

Frankfurter, Felix 1939

ASF
Frankfurter
July 20 1928
Law School of Harvard University,
Cambridge, Mass.

file personal
July 27 29
L

Re: being

If, by any chance,
the President has not
yet seen this, he
will want to

And a good head for
logos. Very sincerely
JF

Where Roosevelt And Hoover Agree



Both Planning to Guard Their Books and
Papers Against the Unhappy Fate of Other
Presidential Collections

By JAMES MORGAN

IN the announcement of his interesting plan to build a library at Hyde Park for his books and papers, President Roosevelt incidentally gave the political gossips a broad hint. The plain implication is that he is thinking of packing up and going home in two years rather than staying in the White House six years more until the end of a third term.

After breaking many precedents Mr. Roosevelt is following an old, uniquely American and wholesome tradition. On stepping down from their high station our Presidents have all returned immediately to the citizenry whence they came. With the exception of Wilson they have lost little time in quitting the capital. Most of them have been shy through after years about reappearing on the scene of their departed greatness, and some have morbidly shunned it. They would rather be first in their old home town than second in Rome.

"What's this place?" Grover Cleveland is said to have inquired as he looked up from his hand of cards with an air of annoyance at the stopping of the train on which he was returning from a hunting trip. "Washington," he was informed by a partner in the game, after which he went on playing without deigning to glance out the car window at the locale of his eight years of power and fame.

Where Roosevelt and Hoover Agree

In looking forward to a retirement at Hyde Park with his books and papers about him, Mr. Roosevelt is following the example of all his predecessors save the one exception noted. At the same time he is wisely departing from the example of all but one of them in making due provision for the safeguarding and for the public use of his library and the documents of his political career. Here, if nowhere else, he is in agreement with Mr. Hoover, who took like thought of his treasures.

Mr. Hoover has been the most notable collector in the Presidential line since Jefferson. In the course of his travels in far lands he improved the opportunity to pick up rare volumes and prints. To the library of his alma mater, Stanford University, he has given an important assemblage of books and pictures on the subject of China and the Chinese. In a projected \$600,000 special library that is to tower more than 200 feet above the campus of his college days, which he overlooks from his present home, he will deposit his immense accumulation of documents relating to the World War. Presumably the accretions of his Presidential period will also find lodgment somewhere at Stanford.

Warning Examples

The books and papers of many of the Presidents were left to be scattered among heirs, who often neglected them in attics or bolstered their fallen fortunes by peddling them for pittance in the marketplace. I used to see at the windows of a shabby old house in a Virginia village the faces of two ancient

tion in the Library of Congress. A third collection, which the aged ex-President made in his last years, was willed by him to his darling University of Virginia; but this had to be sold at auction to pay the debts of the estate, and thus it was dispersed in private hands.

After a stepson of James Madison had wasted the substance of that President, the only property which remained to his mother, Dolly Madison, was the library of her husband. In her home, where she looked across Lafayette Square to the White House over which she had brilliantly reigned as its mistress, Dolly was in such poverty as to move Daniel Webster and other sympathetic neighbors to contribute baskets of provisions to her lean larder. Finally a reluctant Congress bought her hoard of books and papers for \$20,000, with the precaution that it be doled out to her by trustees lest it slip through the butter-fingers of her wastrel son.

With an important exception, Lincoln's books and papers are adrift in a market greedy to gobble them up. Those which came into the possession of his son, Robert T., were deposited by him in the Library of Congress. But he was so obsessed with a zeal to protect them from the public gaze that he refused Beveridge permission to consult them in the preparation of his Lincoln biography, and he sealed them until 1947.

Grant's library wandered across the country in the trail of its inheritor, Ulysses Jr., who placed it on exhibition as a drawing card in his U. S. Grant Hotel in San Diego. Presently it found a more fitting repository in that city, the California Building in Balboa Park.

Theodore Roosevelt's rich accumulation of books and letters remains in possession of his widow at Oyster Bay, as Woodrow Wilson's is in the jealous custody of Mrs. Wilson in Washington. Most of the contents of the 40 boxes which Coolidge brought back to Northampton are now stowed away in a wooden, barn-like addition to his paternal cottage at Plymouth Notch, which he built for the purpose.

The F. D. Plan

Happily Mr. Roosevelt is adopting measures against the fate which befell the literary remains of so many of his predecessors. The President proposes the erection of a suitable building for his collection near the family homestead. Toward the cost of that fireproof structure he will contribute the royalties on his recent publication of his *Public Papers*, and he hopes the remainder of the expense will be met by private contributions to a fund which is starting. The ownership of the contents of the proposed building would be vested in the Federal Government and placed under the Archivist of the United States, with the supervision of the librarian of Congress and a committee of historians.

The President thinks that other members of his Administration will deposit their papers with his and thus make a fairly complete

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Warning Examples

The books and papers of many of the Presidents were left to be scattered among heirs, who often neglected them in attics or bolstered their fallen fortunes by peddling them for pittance in the marketplace. I used to see at the windows of a shabby old house in a Virginia village the faces of two ancient and impoverished spinsters, who would have been royal duchesses in another land, as they were of the blood of George Washington.

If living today those Misses Washington would be receiving old-age assistance. Unfortunately for them, this country still was until recently a stranger to that simple measure of common decency. They were too proud to ask for private charity, and the necessities of existence had to be tactfully smuggled in to them by thoughtful neighbors. One day they were found feeding a roaring bonfire with "old things" out of two antique trunks, and the villagers still are wondering what precious Washingtoniana may have gone up in those flames.

A large portion of the books and papers of the Father of His Country descended to a grandnephew, who sold this inheritance cheap to an English trader. That was some 90 years ago, and they were bought back by the Boston Athenaeum. Thanks to that narrow chance, the most important assemblage of the Mt. Vernon library was saved from shipment abroad and came to rest in this city.

