gas. *Helvering v. Twin Bell Oil Syndicate*, 293 U. S. 312, 320-21; *Anderson v. Helvering*, 310 U. S. 404, 408.

⁷ See *Helvering v. Twin Bell Oil Syndicate*, 293 U. S. 312, 322.

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place, but the possibility of profit ~~for~~
~~separate~~ ^{side} ~~by~~ its extraction & sale.
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5 *Kirby Petroleum Co. vs. Commissioner of Internal Revenue.* 5

Reference is made to a sentence in *Anderson v. Helvering*, 310 U. S. 404, 409, as indicating that this Court had determined that "net profit" payments were not subject to depletion. It reads as follows:

"A share in the net profits derived from development and operation, on the contrary, does not entitle the holder of such interest to a depletion allowance even though continued production is essential to the realization of such profits."

This was said in setting out the series of cases dealing with depletion. No net income was involved in the *Anderson* case. The statement was supported by the citation of *Helvering v. O'Donnell*, 303 U. S. 370, and *Helvering v. Elbe Oil Land Development Co.*, 303 U. S. 372. In the *O'Donnell* case, the taxpayer, who received the "net income" from an oil operation was a stranger to the lease, who had contracted for a share of its net profits as consideration for his stock in a corporation which was the owner of the lease. "The question is whether respondent had an interest, that is, a capital investment in the oil and gas in place As a mere owner of shares in the San Gabriel Company, respondent had no such interest." Page 371. In the *Elbe Oil Land* case, there was a specific provision that consideration other than the "net profit" payment should result in "full ownership" to the buyer. The transaction which included the clause for "net profit" was a sale of all the right, title and interest in the property. This Court said this specific provision made the transaction an "absolute sale" which deprived the owner of any investment in the oil. Thus the *Anderson* case correctly stated that a share in "net profits" does not entitle the holder to a depletion allowance. But when the holder of such share, as here, continues his economic interest in the oil and receives the "net profit" in whole or partial payment for the privilege of extraction, such a lessor is entitled to his depletion allowance.

In our view, the "net profit" payments in these cases flow directly from the taxpayers' economic interest in the oil and partake of the quality of rent for the privilege of extraction rather than of a sale price. Therefore, the capital investment of the lessors is reduced by the extraction of the oil and the lessors should have depletion.

No. 56 is reversed.

No. 197 is affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

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SUPREME COURT OF THE UNITED STATES.

Nos. 56 and 197.—OCTOBER TERM, 1945.

Kirby Petroleum Company,
Petitioner,
56 vs
Commissioner of Internal
Revenue. } On Writ of Certiorari to the
United States Circuit Court
of Appeals for the Fifth
Circuit.

Commissioner of Internal Revenue,
Petitioner,
197 vs.
Anna Vickers Crawford. } On Writ of Certiorari to the
United States Circuit Court
of Appeals for the Ninth
Circuit.

[]

Mr. Justice REED delivered the opinion of the Court.

The writ of certiorari in *Kirby Petroleum Co. v. Commissioner* brings here for review the judgment of the Circuit Court of Appeals for the Fifth Circuit, 148 F. 2d 80, reversing the decision of the Tax Court, 2 T. C. 1258, which had sustained the taxpayer's position. The narrow issue is the deductibility under Sections 23(m) and 114(b)(3)¹ of the Internal Revenue Code of the depletion allowance of 27½ per centum of gross income from prop-

¹ Internal Revenue Code:

"SEC. 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

"(m) *Depletion*.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. . . . In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. . . ."

"SEC. 114. Basis for Depreciation and Depletion.

"(b) *Basis for Depletion*.—

"(3) *Percentage depletion for oil and gas wells*.—In the case of oil and gas wells the allowance for depletion under section 23(m) shall be 27½ per centum of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property"

2 *Kirby Petroleum Co. vs. Commissioner of Internal Revenue.* 2

erty, permitted by those sections from the taxpayer's gross income for 1940 from certain oil leases.

The taxpayer owned the fee simple title to certain Texas lands, except for a minor mineral interest which is not here involved. It leased the lands to two companies for the production of oil, gas and other minerals for a cash bonus, a royalty in the usual form and an agreement, executed contemporaneously with the lease and as part consideration therefor, that the taxpayer should receive twenty per cent of the net money profits realized by the lessees from their operations under the lease.

The same narrow issue is in *Commissioner v. Crawford*. In this latter case, the taxpayer owned an interest in fee in certain real estate in California. She, together with her co-owners, entered into several leases for portions of the property for the production of oil, gas and other minerals. For an understanding of the issues here presented, it is unnecessary to analyze the leases further than to say that they were given in consideration of bonuses, royalties in the usual form and additional payments from the net profits of the operation.² The Commissioner assessed a deficiency because of the denial of a claimed depletion allowance for 1938, 1939 and 1940. The Tax Court supported the taxpayer's position. The Circuit Court of Appeals affirmed. 148 F. 2d 776.

In both cases, the Commissioner concedes that the depletion allowance of Sections 23(m) and 114(b)(3) is applicable to the bonuses and royalties.³ The statutory provisions are identical for all years. The 27½ per cent of Section 114(b)(3) was therefore properly deducted from these bonuses and royalties by the taxpayers. In each of these years there was also income to these taxpayers from the lease provisions for the lessors to share in the net profits from the oil extracted from the leased lands. The taxpayers claim the right to deduct the 27½ per cent depletion from these receipts also. These are the deductions which the Commissioner disallowed. On account of the conflicting decisions

² The following clause of one lease will illustrate the type of arrangement which produced the additional payments:

"When, and as soon as the 'Income Credits' of said account shall exceed the 'Operating Charges' of the Lessee, the Lessor shall be entitled to a secondary and additional royalty, the amount thereof to be one-half of such difference between the 'Operating Charges' and 'Income Credits' of said account." The leases defined methods of computation.

³ *Burnet v. Harmel*, 287 U. S. 103, 111; *Palmer v. Bender*, 287 U. S. 551, 557. See *Anderson v. Helvering*, 310 U. S. 404, 409.

3 *Kirby Petroleum Co. vs. Commissioner of Internal Revenue.* 3

of the Circuits in these cases on the point, certiorari was granted by us. — U. S. —; — U. S. —.

The present provisions for depletion allowances have been worked out so as to give the holder of an economic interest in the oil or other natural resource an allowance for depletion.⁴ While there are income incidents to the utilization of natural resources, there is also an obvious exhaustion of the capital used to produce the income. In theory the aggregate sum allowed for depletion would equal the value of the natural resource at the time of its acquisition by the taxpayer, so that at the exhaustion of the resource the taxpayer would have recovered through depletion exactly his investment. The administrative difficulties in oil and gas production in view of the uncertainties of quantities and time of acquisition, that is at the purchase of the property or at the discovery of oil or gas, finally have brought Congress to the arbitrary allowance of 27½ per cent now embodied in Section 114(b)(3).⁵ Thus a taxpayer's capital is returned to him by the depletion allowance and the rest of the proceeds of the natural asset becomes gross income. *Anderson v. Helvering*, 310 U. S. 404, 407-8. It follows from this theory that only a taxpayer with an economic interest in the asset, here the oil, is entitled to the depletion. *Palmer v. Bender*, 287 U. S. 551, 557; *Thomas v. Perkins*, 301 U. S. 655, 659. The technical title to the oil in place is not important. Title in a case of a lease may depend upon the law of the state in which the deposit lies. *Burnet v. Harmel*, 287 U. S. 103, 109-10. The test of the right to depletion is whether the taxpayer has a capital investment in the oil in place which is necessarily reduced as the oil is extracted. See *Anderson v. Helvering*, 310 U. S. 404, 407.

⁴ Treasury Regulation 103, Sec. 19.23(m)-1, as amended by T. D. 5413, 1944 Cum. Bull. 124, 129:

"Under such provisions, the owner of an economic interest in mineral deposits or standing timber is allowed annual depletion deductions. An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the severance and sale of the mineral or timber, to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from production. Thus, an agreement between the owner of an economic interest and another entitling the latter to purchase the product upon production or to share in the net income derived from the interest of such owner does not convey a depletable economic interest."

⁵ For the background of the present provisions, see *Helvering v. Twin Bell Oil Syndicate*, 293 U. S. 312.

4 *Kirby Petroleum Co. vs. Commissioner of Internal Revenue.* 4

The taxpayers here involved were lessors. Under the leases and our previous decisions, these taxpayers had an economic interest, a capital investment, in so much of the extracted oil as was used by the lessee to pay to the taxpayers the royalties and bonuses. See note 3, *supra*. The taxpayer lessors were entitled to the depletion allowance on these royalties and bonuses whether they were paid to them in oil or cash, the proceeds of the oil. *Helvering v. Twin Bell Oil Syndicate*, 293 U. S. 312, 321.

If the additional payment in these leases had been a portion of the gross receipts from the sale of the oil extracted by the lessees instead of a portion of the net profits, there would have been no doubt as to the economic interest of the lessors in such oil. The lessors' economic interest in the oil is no less when their right is to share a net profit. As in *Thomas v. Perkins*, 301 U. S. 655, their only source of payment is from the net profit which the oil produces. In both situations the lessors' possibility of return depends upon oil extraction and ends with the exhaustion of the supply. Economic interest does not mean title to the oil in place but the possibility of profit from that economic interest dependent solely upon the extraction and sale of the oil.⁶

The depletion allowance, in the aggregate, is always the same amount, 27½ per cent of the "gross income from the property."⁷ "In the case of leases the deductions shall be equitably apportioned between the lessor and lessee." Section 23(m). An equitable apportionment is obtained by excluding from the lessee's gross income from oil or gas produced from the property, *Helvering v. Twin Bell Oil Syndicate*, *supra*, 321, "an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property." Section 114(b)(3).⁸ Such deductions become the gross income of the lessor. We think these taxpayers had an economic interest in the oil, sufficient to support depletion on the sums received as net profit.

If we assume that the only payment for the privilege of oil extraction made to the taxpayer lessors by the lessees was the

⁶ While the reservation of royalties shows an economic interest in the oil necessary for the satisfaction of the royalties, such reservation would not show an economic interest in oil not necessary for the payment of the royalties. But see *Estate of Jophet*, 3 T. C. 86.

⁷ Sec. 114(b)(3). The gross income refers only to oil and gas. *Helvering v. Twin Bell Oil Syndicate*, 293 U. S. 312, 320-21; *Anderson v. Helvering*, 310 U. S. 404, 408.

⁸ See *Helvering v. Twin Bell Oil Syndicate*, 293 U. S. 312, 322.

portion of "net income" paid under the leases, it would be clear that such payment of "net income" would taxwise be rent or royalty paid by the lessees for the privilege of extraction. Since Section 114(b)(3) would require the lessees to deduct this rent or royalty from their gross incomes from the sale of oil from the property before taking the lessees' depletion, a gross receipt from oil sold, equal to the amount of the "net income" paid to the taxpayer lessors, would not be subject to depletion, unless the taxpayer lessors are permitted to apply depletion to this payment. This would be contrary to the purpose of the depletion statute, which is to allow to the lessor and lessee together a depletion of $27\frac{1}{2}$ per cent of the gross sale price of the oil. On the other hand if depletion on the "net income" payments is allowed to the lessors, the lessees are allowed depletion on the gross income from oil sales less the net income payment and the entire allowable depletion is allocated between the lessors and lessees.

Reference is made to a sentence in *Anderson v. Helvering*, 310 U. S. 404, 409, as indicating that this Court had determined that "net profit" payments were not subject to depletion. It reads as follows:

"A share in the net profits derived from development and operation, on the contrary, does not entitle the holder of such interest to a depletion allowance even though continued production is essential to the realization of such profits."

The *Anderson* case involved the taxability to the oil operator of the gross proceeds of the oil, which his contract for the purchase of the oil property required him to turn over to the seller as a means of satisfying a deferred payment for the property. As the deferred payment also had to be satisfied out of any sale of the fee simple title to the land, we held the operator liable as a purchaser because the seller was not "entirely dependent" upon the oil production for his purchase price. This gave the operator the benefit of the applicable depletion. Page 413. Only the reservation of an interest in the fee differentiated the *Anderson* case from *Thomas v. Perkins*, 301 U. S. 655, where deferred payment in oil or its proceeds, payable only from production, was held subject to depletion when paid to the assignors.