Scattered Treasures

John Adams' library was given by him to the town of Quincy, which wisely and unselfishly decided in 1893 that it would be more secure and useful in the keeping of the great Boston Public Library. It is only some 10 years ago that the John Quincy Adams library, which is housed in a stone building in the yard of the Presidents' House in Quincy, became part of a public memorial through the generosity of the family.

The story of Jefferson's library is a sorrowful one. He was a born bibliophile and he pursued this passion not only in the United States but as well in Paris, London, Madrid, Amsterdam and Frankfurt. As an act of charity toward the author of the Declaration in his impecunious old age Congress purchased his books in 1815 for \$23,950. On the high authority of Mr. A. S. W. Rosenbach, that was probably one-fourth of what it was worth at the time. Yet, as Mr. Rosenbach says in a paper published by the American Antiquarian Society at Worcester, some Congressmen scrupled to vote for the stingy appropriation and lifted up their voices in holy horror at the "immoral, indecent, irreligious and generally revolutionary character" of the collection.

Fire was an enemy that relentlessly pursued Jefferson's books. His earlier collection was destroyed in the burning of his birthplace at Shadwell, when he was met on his return home by a slave with the rejoicing assurance that "we saved your fiddle." Another fire in 1851 consumed the larger part of his collec-

tion. Most of the contents of the 40 boxes which Coolidge brought back to Northampton are now stowed away in a wooden, barn-like addition to his paternal cottage at Plymouth Notch, which he built for the purpose.

The F. D. Plan

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The President thinks that other members of his Administration will deposit their papers with his and thus make a fairly complete documentation of the New Deal era. He intends that not only the library but his home also shall pass to the Government at his death to "be maintained for the benefit of the public by the Federal Government." That is where the plan breaks with custom.

All the dwelling places of his predecessors which have been made into memorials are under local control. Most of them were purchased and are conducted by private associations. That was the model set at Mt. Vernon, and it has been followed generally.

Congress is capable of gross carelessness. It is conceivable that in the course of a long future a voluntary organization would be a more faithful custodian of Hyde Park than one as far removed as the Government at Washington is.

Back to the Old Home Town

Caught in the irresistible process of a remorseless centralization of political, industrial and financial power, we Americans remain nonetheless sentimentally localized. We persist, if you please, a nation of villagers, as George Bernard Shaw called us. Pity the denizen pent up in any of our huge cities who has no day dream of going back to some loved countryside. No American would enter battle with Lord Nelson's cry of "the peerage or Westminster Abbey." We have neither, and more likely our heroes in the past have stepped into the imminent, deadly breach with a thought of returning or being borne in honor to the old home town.

Arlington National Cemetery, that encampment of the heroic dead, is a sign of changing times which cannot be ignored. Already a President lies there under the gravestone of William Howard Taft. The only other to find sepulture within sight of the Capitol was Woodrow Wilson, who rests in a chapel of the unfinished cathedral on Mt. St. Albans. As for all the others, a pilgrim would have to journey into 12 states, from Concord, N. H., to Springfield, Ill., in a visit to their graves on remote farms or in obscure cemeteries, with only a few in large cities.

Now comes Franklin D. Roosevelt, after having led in the most intensive development of national supremacy since the Civil War, to testify his loyalty to the old, familiar American way. The Library of Congress is forming a collection of the books and papers of the Presidents, and it or the new Archives Building is the most appropriate and accessible place for them. Yet Mr. Roosevelt, in deciding against both those Governmental repositories in favor of Hyde Park, is following the longer tradition. He is going back home, and he wants to take his belongings with him.

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file
personal

[1937] ~~July 1937~~
PSF
Frankfurter heard orally -
Supreme Court of the United States
Washington, D. C. ✓

Dear Hand:

It may be, as some
call it respectfully a
gesture, but your letter
to the Pope - with the si-
milar letter to the other
two - is one of those historic
featuers of Compassion,
courage, and faith, ap-
proprately phrased with
beauty, which help keep
aloft the aims and
achievements of civi-
lization, and thereby -

in the good time of Providence
give me the patience
and purpose to persist
in vindicating those
elemental and eternal
human values ^{that are} en-
shrined in the Sermon
on the Mount.

And so, in common
with all those upon
whom I rely, I am
I am grateful.

Said July 1942
S.T.

BF Frankfurter ~~Letter~~

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FELIX FRANKFURTER
CAMBRIDGE, MASS.

file
personal

[1-4-39]

192 Brattle Street
Kates

Dear Frank:

And now I have the highest
authority in the land to prove that
there much malign me who say that
I'm a talker. You will testify that
you found me tongue-tied. How
could I have responded to your
gracious phone message otherwise
than to be moved to mumbling
silence. When so much is involved
of past and future it would
shrivel great things into mere
to speak of "honor" and "confi-
dence" and all that. Believe
me that I am humbly aware
of the consecrated land that you
have laid upon me. And to have
it at your hands - with all that
you signify for my most precious
devotions to this country - is to sacri-
fice land with its due and significant
with the affectionate devotion of old friends.

Lucy Pico PSF Frankfurter

TELEGRAM

59WUAB 22 11:30 p.m.

The White House
Washington

*file
Personal
under
"Frankfurter"*

TDB Cambridge, Mass., Jan. 6, 1939.

THE PRESIDENT:

Says Marion "I hope you'll be on the stand for days so that
I can learn something about you".

Unsigned.

*2 an
Frankfurter*

TELEGRAM

Security File

RF Frankfurter

The White House

Washington

5WUAB 18

TDB., Cambridge, Mass., Jan. 7, 1939.