The part just quoted from the *Anderson* case occurs in setting out the series of cases dealing with depletion. No net income was involved in the *Anderson* case. The statement was supported by the citation of *Helvering v. O'Donnell*, 303 U. S. 370, and *Helvering*

6 *Kirby Petroleum Co. vs. Commissioner of Internal Revenue.* 6

v. *Elbe Oil Land Development Co.*, 303 U. S. 372. In the *O'Donnell* case, the taxpayer, who received the "net income" from an oil operation was a stranger to the lease, who had contracted for a share of its net profits as consideration for his stock in a corporation which was the owner of the lease. "The question is whether respondent had an interest, that is, a capital investment, in the oil and gas in place As a mere owner of shares in the San Gabriel Company, respondent had no such interest." Page 371. In the *Elbe Oil Land* case, there was a specific provision that consideration other than the "net profit" payment should result in "full ownership" to the buyer. The transaction which included the clause for "net profit" was a sale of all the right, title and interest in the property, which consisted of tangible personalty and drilling permits, agreements, and leases. This Court said the additional payment of a share of net profits did not qualify "in any way the effect of the transaction as an absolute sale." Page 375. Thus the *Anderson* case correctly stated that a share in "net profits," disassociated from an economic interest, does not entitle the holder to a depletion allowance. The facts of each transaction must be appraised to determine whether the transferor has made an absolute sale or has retained an economic interest—a capital investment.

In our view, the "net profit" payments in these cases flow directly from the taxpayers' economic interest in the oil and partake of the quality of rent rather than of a sale price. Therefore, the capital investment of the lessors is reduced by the extraction of the oil and the lessors should have depletion.

No. 56 is reversed.

No. 197 is affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

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SUPREME COURT OF THE UNITED STATES.

No. 318.—OCTOBER TERM, 1945.

The Social Security Board, Petitioner,	} On Writ of Certiorari to the United States Cir- cuit Court of Appeals for the Sixth Circuit.
vs.	
Joseph Nierotko.	

[]

Mr. Justice REED delivered the opinion of the Court.

A problem as to whether "back pay," which is granted to an employee under the National Labor Relations Act, shall be treated as "wages" under the Social Security Act comes before us on this record. If such "back pay" is a wage payment, there is also at issue the proper allocation of such sums to the quarters of coverage for which the "back pay" was allowed.

The respondent, Joseph Nierotko, was found by the National Labor Relations Board to have been wrongfully discharged for union activity by his employer, the Ford Motor Company, and was reinstated by that Board in his employment with directions for "back pay" for the period February 2, 1937, to September 25, 1939.¹ The "back pay" was paid by the employer on July 18, 1941. Thereafter Nierotko requested the Social Security Board to credit him in the sum of the "back pay" on his Old Age and Survivor's Insurance account with the Board.² In conformity with its minute of formal general action of March 27, 1942, the Board refused to credit Nierotko's "back pay" as wages. On review of the Board's decision,³ the District Court upheld the Board. The Circuit Court of Appeals reversed. — F. 2d —. On account of the importance of the issues in the administration of the Social Security Act, we granted certiorari.⁴ — U. S. —; Judicial Code § 240.

¹ N. L. R. A., Sec. 10(c), 49 Stat. 454.

² Social Security Act, Sec. 205(c)(3), 53 Stat. 1369.

³ Sec. 205(g).

⁴ The briefs of the Government advise us that more than thirty thousand individual employees were allowed "back pay" in "closed" cases by the National Labor Relations Board under Sec. 10(c), 49 Stat. 449, in the period 1939-1945. See *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 187, *Second*. The aggregate in money exceeded \$7,700,000 in the fiscal years 1939 to 1944 as shown by the reports of the N. L. R. B. for those years.

During the period for which "back pay" was awarded respondent the Federal Old Age benefits were governed by Title II of the Social Security Act of 1935. 49 Stat. 622. As Title II of the Social Security Act Amendments of 1939 became effective January 1, 1940 (53 Stat. 1362), the actual payment of the "back wages" occurred thereafter. In our view the governing provisions which determine whether this "back pay" is wages are those of the earlier enactment.⁵

Wages are the basis for the administration of Federal Old Age Benefits. 49 Stat. 622. Only those who earn wages are eligible for benefits.⁶ The periods of time during which wages were earned are important and may be crucial on eligibility under either the original act or the Amendments of 1939. See sec.

⁵ By the foregoing statement it is not intended to imply that the variations in the definitions of wages between the two enactments are significant on the issues herein considered. Sec. 209(b) of the Amendment recognizes possible differences in the meaning of employment: "(b) the term 'employment' means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210(b) of the Social Security Act prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him"

⁶ "Sec. 202. (a) Every qualified individual (as defined in section 210) shall be entitled to receive, with respect to the period beginning on the date he attains the age of sixty-five, or on January 1, 1942, whichever is the later, and ending on the date of his death, an old-age benefit (payable as nearly as practicable in equal monthly installments) as follows:

"(1) If the total wages (as defined in section 210) determined by the Board to have been paid to him, with respect to employment (as defined in section 210) after December 31, 1936, and before he attained the age of sixty-five, were not more than \$3,000, the old-age benefit shall be at a monthly rate of one-half of 1 per centum of such total wages;

(2) If such total wages were more than \$3,000, the old-age benefit shall be at a monthly rate equal to the sum of the following:

(A) One-half of 1 per centum of \$3,000; plus

(B) One Twelfth of 1 per centum of the amount by which such total wages exceeded \$3,000 and did not exceed \$45,000; plus

(C) One-twenty-fourth of 1 per centum of the amount by which such total wages exceeded \$45,000."

Sec. 210. "(c) The term 'qualified individual' means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He is at least sixty-five years of age; and

(2) The total amount of wages paid to him, with respect to employment after December 31, 1936, and before he attained the age of sixty-five, was not less than \$2,000; and

(3) Wages were paid to him, with respect to employment on some five days after December 31, 1936, and before he attained the age of sixty-five, each day being in a different calendar year."