THE PRESIDENT:

Our new Mr. Dooley went over big and being still a free man I
glory in Young Hickory.

Felix Frankfurter.

file personal ✓

Kate School of Harvard University,
Cambridge, Mass.

January 16, 1939

~~Frankfurter~~
PSF
Frankfurter

My dear Mr. President:

You and I have at least one strong prejudice in common, namely a fastidious regard for hallowed precedents, even when their observance entails inability to enjoy a pleasure which was gaily and deeply anticipated. That's the nature of this hard world.

And so I am bound to report the sad findings of a meticulous and arduous research on my part. With every desire to discover the contrary, I must report that I find no exception to the rule that no Associate Justice-Designate, before he became a full-fledged member of the Court, has ever attended the dinner given by the Chief Executive to members of the Supreme Court. The records are not clear whether this practice carries out a "theory" or a "principle" of the American constitutional system. Certain it is that there is no deviation in practice. Such hallowed customs should not suddenly be broken in upon.

I will not add to the poignancy of our grief by dwelling further, at least in words, over our sad inability to attend the dinner to which we were so graciously bidden.

God, the President and the Senate willing, perhaps our opportunity to attend such a dinner is not forever barred.

Respectfully yours,

Frankfurter

The President

TELEGRAM

*Julia Lee PSF
Frankfurter*

17WUAB 14 4:22 p.m. **The White House**
Washington

Cambridge, Mass., Jan. 17 , 1939.

Marguerite LeHand:

We are taking the Federal tomorrow night arriving in Washington
Thursday morning warmest regards.

Felix Frankfurter

~~Supreme Court~~ Frankfurter [1-30-39]
PSF
Thursday

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

Clipping from London
Daily Telegraph is in clipping
book (Vol 2. Foreign)

Dear Russ

Two things:

1. My warmest con-
gratulations on your
new Circuit judges.
It is a grand batch of
names - and sets
the right traditions to be
followed.
2. Just remember
my Australian Justice
Ewart, from whom the
Enclosure comes.
Ever yours
FF.

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~~Friday 21st~~
PSF Frankfurter January 30, 1939

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

Alan Rankin

In the unequivocal ways
of faith, the Webster County
Querein and the Vicerine
Querein have for de-
cades pursued the same
directions of devotion to
our beloved Country. And
now, on your blessed
birthday I am given the
gift of opportunity for
service to the Nation which,
in any circumstances
would be arising, but
which I would rather

have had at your hands
than at those of any other
President having only
Lincoln.

This is my first writing
as an Associate Justice
and it brings you
my affectionate good
wishes.

Yours
Hein Kautz

11-17-9

PSF

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

fill
personal
Frankfurter
Haley
P.S. 7
Ap. 13

Personal

The President,

The White House

By hand

*Felix
Frankfurter*

July file

*PSF
Frankfurter
9-2-39*

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

March 8, 1939

Dear Missey:

The enclosure comes to me from my dear friend Dr. Cohn, who is a member of the China Medical Board. While the document is confidential, it struck me that the President would be interested in seeing it, even though its contents will not be entirely new to him, before I return it. May I trouble you, therefore, to send it back to me as soon as may be?

Very cordially,

FF

Miss Marguerite LeHand

Enclosure

P.S. Who's Who indicates sufficiently the facts about the writer, Dr. John Leighton Stuart.

FF

~~July 1930~~ PSF
Frankfurter

March 13, 1930.

Dear Mr. Justice:-

The President asks me to
return the enclosed to you and to thank
you for letting him see it.

With kindest regards,

Always sincerely,

M. A. Le Hand
PRIVATE SECRETARY

Honorable Felix Frankfurter,
Associate Justice of the Supreme Court of the U. S.,
Supreme Court,
Washington, D. C.

Daily File

PEI

PSF
Frankfurter

March 14, 1939.

My dear Major Frankfurter:-

Your effort to retire from the United States Army at this time of crisis has been rejected.

If instead of consulting the words of Cicero (a mere talker) to find the motto "inter leges arma silent", you had consulted the famous phrase of Major General Caesar (a doer), "leges impellent arma", i. e., laws make for war -- you would see that it is more essential than ever that you remain in the Army.

I am enclosing a memorandum from the Chief of Staff, which I take it results from a three day consideration of your case by the whole general staff.

I regret that it is impossible at this moment to consider you for promotion to the rank of Lieutenant Colonel. I am informed that this will depend somewhat on your conduct during the next few years.

If shortly before January 20, 1941, you will re-submit your request for promotion, I shall be glad to act on it one way or the other before I retire as Commander-in-Chief of the Army and Navy in favor of Senator Nye.

With great respect, I am, Sir,

Commander-in-Chief

Major Felix Frankfurter, U.S.A., Res.,
3624 Prospect Avenue, N.W.,
Washington, D. C.

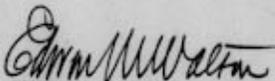
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THE WHITE HOUSE
WASHINGTON

March 13, 1939.

MEMORANDUM FOR THE PRESIDENT:

I spoke to the Chief of Staff regarding Justice Frankfurter's resignation. He and the entire War Department, including myself, are most anxious to retain the Justice in the Service. It is a great tribute and distinction for the Army and will help the Reserve Corps.

I attach a letter from General Craig, expressing the War Department's viewpoint.


EDWIN M. WATSON

Colonel, F.A.
Military Aide to The President.

THE WHITE HOUSE
WASHINGTON

March 10, 1939.

MEMORANDUM FOR
COLONEL WATSON

Will you speak to me
about this?

F. D. R.

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March 11, 1939.

MEMORANDUM FOR COLONEL WATSON:

With reference to the attached resignation from the Officers' Reserve Corps, it is my earnest hope that The President may prevail upon Justice Frankfurter to reconsider his action.

Retention of his commission is not inconsistent with his office. The President is a member of our military forces, not only in this instance by his position as Commander-in-Chief, but also by reason of his sympathy and interest.

Justice Frankfurter can be assigned to the General Assignment Group which is comprised of Members of Congress and other high executives of the federal government. The War Department administers that group with recognition of the complete precedence of their civil obligations during both peace and war.

The retention of their commissions by that group is advantageous to the government. Though not generally known by any military title they retain an interest in military subjects on which quite properly their opinion is respected by intimate colleagues.

Should Justice Frankfurter withdraw his resignation, he would remain the only member of the Supreme Court in the Officers' Reserve Corps. Pride of profession makes me believe he thereby would not create an unbecoming precedent for the Supreme Court. I know he would honor the Reserve Corps by his action.

Chief of Staff.

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

March 8, 1939

Dear C-1-C:

Inter leges arma silent was not a maxim of the hard-headed Romans. Nevertheless, under the circumstances, it is, I suppose, sensible for me to lay down my paper arms by resigning my commission as a Major in the Reserve Corps.

There is probably some official in the War Department to whom I might appropriately make this martial communication, but I should like to salute once more my Commander-in-Chief before Senator Nye takes away his constitutional powers!

With great respect, I am, Sir,

Faithfully yours,

Felix Frankfurter

Major, J.A.G.-Res.

The President

*file
plus mail*

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*PSF
Frankfurter*

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

March 14, 1939

The Honorable, Franklin D. Roosevelt,
Commander-in-Chief of the Armed Forces
of the United States.

Sir:

Even though it be couched in the unlaconic language
appropriate for the judicial mind, I recognize a military
order when issued; and so

I remain, Sir,

Obediently and martially yours,

Felix Frankfurter
Lieutenant Colonel in spe, J.A.G.-Res.

The President

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~~July 7th~~

PSF

[6]

Frankfurter Appendix

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

File 1939

Mr. Frank

Personal

You done three
sweet things - the
Hayden and Leiden
nominations and
your Reorganization
Order, with its message
to Congress. There are
things that continue
to give proof that de-
mocracy can function.
I'm glad that Kottian
has it. Last discovered

See Hitler wants to
dominate. Who needs
that the British are
right!

Carl Gustaf
1911

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PSF
Frankfurter

Sunday

3624 PROSPECT AVENUE

[4-15-37]

Dear France -

Your messages
to Hitler and Mussolini
were not words
but acts - the most
potent of acts, the
mobilization of the
moral forces of the
world. Prayers must
be going up for
your success in this

Endeavor to save the
world from consi-
derable self-destruc-
tion.

And you were
cunningly delicious
last night.

"It is a joy &
satisfaction to have
a cultivated gentle-
man in the White House."

Roberts J. (with Emphases)

"By God it is"

Emphases

P. d. F. F. F. Ep. 13 Frankfurter

THE WHITE HOUSE
WASHINGTON

May 3, 1939.

MEMORANDUM FOR

F. F.

I have had a bad time picking a Librarian to succeed Putnam. What would you think of Archie MacLeish? He is not a professional Librarian nor is he a special student of incunabula or ancient manuscripts. Nevertheless, he has lots of qualifications that said specialists have not.

What do you think? You might consult with Sam Morison and any other Twentieth Century minds you think useful. I assume you will not revert to the Nineteenth Century in making your recommendation!

F. D. R.

[5-5-39]

Supreme Court of the United States.

Memorandum.

file plus mem

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Dear Miss

Please bring this
item along to the President's
office. It was the President's
intercession, as he
will recall, that saved
Lorwin's life at least
from torture and,
probably, death.

V.L.

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 motions and appointments at the Yale School of Forestry, effective on July 1. These staff changes have been occasioned by the retirement of Dean Henry S. Graves and the death of Professor Ralph C. Bryant. As previously announced, Professor Samuel J. Record has been named dean of the school. He will also carry the title of Pinchot professor of forestry. Dr. George A. Garratt, associate professor of forest products, has been appointed Manufacturers' Association professor of lumbering, to fill the vacancy created by the death of Professor Bryant. Dr. Harold J. Lutz, assistant professor of forestry since 1933, has been promoted to an associate professorship. Dr. Walter H. Meyer, professor of forest management at the University of Washington, has been appointed associate professor of forestry, to fill the teaching vacancy created by the retirement of Dean Graves. Robert T. Clapp has been promoted to an assistant professorship, on the Charles Lathrop Pack Foundation, and will serve as director of the Yale Forests and of the summer term of the School of Forestry, as well as giving instruction during the regular college year. Robert W. Hess, assistant professor of forestry at the University of Maine, has been appointed assistant professor of forest products, to fill the vacancy resulting from Professor Garratt's promotion to the professorship of lumbering. Professor Hess was formerly associated with the University of Arkansas.

DR. ALFRED C. CALLEN, of the University of Illinois, has been appointed head of the department of mining engineering and dean of the College of Engineering at Lehigh University. Dr. Bradford Willard, of the Pennsylvania Topographical and Geologic Survey, has been appointed head of the department of geology, and Professor Gilbert E. Doan, of the faculty, head of the department of metallurgical engineering. Relinquishing their administrative work under an age rule of the board, but continuing on the teaching faculty are: Professor Bradley Stoughton, dean of the College of Engineering and head of the department of metallurgical engineering; Professor Benjamin L. Miller, head of the department of geology, and Professor Howard Eckfeldt, head of the department of mining engineering.