210(c) and compare sec 209(g), 53 Stat. 1376.⁷ The benefits are financed by payments from employees and employers which are calculated on wages.⁸ The Act defines "wages" for Old Age benefits as follows:

"SEC. 210. When used in this title—

(a) The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash, . . ."

Employment is defined thus:

"(b) The term 'employment means any service, of whatever nature, performed within the United States by an employee for his employer, except—"

The tax titles of the Social Security Act have identical definitions of wages and employment.⁹ An employee under the Social Security Act is not specifically defined but the individual to whom the Act's benefits are to be paid is one receiving "wages" for "employment" in accordance with § 210(c) and employment is service by an "employee" to an "employer." Obviously a sharply

⁷ Sec. 209. "(g) The term 'fully insured individual' means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He had not less than one quarter of coverage for each two of the quarters elapsing after 1936, or after the quarter in which he attained the age of twenty-one, whichever quarter is later, and up to but excluding the quarter in which he attained the age of sixty-five, or died, whichever first occurred, and in no case less than six quarters of coverage; or

(2) He had at least forty quarters of coverage.

As used in this subsection, and in subsection (h) of this section, the term 'quarter' and the term 'calendar quarter' mean a period of three calendar months ending on March 31, June 30, September 30, or December 31; and the term 'quarter coverage' means a calendar quarter in which the individual has been paid not less than \$50 in wages. . . ."

⁸ 49 Stat. 636-37:

"Section 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum. . . ."

"Sec. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum. . . ."

⁹ Sections 811(a) and (b), and 907(b) and (c).

defined line between payments to employees which are wages and which are not is essential to proper administration.¹⁰

Under the National Labor Relations Act an employee is an individual "whose work has ceased . . . because of any unfair labor practice." Sec. 2(3), 49 Stat. 450. The enforcement provisions of the Labor Act under which Nierotko received his "back pay" allow the Labor Board to reinstate "employees" with "back pay." Sec. 10(c). The purpose of the "back pay" allowance is to effectuate the policies of the Labor Act for the preservation of industrial peace.¹¹

The purpose of the Federal Old Age Benefits of the Social Security Act is to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor.¹² Eligibility for these benefits and their amount depends upon the total wages which the employee has received and the periods in which wages were paid.¹³ While the legislative history of the Social Security Act and its amendments or the language of the enactments themselves do not specifically deal with whether or not "back pay" under the Labor Act is to be treated as wages under the Social Security Act, we think it plain that an individual, who is an employee under the Labor Act and who receives "back pay" for a period of time during which he was wrongfully separated from his job, is entitled to have that award of back pay treated as wages under the Social Security Act definitions which define wages as "remuneration for employment" and employment as "any service . . . performed . . . by an employee for his employer."

¹⁰ Provisions similar to those quoted are found in the Social Security Act Amendments of 1939. See sections 202(a), 202(e), 203(d), 209(a), (b), (e), (g), (h), and 601, 604, and 606 at 53 Stat. 1362 *et seq.*

¹¹ 49 Stat. 449:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

¹² See *Helvering v. Davis*, 301 U. S. 619, 641; H. Rep. No. 728, 76th Cong., 1st Sess., 3-4; S. Rep. No. 734, 76th Cong., 1st Sess., 3-4.

¹³ Under the Social Security Act of 1935, see sec. 202(a) and sec. 210(c), *supra*, note 6. Under the 1939 Amendments, see sec. 202 and 209(e), (f) and (g), 53 Stat. 1363, *et seq.*

Surely the "back pay" is "remuneration." Under Section 10(c) of the Labor Act, the Labor Board acts for the public to vindicate the prohibitions of the Labor Act against unfair labor practices (section 8) and to protect the right of employees to self-organization which is declared by section 7.¹⁴ It is also true that in requiring reparation to the employee through "back pay" that reparation is based upon the loss of wages which the employee has suffered from the employer's wrong. "Back pay" is not a fine or penalty imposed upon the employer by the Board. Reinstatement and "back pay" are for the "protection of the employees and the redress of their grievances" to make them "whole." *Republic Steel Corp. v. Labor Board*, 311 U. S. 7, 11, 12. "... a worker's loss in wages and in general working conditions must be made whole." A worker is not given "back pay" by the Board equal to what he would have earned with the employer but for the unlawful discharge but that sum less any net earnings during the time between discharge and reinstatement.¹⁵

Since Nierotko remained an employee under the definition of the Labor Act, although his employer had attempted to terminate the relationship, he had "employment" under that Act and we need further only consider whether under the Social Security Act its definition of employment, as "any service . . . performed . . . by an employee for his employer," covers what Nierotko did for the Ford Motor Company. The petitioner urges that Nierotko did not perform any service. It points out that Congress in considering the Social Security Act thought of benefits as related to "wages earned" for "work done."¹⁶ We are unable, however, to follow the Social Security Board in such a limited circumscription of the word "service." The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind import breadth of coverage. They admonish us against holding that "service" can be only productive activity. We think that "service" as used by Congress in this definitive phrase means not only work actually done but

¹⁴ *Virginia Electric Co. v. Labor Board*, 319 U. S. 533, 543.

¹⁵ *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 196, 198. See Third Annual Report, National Labor Relations Board, 202, n. 11; Eighth Annual Report 41, Ninth Annual Report 49. Nierotko's order was in this form, XIV N. L. R. B. 346, 410.