DEAN ROBERT C. DISQUE, of the School of Engineering of Drexel Institute of Technology, has been appointed educational consultant in planning and carrying out the cooperative system of education in the Institute of Technology to be established at Northwestern University through the \$6,735,000 gift of the Walter P. Murphy Foundation. He will assume the position left vacant by the recent death of Dean Herman Schneider, of the University of Cincinnati, founder of the cooperative plan, who was originally selected as adviser to the new institute by North-

western University and the Walter P. Murphy Foundation.

DR. JAMES G. HORSFALL, chief in research in plant pathology at the New York State Experiment Station at Geneva since 1929, has resigned to become head of the department of plant pathology and botany at the Connecticut Agricultural Experiment Station at New Haven.

M. J. GOSS, of the Industrial Farm Products Research Division of the Bureau of Chemistry and Soils, has been appointed technical assistant in the general organization of the Regional Research Laboratories which are being established by the U. S. Department of Agriculture.

DR. NORMAN W. KRASE, professor of chemical engineering at the University of Pennsylvania, has been appointed by the E. I. du Pont de Nemours and Company to take charge of all semi-works operations for the ammonia department of the chemical division, with headquarters at the Experimental Station, Wilmington, Del. He will begin his new work at the end of the present academic year.

DR. JUAN NEGRI, formerly professor of physiology at the University of Madrid, who was premier of the Spanish Republican Government, sailed for New York on April 26.

FRANKLIN C. McLEAN, professor of pathological physiology at the University of Chicago, writes: "Professor Otto Loewi has been released from Germany. He may be addressed in care of Club de la Fondation Universitaire, Rue d'Egmont, Brussels. Before being released he was stripped of all his property, both inside of and outside of Germany, including his Nobel prize money, which had never been in either Austria or Germany. Mrs. Loewi is still detained in Germany."

COLONEL JOSEPH F. SHERA, director of the Army Medical School, delivered the annual Kober Lecture at Georgetown University Medical School, Washington, D. C., on March 28, on a new vaccine for typhoid developed by the army. He was presented with a check for \$500, provided under the terms of the Kober Foundation.

THE John Torrey lecture in botany of the Torrey Botanical Club was delivered by Dr. P. R. White, of the Rockefeller Institute for Medical Research, Princeton, New Jersey, before the club and the Columbia Institute of Arts and Sciences on Friday evening, April 21. He spoke on "Tissue Cultures in Plants."

DR. GEORGE B. KISTIAKOWSKY, professor of chemistry, Harvard University, will deliver the Edgar Fahs Smith Memorial Lecture at the University of Pennsylvania on May 26. His subject will be "Energetics of Some Organic Molecules."

BSF Frankfurter

~~Justy file~~

PSF
Frankfurter

Dear Felix

May 24, 1936.

Dear Felix-

Many thanks for your note.

On Monday night I felt a little like a
cross between a First Grade Printer and
a Congressman — but anyway the vacci-
nation seemed to take and I may try
another shot soon.

My best to you both,

As ever yours,

Honorable Felix Frankfurter,
Supreme Court of the United States,
Washington, D. C.

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Supreme Court of the United States.
Memorandum.

....., 193

Dear Sir

Please pass this
in, and oblige,

Yours truly
[Signature]

1920

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Tuesday

3624 PROSPECT AVENUE

Dear Frank

Since I am con-
 stantly admonished
 that now I must use
 only moderate language,
 I must content myself
 with saying that your
 speech last night
 was glorious. And I
 shall only add that if
 I had the power that
 some judges in the
 past thought that they
 had, I would make

you make that kind
of a speech at least
once a month. That
speech is what I call
education for a
democracy.

Yours always,

W. F.

The President.

PSF
Frankfurter [6-39]
Supreme Court of the United States.

Memorandum.

Monday, 193

Dear Missy

Please show the
other President &
firmly suggest that
others take a more
respectful view of
the process of ad-
judication ! ! ! !
A grand passion.
We begin to believe we
shall celebrate !

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THE WHITE HOUSE
WASHINGTON

6/6/39

MEMORANDUM FOR MISSY

Send back to Felix and
say that the President remarked
that Felix was at least headed down
the right road.

F. D. R.

July 1st [c. June, 1939]

Saturday

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

PSF

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

file
plus mail

Dear Mr. Chief Justice

1. Please tell the President that before long I shall have for him a long, pedantic, liberal-
analogous memorandum on our technique of work - and without the collaboration of Miss Le Hand.

2. If he has not already seen the enclosed cartoon by Low, the President may be amused by it.

3. The other day someone asked me, rather chal-

linguistically? And why do
so few think that this
is it. Or such a very
smart girl? "Say I:
"well - she knows when
to head off from what
function."

Ever yours
H.

As to 3. supra (as the
lawyers say), if pushed
hard I could give ad-
ditional reasons why
she is "a very smart girl".



"WARMONGER!"

Ad [unclear]
X

~~Frankfurter~~ Frankfurter
PSF

June 1, 1939

Dear Celeste:

If I were still in Cambridge, I would say to you that Raymond may see what I wrote in February, 1933, as his discretion indicates. What I wrote then, of course, had explicit reference to the question whether Raymond should hold office with all that is implied by formal office-holding rather than to have an unattached, continuous but outside share in the forthcoming Administration. He is still at liberty, of course, to use my letter in dealing with that particular problem and the way in which it was resolved, namely, by having Ray take office. Hee

But now that I am imprisoned in an institution which involves others, and as to which tradition imposes on me public silence, it is very important not to have the institution involved through me--however unwittingly--in a contentious political issue as to which my mouth necessarily has to be sealed. Therefore, regard for others makes it appropriate for me to ask that this February, 1933 letter of mine be not related to the London Conference. It was written before there was any London Conference, and my writing was wholly unrelated to the issues which there arose.

I looked forward to seeing you here and was greatly disappointed, the more so because it was the sudden death of a very charming and very beloved sister-in-law that took me out of the city.

Yours,

P.S. Of course, I put no limits on use of letter if its identity is not given, but attributed to a friend.

Miss Celeste Jedel

TELEGRAM

Study file

The White House
Washington

PSF
file personal Frankfurter

11WU. RA. 17- 11:35 a.m.

Cambridge, Mass., June 7, 1939

THE PRESIDENT.

Warmest congratulations on MacLeish appointment. Really grand. A great service to everything represented by the great library.

Felix Frankfurter.

~~July 20~~ 192 Braute Street
Law School of Harvard University, June '39
Cambridge, Mass. PSF
Frankfurter

Braute

1. Having seen the beginning of the Ray &oley correspondence, do you think I may be interested in his letter book. Please reply.

2. Did the MacLeish editorials will please the next issue - and maybe you too.

3. Did His Majesty approve of your hair-dress? It sure he looked - surreptitiously - in your direction.

Bless you. Ever yours
R.F.

PSF
Frankfurter

July 21 192 Brauer Street

Law School of Harvard University,

Cambridge, Mass.

June 27
[6-10-37]

Dear Lane

file
journal

The enclosed is from
today's - Saturday -
Boston Herald. Perhaps
Senator Buckley will
want to put it into
the record. I have
good reasons for believing
that Lord the Librarian
of the great Boston Public
Library has been to
Petersburg last week.
It is a brilliant affair.
Evidently the Washington visit
came off first. Always devotedly

Handwritten notes on a separate sheet of paper, including the number 149 and some illegible text.

OPPOSITION TO MacLEISH

Neither the organized nor the unorganized opposition to the nomination of Archibald MacLeish as librarian of Congress seems to have a substantial foundation. The president of the American Library Association, who has sent out telegrams to various associates urging protests to senators, is presumably disturbed because Mr. MacLeish lacks specialized training as a librarian. That is an understandable attitude. It indicates, however, a narrowness which does not reflect any great credit on the A. L. A.

There is far more to the task of a librarian of Congress than the carrying out of technical assignments. Congressmen, 531 of them, must be served and appeased. Political pressure must be resisted constantly. Skill in administration, close contact with men of affairs and co-operation from a score of sources, literary and non-literary, are essential if the high standards of Herbert Putnam are to be maintained. The non-professional tasks are perhaps more important than the professional; and we doubt that any schooled librarian could perform them nearly as well as Mr. MacLeish.

Indeed, the non-career librarians have perhaps made more enduring contributions to library administration and upbuilding than the career men—and the story is the same in American diplomacy. The list of such librarians is most impressive.

The great Justin Winsor lacked technical acquirements. Archibald Carey Coolidge, who did so much to make the Widener library at Harvard what it is, was not a professional librarian. The new head of the Yale University library, Bernard Knollenberg, has not pursued librarianship as a life career. President McKinley's appointee, John Russell Young, who made great improvements in the library of Congress, was also lacking in knowledge of the Dewey decimal system and some other subjects taught to students of library schools. The army medical library, unrivalled in the world as a medical library, was the creation of a surgeon named John S. Billings. The greatest law library in the world, the Harvard law library, has never had a professional librarian at its head, and was created by professors.

Herbert Putnam himself was primarily a lawyer. He began his notable career at the Boston public library and continued it at Washington after he had interrupted his western library activities by a bar career of a few years. Edmund Gosse, librarian of the House of Lords, and Sir Frederick Kenyon of the British Museum, a famous repository of books, would fall, with those famous Americans, in the narrow test which apparently the head of the American Library Association would apply.

The MacLeish choice seems to us not only good but brilliant. There is probably not a trained librarian in the United States who has his manifest qualifications for a distinguished career as head of the great institution. Men and women entirely familiar with the more or less mechanical aspects of library administration are to be had by the score. Many of them are on the staff of Mr. Putnam and will be available for his successor.

PS: From Kinship 2, 1919

Boston Herald, June 1919

BF Frankfurter

July 1939

TELEGRAM

11WUD 21

**The White House
Washington**

file

UY Boston Mass 1151am June 13 1939

Miss Marguerite LeHand

The White House

Can I reach your chief on phone tonight when please wire
me care Dr. Alfred Cohn, 300 Central Park West, New York
City.

Felix Frankfurter.

1211pm

Study File

192 Berute Trust

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

PSF

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

*file
presumably June 17*

Dear Mr. President:

The enclosed has just come here, and you are free to make whatever use of it you deem appropriate, for Professor Blake feels very strongly the great importance of Mac Leish's appointment as Librarian of Congress. I need hardly remind you that Professor Blake is not only one of Harvard's most distinguished scholars, but was, until last year, Archie Lodge's

successor as Librarian of
the great Widener Library.
He then speaks with an authority
on library matters.

Faithfully yours
F. W. Anderson

The President.

40 APPLETON STREET
CAMBRIDGE, MASSACHUSETTS

June 12, 1939.

Dear Felix:-

After our, unexpected and delightful meeting today, I feel that I should like to make more precise some of the reasons why I feel that the nomination of Archibald Mac Leish for the Library of Congress is such an excellent one.

The part of Librarianship is much more than that of a technical administrator, but demands a personality, rounded and cultured, book loving but no book-worm, courteous and cordial, enthusiastic and restrained.

Dr Paterson's personality made the part what it is, and Mac Leish will, I do not doubt, follow in the same direction, and with a different but equal success.