¹⁶ H. Rep. No. 615, 74th Cong., 1st Sess., pp. 6, 21, 32, and S. Rep. No. 628, 74th Cong., 1st Sess., pp. 7, 32.

the entire employer-employee relationship for which compensation is paid to the employee by the employer.¹⁷

An argument against the interpretation which we give to "service performed" is the contrary ruling of the governmental agencies which are charged with the administration of the Social Security Act. Their competence and experience in this field commands us to reflect before we decide contrary to their conclusion. The first administrative determination was apparently made in 1939 by an Office Decision of the Bureau of Internal Revenue on the problem of whether "back pay" under a Labor Board order was wages subject to tax under Titles VIII and IX of the Social Security Act which the Bureau collects.¹⁸ The back pay was held not to be subject as wages to the tax because no service was performed, the employer had tried to terminate the employment relationship and the allowance of back pay was discretionary with the Labor Board. Reliance for the conclusions was placed upon *Agwilines, Inc. v. National Labor Relations Board*, 87 F. 2d 146, which had held "back pay" a public reparation order and there-

¹⁷ For example the Social Security Board's Regulations No. 3 in considering "wages" treats vacation allowances as wages. 26 CFR, 1940 Supp., 402.227(b).

Treasury Department Regulations No. 91 relating to the Employees' Tax and the Employer's Tax under Title VIII of the Social Security Act, 1936, Art. 16, classifies dismissal pay, vacation allowances or sick pay, as wages. Regulations 106 under the Federal Insurance Contributions Act, 1940, pp. 48, 51, continues to consider vacation allowances as wages. It differentiates voluntary dismissal pay.

Our attention has not been called to any formal regulation of any governmental agency excluding "back pay" from wages. The Treasury Department has authority to issue regulations for Social Security taxes. Secs. 808 and 908, 49 Stat. 638, *et seq.*; I. R. C., Sec. 1429, 53 Stat. 178. So has the Social Security Board, sec. 1102, 49 Stat. 647, and sec. 205(a), 53 Stat. 1368. All authority for the promulgation of regulations limits the action to rules and regulations not inconsistent with the provisions of the various sections.

In regulations governing the collection of income taxes at source on or after January 1, 1945, 58 Stat. 247, the Bureau of Internal Revenue classified vacation allowances and dismissal pay as wages under the following statutory definition of wages:

"Sec. 1621. Definitions. As used in this subchapter—

(a) Wages. The term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remunerations paid—" See 26 CFR, 1944 Supp., 405.101(d) and (e).

¹⁸ I. R. B., 1939, 14-9776, S. S. T. 359. No regulations covering "back pay" under the Social Security Act have been found. They are authorized by §§ 808 and 908, 49 Stat. 638.

I. R. B., 1940, 1-22-10271, S. S. T. 389, an Office Decision, holds that amounts paid employees during absence on jury service to make their pay equivalent to regular salary are wages.

Though formal
action was
taken by the
Social Security
Board on
March 27, 1942,

fore not triable by jury as a private right for wages would have been. This position is maintained by the Social Security Board by minute of March 27, 1942. It is followed by the National Labor Relations Board which at one time approved the retention by the employer of the tax on the employees' back pay for transmission to the Treasury Department as a tax on wages and later reversed its position on the authority of the Office Decision to which reference has just been made. *Re Pennsylvania Furnace and Iron Co.*, 13 N. L. R. B. 49, 53(5), 54, 58.¹⁹

The Office Decision seems to us unsound. The portion of the *Agwilines* decision, which the Office Decision relied upon, was directed at the constitutional claim to a right of trial by jury. It stated that "back pay" was not a penalty or damages which a private individual might claim. But there ~~was~~ nothing in the opinion which supported the idea that the "back pay" award differed from other pay. Indeed the opinion said that "congress has the right to eradicate them [unfair practices] from the beginning." 87 F. 2d at 151, l.c. We think the true relation of awards of "back pay" to compensation appears in the *Republic Steel* and *Phelps-Dodge* cases, hereinbefore discussed.²⁰

But it is urged by petitioner that the administrative construction on the question of whether "back pay" is to be treated as wages should lead us to follow the agencies' determination. There is a suggestion that the administrative ~~conclusion~~ should be treated as conclusive. *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 130; *Gray v. Powell*, 314 U. S. 402, 411. In the acts which were construed in the cases just cited, as in the Social Security Act, the administrators of those acts were given power to reach preliminary conclusions as to coverage in the application of the respective acts. Each act contains a standardized phrase that Board findings supported by substantial evidence shall be conclusive.²¹ The validity of regulations is specifically reserved for judicial determination by the Social Security Act Amendments of 1939, sec. 205(g).

¹⁹ The states have largely followed the Bureau of Internal Revenue in their classification of "back pay." Some have disagreed. *Unemployment Insurance Service*, All State Treatise, C. C. H., Paragraph 1201. See *Robins Dry Dock v. Tonra*, 258 App. Div. 835, 283 N. Y. 676.

²⁰ This is the view of the Eighth Circuit when a "back pay" claim was presented in bankruptcy. *N. L. R. B. v. Killoren*, 122 F. 2d 609, 614.

²¹ National Labor Relations Act, 49 Stat. 453, sec. 10; Bituminous Coal Act of 1937, 50 Stat. 72, sec. 4-A; Social Security Act Amendments of 1939, secs. 205(c)(3) and (g).

The Social Security Board and the Treasury were compelled to decide, administratively, whether or not to treat "back pay" as wages and their expert judgment is entitled, as we have said, to great weight.²² The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to findings of fact. Both *Hearst Publications*, p. 131, and *Gray v. Powell*, p. 411, advert to the limitations of administrative interpretations. Administrative determinations must have a "reasonable basis in law" and the statute must be applied in a "just and reasoned manner." Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate of the legislative power. Congress might have declared that "back pay" awards under the Labor Act should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretive power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function.²³ Congress used a well understood word—"wages"—to indicate the receipts which were to govern taxes and benefits under the Social Security Act. There may be borderline payments to employees on which courts would follow administrative determination as to whether such payments were or were not wages under the act.

We conclude, however, that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit of the Social Security Act payments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation.

²² See *Sanford v. Com.*, 308 U. S. 39, 52; *Skidmore v. Swift & Co.*, 323 U. S. 134, 139-40.

²³ *School of Magnet Healing v. McAnnulty*, 187 U. S. 94, 110; *International Ry. Co. v. Davidson*, 257 U. S. 506, 514; *Iselin v. United States*, 270 U. S. 245; *Koshland v. Helvering*, 298 U. S. 441; *Federal Comm'n v. Broadcasting Co.*, 309 U. S. 134, 144-145; *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 489; *Helvering v. Credit Alliance Co.*, 316 U. S. 107, 113; *Helvering v. Sabine Trans. Co.*, 318 U. S. 306, 311-12; *Addison v. Holly Hill Co.*, 322 U. S. 607, 611, *et seq.*; cf. *Steuart & Bro. v. Bowles*, 322 U. S. 398, 403.

Petitioner further questions the validity of the decision of the Circuit Court of Appeals on the ground that it must be inferred from the opinion that the "back pay" must be allocated as wages by the Board to the "calendar quarters" of the year in which the money would have been earned, if the employee had not been wrongfully discharged. We think this inference is correct.²⁴ This conclusion, petitioner argues, tends to show that "back pay" cannot be wages because the Amendments of 1939 use "quarters" as the basis for eligibility as well as the measure of benefits and require "wages" to be "paid" in certain "quarters."²⁵

If, as we have held above, "back pay" is to be treated as wages, we have no doubt that it should be allocated to the periods when the regular wages were not paid as usual. Admittedly there are accounting difficulties which the Board will be called upon to solve but we do not believe they are insuperable.²⁶

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

²⁴ See *Nierotko v. Social Security Board*, 149 F. 2d 273, 274, r. c.

²⁵ See note 7, *supra*. The same problem would arise under the Social Security Act, 49 Stat. 625, sec. 210(c).

²⁶ The Social Security Board itself has recommended the inclusion of "back pay" in wages. Annual Report of the Federal Security Agency, Social Security Board (1945), sec. 5, p. 38:

"Certain items of income which are now not considered 'wages' under the definition in the act, should be included as wages, so that the base for benefits would represent the worker's actual remuneration from employment. These include tips, dismissal payments which the employer is not legally required to make but nevertheless does make, and payments made under orders of the National Labor Relations Board or a similar State board."

A pending bill, S. 1050, 79th Cong., 1st Sess., Part F, sec. 275, makes provision for the inclusion in wages under the Social Security Act of sums paid pursuant to the National Labor Relations Act.

"Back pay" is now treated distributively under the Internal Revenue Code. Sec. 119, Revenue Act of 1943, 53 Stat. 39.

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SUPREME COURT OF THE UNITED STATES.

No. 122.—OCTOBER TERM, 1945.

Julius Fisher, Petitioner,
vs.
The United States of America. } On Writ of Certiorari to the
United States Court of Ap-
peals for the District of Co-
lumbia.

[]

Mr. Justice REED delivered the opinion of the Court.

This writ of certiorari brings here for review the sentence of death imposed upon petitioner by the District Court of the United States for the District of Columbia after a verdict of guilty on the first count of an indictment which charged petitioner with killing by choking and strangling Catherine Cooper Reardon, with deliberate and premeditated malice. The United States Court of Appeals for the District of Columbia affirmed the judgment and sentence of the District Court. 149 F. 2d 28.

The errors presented by the petition for certiorari and urged at our bar were, in substance, that the trial court refused to instruct the jurors that they should consider the evidence of the accused's psychopathic aggressive tendencies, low emotional response and borderline mental deficiency to determine whether he was guilty of murder in the first or in the second degree. The aggregate of these factors admittedly was not enough to support a finding of not guilty by reason of insanity.¹ Deliberation and premeditation are necessary elements of first degree murder.

Consideration for a proper administration of justice (In view of the issue presented) induced us to grant the writ. Judicial Code, Section 240(a).

The homicide took place in the library building on the grounds of the Cathedral of Saint Peter and Saint Paul, Washington, D. C.,

¹ The Code of Law for the District of Columbia (1940 Ed.) provides as follows:

Title 22, section 2401, "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402 of this Code, rape, mayhem, robbery,

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on March 1, 1944. The victim was the librarian. The petitioner was the janitor. The petitioner testified that Miss Reardon was killed by him immediately following insulting words from her over his care of the premises. After slapping her impulsively, petitioner ran up a flight of steps to reach an exit on a higher level but turned back down, after seizing a convenient stick of firewood, to stop her screaming. He struck her with the stick and when it broke choked her to silence and death.

The effort of the defense is to show that the murder was not deliberate and premeditated; that it was not first but second degree murder. The evidence, it is agreed, would be sufficient to support a verdict of murder in the first degree, if petitioner was a normal man in his mental and emotional characteristics. Cf. *Bostic v. United States*, 94 F. 2d 636, 638. But the defense takes the position that the petitioner is fairly entitled to be judged as to deliberation and premeditation, not by a theoretical normality but by his own personal traits. It is the contention of the defense that the mental and emotional qualities of petitioner were of such a level at the time of the crime that he was incapable of deliberation and premeditation although he was then sane in the usual legal sense. He knew right from wrong. See The M'Naghten Rules, 10 C. and F. 200, 210. His will was capable of controlling his impulses. *Smith v. United States*, 36 F. 2d 548. Testimony of psychiatrists to support petitioner's contention was introduced. An instruction charging the jury to consider the personality of the petitioner in determining intent, premeditation and deliberation was sought and refused.

From the evidence of the psychiatrists for the defense, the jury might have concluded the petitioner was mentally somewhat below the average with minor stigmata of mental subnormalcy. An expert testified that he was a psychopathic personality² of a pre-

or kidnapping, or in perpetrating or in attempting to perpetrate any house-breaking while armed with or using a dangerous weapon, is guilty of murder in the first degree."

Title 22, section 2403, "Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree."

Title 22, section 2404, "The punishment of murder in the first degree shall be death by electrocution. The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years."

²"The only conclusion that seems warrantable is that, at some time or other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character." Curran and Mallinson, *Psychopathic Personality* (1944), 90 J. Ment. Sci. 278.

dominantly aggressive type. There was evidence that petitioner was unable by reason of a deranged mental condition to resist the impulse to kill Miss Reardon. All evidence offered by the defense was accepted by the trial court. The claimed error is limited to the refusal of the one instruction. Of course, in view of the status of the defense of partial responsibility in the District and the nation no contention is or could be made of the denial of due process. The prosecution had competent evidence that petitioner was capable of understanding the nature and quality of his acts. Instructions in the usual form were given by the court, which are unchallenged, submitting to the jury the issues of insanity, irresistible impulse, malice, deliberation and premeditation. Under the instructions the jury could have determined from the evidence that the homicide was not the result of premeditation and deliberation.