The men who have made their mark as Librarians have done so in large measure because of their personal qualities, and not because of the technical refinement of their administrative procedure. Many of them have

been famous scholars - Delisle of the Bibliothèque Nationale, Ettore of the Vatican, Kenyon of the British Museum, Von Scharf of Leipzig, Wilson of Harvard. Do not think for a moment that I deery the necessity of technical knowledge + professional experience; these are essential, and there are many things in the Library of Congress which need attention and reform, but subordinates can be found to do these tasks under a capable and energetic leader, who sees the wood as a whole & leaves to his chosen lieutenants the task of clearing out the thickets to which they are respectively assigned.

The Library of Congress is the national library of America; it needs an American figure, outstanding in the intellectual life of the country, to stand at its head. It is my considered opinion that Mr MacLeish will discharge his task with honor to the country and with credit to himself. As you know, I have had some extensive experience in Library matters, and I sincerely hope that there will be no obstacles to the appointment

Most cordially yours Robert C. Bliss

P. L. F.
Sp. 13

J. F.

Frankfurter

THE WHITE HOUSE
WASHINGTON

June 15, 1939.

MEMORANDUM FOR

MR. JUSTICE FRANKFURTER

The President asks me to thank you for letting him see the enclosed letter which I am returning for your files.

M. A. Le Hand
PRIVATE SECRETARY

TELEGRAM

~~Harry Linn~~
The White House
Washington

file *PF*
Frankfurter

34WU. RA. 15- 10:25 a.m.

New Milford, Conn., August 25, 1939

THE PRESIDENT.

You at least are doing all that any mortal can do.
Our affectionate good wishes.

Felix Frankfurter.

1189
Supreme Court of the United States
Washington, D. C.

PSF
CHAMBERS OF
JUSTICE FELIX FRANKFURTER

Aug 27

Dear Irving

Be good enough
to pass this on.

Had "the crisis"
has worked out as
by the clock. You will
remember that I told
you, when I came back,
that in London they
had definite word it
was to begin about the 21st.

I hope you had some re-
folding fun + no heat.
Over best. 176.

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

Wesley Hill, Gen.

Aug. 30, '39

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

file
personal

v

Dear Frank:

As Max and I
sit glued to the radio dur-
ing the day and for a good
part of the night, I reflect
not only on those enduring
values of man we call
civilization and the fate
of friends and relatives
in Vienna and Paris and
London, but also think
of what our dear, these
anxious days, are casting
on you. All your com-
munications seem to me
to have ^{been} just right - rightly
conceived and admirably

2

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

Abused - and you have
given the right lead for
this country and for all
those to whom brute rule
is intolerable.

As wise a man as I
saw in London was the
Chilean Ambassador and
I thought his letter from
him, about the effect of
your abrogation of the
Tapanue treaty, would
interest you.

Take good care of yourself -
for in any event we are up
against the nation's joint
warmer regards. True Love

Chinese Embassy,
49, Portland Place, W.1.

August 13, 1939

Dear Justice Frankfurter,

I think I should write you this note not only to thank you for your letter from the ship and posted at Cambridge, but also to comment how promptly prophetic your conviction proved to be that the long run need not be too long, if only the will and understanding of even a few men are determined enough to insist on the decent ends. President Roosevelt's courageous act of abrogation fulfilled your conviction only two days after I had received your letter. It literally transformed the whole international situation, and I can only wish that equal will and understanding over

here may sustain that transformation.

I had no opportunity to get in touch with Mr. Morgenthau, glad as I should have been to do so, as he was in town for only three hours on his way to Holland. Currency remains China's central vital problem in the present situation.

I trust that you and Mrs. Frankfurter may be fortified by plenty of the good Massachusetts and Maine air before you face Washington again.

Sincerely yours,
Huo Tai-chi

THE BOSTON HERALD

MORNING AND SUNDAY

BY THE BOSTON HERALD TRAVELER CORPORATION



PSF
Frankfurter
Boston  Traveler

EVENING

IN THE COMMONWEALTH OF MASSACHUSETTS

BOSTON MASSACHUSETTS

HANK W. BUXTON

Editor

September 6, 1939

Dear Felix:

~~First, I was tied up when you called this morning. Second, I couldn't have talked if I hadn't been busy, for five stonemasons are working outside the two windows of the office and conversation is almost impossible. When I telephoned to you, you were in transit to Archie and Conway and some intensified indoctrination of Mr. Putnam's successor.~~

The fellows in the office are considerably excited by the embargo provision of the Neutrality Act. To a man we are for repeal of it. The Transcript, Herald, Post, Globe, N.Y. Times, N.Y. Herald-Tribune, Baltimore Sun, Cleveland Plain Dealer, Springfield Republican, Kansas City Star, and all other papers which I have seen are for repeal. Probably you noticed that Senators Gibson and Austin of Vermont have enlisted on the side of light and reason. George Tink was in for a little three-hour chat Saturday and again this morning. He is an embargoist, but he is beginning to have some misgivings. Outside of Tink, I don't know anybody who defends the present act. Therefore I presume to guess that if there should be a special session of Congress there would be almost immediate repeal or modification.

I suppose I should say that I have been shocked by the outbreak of war, but I can't say that I have. It has been a relief of a kind. I encounter no German sympathizers in these parts. There were police guards at the house and office of the German consul but no gratifying unseemly episodes have taken place yet. I am a bit surprised at the willingness of some of my friends to have the United States declare in on the game just as quickly as possible.

My best, please, Major of Battle Street, to Marion and to Archie.

Sincerely,

P.S. I am enclosing a copy of a Herald editorial on Palestine written by F.L. Bullard. He was glowing with enthusiasm when he turned in the copy. I am also enclosing a note to Mr. Flexner, who wrote to me August 31st that he was sending the report of the P.E.C. at your request.