However, such a result could not have been reached on the theory of partial responsibility³ for his acts which the petitioner urges. Petitioner sought an instruction from the trial court which would permit the jury to weigh the evidence of his mental deficiencies, which were short of insanity in the legal sense, in determining the fact of and the accused's capacity for premeditation and deliberation.⁴ The appellate court approved the refusal upon the alternate ground that an accused is not entitled to an instruction upon petitioner's theory.⁵ This has long been the law of the District of Columbia.⁶ This is made abundantly clear by *United States v.*

³ The phrase is used herein to indicate responsibility for a lesser grade of offense. See Glueck, *Mental Disorder and the Criminal Law* (1925) 310, n. 1.

⁴ The instruction requested reads as follows:

"The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case."

Our conclusion does not require that we pass upon whether the instruction was correct if petitioner's theory is sound, or whether if incorrect, the judge should have recast the instruction in proper form. See the case below, 149 F. 2d 28, 29 r. c. Compare *Freihage v. United States*, 56 F. 2d 127, 133, with *George v. United States*, 125 F. 2d 559, 563.

⁵ *Fisher v. United States*, 149 F. 2d 28, 29 l. c.

The Court of Appeals spoke of an acquittal under the proposed instruction. The other language of the opinion and the refusal of the petition for rehearing, which pointed out the misuse of the word, shows clearly that a reduction in degree was meant, not an acquittal.

⁶ Cf. *Guiteau's Case*, 10 Fed. 161, 168, 182; *Bolden v. United States*, 69 F. 2d 131; *Owens v. United States*, 85 F. 2d 270, 272.

Lee, 4 Mackey 489, 495. This also was a murder case in which there was evidence of mental defects which did not amount to insanity. An instruction was asked and denied in the language copied in the margin.⁷

It is suggested that the *Lee* case was decided when murder under the District law was not divided into degrees and that therefore it was not proper to instruct as to the accused's mental capacity to premeditate and deliberate while now it would be. We do not agree. The separation of the crime of murder into the present two degrees by the code of law for the District of Columbia, March 3^d, 1901, 31 Stat. 1189, 1921, is not significant in analyzing the necessity for the proposed submission of the evidence concerning petitioner's mental and emotional characteristics to the jury by specific instruction. The reason for the change, doubtless, lay in the wide range of atrocity with which the crime of murder might be committed so that Congress deemed it desirable to establish grades of punishment. Cf. *Davis v. Utah Territory*, 151 U. S. 262, 267, 270. Homicide, at common law, the rules of which were applicable in the District of Columbia, had degrees. Murder was "with malice aforethought, either express or implied." *Hill v. United States*, 22 App. D. C.

⁷ 4 Mackey 495-96:

The instruction requested was: "If the jury are not satisfied from the evidence that the defendant, at the time he committed the act, was so mentally unsound as to render him incapable of judging between right and wrong; yet if the jury find from the evidence that there was such a degree of mental unsoundness existing at the time of the homicide as to render the defendant incapable of premeditation and of forming such an intent as the jury believe the circumstances of this case would reasonably impute to a man of sound mind, they may consider such degree of mental unsoundness in determining the question whether the act was murder or manslaughter."

The court said: "It rests upon the idea that there is a grade of insanity not sufficient to acquit the party of the crime of manslaughter and yet sufficient to acquit him of the crime of murder.

"The law does not recognize any such distinction as that in the forms of insanity. The rule of law is very plain that in order that the plea of insanity shall prevail, there must have been that mental condition of the party which disabled him from distinguishing between right and wrong in respect of the act committed.

"Now if the prisoner was so far capable of distinguishing between right and wrong as to be guilty of the crime of manslaughter, he surely was capable of distinguishing between right and wrong in respect of the crime of murder of the identical party. There can be no recognition of the doctrine that a man is incapable of distinguishing between right and wrong so as to determine that the case is not a case of murder, and yet capable of distinguishing between right and wrong so as to be guilty of manslaughter. There is no such doctrine, and nothing in the books that favors any such idea. The prayer therefore is unsound in all respects, and even if it had been sound, not being supported by evidence, the court below was entirely justified in rejecting it."

395, 401; *Hamilton v. United States*, 26 App. D. C. 382, 386-91; *Burge v. United States*, 26 App. D. C. 524, 527-30. Manslaughter was unlawful homicide without malice. Blackstone, Book IV, p. 191. As capacity of a defendant to have malice would depend upon the same kind of evidence and instruction which is urged here,⁸ it cannot properly be said that the separation of murder into degrees introduced a new situation into the law of the District of Columbia.⁹ As shown by the action of the District of Columbia courts in this case and the others cited in this and the preceding paragraph, we think it is the established law in the District that an accused in a criminal trial is not entitled to an instruction based upon evidence of mental weakness, short of legal insanity, which would reduce his crime from first to second degree murder.

Petitioner urges forcefully that mental deficiency which does not show legal irresponsibility should be declared to be a relevant factor in determining whether an accused is guilty of murder in the first or second degree, upon which an instruction should be given, as requested. It is pointed out that the courts of certain states have adopted this theory. Others have rejected it.¹⁰ It is

⁸ See *Hart v. United States*, 130 F. 2d 456, 458; *Bishop v. United States*, 107 F. 2d 297, 302-3; *McHargue v. Commonwealth*, 231 Ky. 82; *State v. Eaton*, 154 S. W. 2d 767 (Mo.).

⁹ The reference to the establishment of degrees of murder in *Hopt v. People*, 104 U. S. 631, 634, may indicate a different point of view. The Court was there considering intoxication under a statutory requirement that the intoxication should be taken into consideration by the jury in determining the degree of the offense.

¹⁰ We are indebted to the respondent's brief for the collection of cases. Those accepting the petitioner's theory are: *Andersen v. State*, 43 Conn. 514, 526 (1876); *State v. Johnson*, 40 Conn. 136, 143-44 (1873); *Fisher v. People*, 23 Ill. 283, 295 (1860); *Donahue v. State*, 165 Ind. 148, 156 (1905); *Aszman v. State*, 123 Ind. 347, 356 (1889); *Rogers v. Commonwealth*, 96 Ky. 24, 28 (1894); *Mangrum v. Commonwealth*, 19 Ky. Law Rep. 94 (1897); *Commonwealth v. Trippi*, 268 Mass. 227, 231 (1929); *State v. Close*, 106 N. J. L. 321, 324 (1930); *State v. Schilling*, 95 N. J. L. 145, 148 (1920); *People v. Moran*, 249 N. Y. 179, 180 (1928); *Jones v. Commonwealth*, 75 Pa. 403, 408, 410 (1874); *State v. Green*, 78 Utah 580, 602 (1931); *State v. Anselmo*, 46 Utah 137, 145, 157 (1915); *Dejarnette v. Commonwealth*, 75 Va. 867, 880-81 (1881); *Hempton v. State*, 111 Wisc. 127, 135 (1901).

Those rejecting it are: *United States v. Lee*, 15 D. C. (4 Mackey) 489, 495-96 (1886); *Foster v. State*, 37 Ariz. 281, 289-90 (1930); *Bell v. State*, 120 Ark. 530, 557-58 (1915); *People v. French*, 12 Cal. 2d 720, 738 (1939); *People v. Cordova*, 14 Cal. 2d 308, 311-12 (1939); *People v. Troche*, 206 Cal. 35, 47 (1928); *State v. Van Vlack*, 57 Idaho 316, 360-67 (1937); *Sage v. State*, 91 Ind. 141, 144-45 (1883); *Spencer v. State*, 69 Md. 28, 41-43 (1888); *Commonwealth v. Cooper*, 219 Mass. 1, 5 (1914); *State v. Holloway*, 156 Mo. 222, 231 (1900); *State v. Rodia*, 132 N. J. L. 199 (1944); *State v. Noel*, 102 N. J. L. 659, 676-77 (1926); *State v. James*, 96 N. J. L. 132, 149-51 (1921);

6 urged, also, that since evidence of intoxication to a state where one guilty of the crime of murder may not be capable of deliberate premeditation requires in the District of Columbia an instruction to that effect (*McAffee v. United States*, 111 F. 2d 199, 305 r.c.), courts from this must deduce that disease and congenital defects, for which the accused may not be responsible, may also reduce the crime of murder from first to second degree. This Court reversed the Supreme Court of the Territory of Utah for failure to give a partial responsibility charge upon evidence of drunkenness in language which has been said to be broad enough to cover mental deficiency. *Hopt v. People*, 104 U. S. 631, 634.¹¹ It should be noted, however, that the Territory of Utah had a statute specifically establishing such a rule.¹²

No one doubts that there are more possible classifications of mentality than the sane and the insane. White, *Insanity and the Criminal Law* 89. Criminologists and psychologists have weighed the advantages and disadvantages of the adoption of the theory of partial responsibility as a basis of the jury's determination of the degree of crime of which a mentally deficient defendant may be guilty.¹³ Congress took a forward step in defining the degrees of

State v. Maioni, 78 N. J. L. 339 (1909); *Sindram v. People*, 88 N. Y. 196, 200-201 (1882); *Commonwealth v. Barner*, 199 Pa. 335, 342 (1901); *Commonwealth v. Hollinger*, 190 Pa. 155, 160 (1899); *Commonwealth v. Wireback*, 190 Pa. 138, 151-52 (1899); *Jacobs v. Commonwealth*, 121 Pa. 586, 592-93 (1888); *Commonwealth v. Scott*, 14 Penna. District & County Rep. 191 (1930); *Witty v. State*, 75 Tex. Cr. Rep. 440, 457 (1914); *Hogue v. State*, 65 Tex. Cr. Rep. 539, 542 (1912); *State v. Schneider*, 158 Wash. 504, 510-11 (1930).

¹¹ 104 U. S. at 634: "But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."

See Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 Harv. L. Rev. 535 at 552.

The cases cited by this Court to support this statement are all instances of intoxication. Since drunkenness alone is specifically mentioned, the "or otherwise" may refer to various stages of intoxication.

¹² See 104 U. S. 631 at 634.

¹³ Wharton, *Criminal Law* (12 ed.), vol. 1, sec. 64; Weihofen, *Insanity as a Defense in Criminal Law* (1933), pp. 100-103; Weihofen, *Partial Insanity and Criminal Intent*, 24 Ill. Law Rev. 505 (1930); Keedy, *Insanity and Criminal Responsibility*, 30 Harv. Law Rev. 535, 552-554 (1917); Mental Abnormality and Crime, *English Studies in Criminal Science* (1944), pp. 61-63; Glueck, *Mental Disorder and the Criminal Law* (1925), pp. 199-208; Mental Disease and Criminal Responsibility, 45 Col. Law Rev. 677 (1945).

murder so that only those guilty of deliberate and premeditated malice could be convicted of the first degree. It may be that psychiatry has now reached a position of certainty in its diagnosis *and prognosis* which will induce Congress to enact the rule of responsibility for crime for which petitioner contends. For this Court to require the District of Columbia to adopt such a requirement for criminal trials would involve a fundamental change in the common law theory of responsibility.

We express no opinion upon whether the theory for which petitioner contends should or should not be made the law of the District of Columbia. Such a radical departure from common law concepts is more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District. The administration of criminal law in matters not affected by Constitutional limitations is a matter peculiarly of local concern. Compare *McNabb v. United States*, 318 U. S. 332, with *Ashcraft v. Tennessee*, 322 U. S. 143, 156. This Court has in a less important matter undertaken to adjust by decision an outmoded rule of the common law to modern conditions. But when that step was taken, it was declared that "experience has clearly demonstrated the fallacy or unwisdom of the old rule." *Funk v. United States*, 290 U. S. 371, 381. See *Weiler v. United States*, 323 U. S. 606, 609. Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere. *District of Columbia v. Pace*, 320 U. S. 698, 702; *Busby v. Electric Utilities Union*, 323 U. S. 72, 74-5. We shall not do so here.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

*or a general
federal law*