1 PSF
Felix Frankfurter's letter _____
_____ 0 Sept 13, 1939 attached

THE WHITE HOUSE
WASHINGTON

Neutrality
2

COPY OF THE PRESIDENT'S LONGHAND MEMO

"Mis-called Neut. Act." In every case puts us on side of the offenders.

1. Return to Internat. Law
2. (a) Repeal
- (b) Citizens not to go to War Zones Vessels
- (c) Credits
- (d) Title
- (e) Am. vessels with contraband to go to European ports of belligerents.

66C

Mis-called Nuthet

for every case parts per one
side of the apparatus

1. Return to Internet band

(a) Kypsal

(b) Litigous with 10% to
100% Jones Kipals

(c) Kipals

(d) Title

(e) Km. Kipals with water band
to go to Langman parts
of Kipals

1. W. C. [unclear]

PSF

Law School of Harvard University,
Cambridge, Mass.

Heak, Harv.

file
September 13.
1939

Dear Russell:

1. Only if you knew how deeply I feel the dependence of the well-being of this country and of the world on your well-being, could you realize with what ruffiness I found you as fit as I did. Your Lincolnian calm - compounded of sagacity and good-humor - is precisely what is most needed for the long pull ahead, and as an infectious example for the country.

2. The enclosed from Buxton shows the wind is blowing up here.

3. I hope that the propriety and prudence will justify some such reticence as the following in your message to Congress:

"A so-called neutrality law which in practical operation favors the forces of aggression must be fundamentally wrong in conception. It runs counter

(over)

to American traditions and ideals,
and is in conflict with inter-
national law.

All good luck to you - and
your unabated good health and
good spirits!

Ever faithfully yours

F.T.

~~The~~ Personal
Supreme Court of the United States.
Memorandum.
No. 13 ~~July 24~~
[Oct-1939]
PSF

....., 193

That is guaranteed
to induce deeper
and quiet sleep
than even natural
conscience.

But - beginning
on bottom p. 8 things
are said that may
not be without interest
to you.

F.F.
✓

SUPREME COURT OF THE UNITED STATES.

Nos. 110, 111, 112, 183 and 399.—OCTOBER TERM, 1939.

- | | | |
|--|---|---|
| Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
110
<i>vs.</i>
Mary Q. Hallock and Central United National Bank of Cleveland, Trustees. | } | On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. |
| Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
111
<i>vs.</i>
Mary Q. Hallock, Executrix, Estate of Henry Hallock, Deceased. | | |
| Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
112
<i>vs.</i>
S. H. Squire, Superintendent of Banks of the State of Ohio, etc. | | |
| Walter J. Rothensies, Collector of Internal Revenue for the First District of Pennsylvania, Petitioner,
183
<i>vs.</i>
C r a i g H u s t o n, Administrator d.b.n.c.t.a. of the Estate. | } | On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit. |
| Waldo G. Bryant and Ida Bryant, Executors of the Estate of Waldo C. Bryant, Deceased, Petitioners,
399
<i>vs.</i>
Guy T. Helvering, Commissioner of Internal Revenue. | | |

[January 29, 1940.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

These cases raise the same question, namely, whether transfers of property *inter vivos* made in trust, the particulars of which will later appear, are within the provisions of § 302(c) of the Revenue

Act of 1926.¹ They were heard in succession and may be decided together. In each case the Commissioner of Internal Revenue included the trust property in the decedent's gross estate. In Nos. 110, 111 and 112—affecting three beneficiaries under the same instrument—his determination was reversed by the Board of Tax Appeals (34 B. T. A. 575) and the Board was affirmed by the Circuit Court of Appeals for the Sixth Circuit (102 F. (2d) 1). In No. 183, the taxpayer paid under protest, successfully sued for recovery in the District Court for the Eastern District of Pennsylvania, and his judgment was sustained by the Circuit Court of Appeals for the Third Circuit. (103 F. (2d) 834). In No. 399, the Commissioner was in part successful before the Board of Tax Appeals (36 B. T. A. 669) and the Circuit Court of Appeals for the Second Circuit affirmed the Board (104 F. (2d) 1011).

Neither here nor below does the issue turn on the unglossed text of § 302(c). In its enforcement, Treasury and courts alike encounter three recent decisions of this Court, *Klein v. United States*, 283 U. S. 231, *Helvering v. St. Louis Trust Co.*, 296 U. S. 39, and *Becker v. St. Louis Trust Co.*, *Ibid.* 48. Because of the difficulties which lower courts have found in applying the distinctions made by these cases and the seeming disharmony of their results, when judged by the controlling purposes of the estate tax law, we brought the cases here. 308 U. S. —; *Ibid.* —; *Ibid.* —. All involve dispositions of property by way of trust in which the settlement provides for return or reversion of the corpus to the donor

¹ c. 27, 44 Stat. 9, as amended by § 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 279:

“The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

“(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in cases of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.”

upon a contingency terminable at his death. Whether the transfer made by the decedent in his lifetime is "intended to take effect in possession and enjoyment at or after his death" by reason of that which he retained, is the crux of the problem. We must put to one side questions that arise under sections of the estate tax law other than § 302(c)—sections, that is, relating to transfers taking place at death. Section 302(c) deals with property not technically passing at death but with interests theretofore created. The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment.

We turn to the cases which beget the difficulties. In *Klein v. United States*, *supra*, decided in 1931, the decedent during his lifetime had conveyed land to his wife for her lifetime, "and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor," The instrument further provided, "Upon condition and in the event that said grantee shall survive the said said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple," The taxpayer contended that the decedent had reserved a mere "possibility of reverter" and that such a "remote interest",² extinguishable upon the grantor's death, was not sufficient to bring the conveyance within the reckoning of the taxable estate. This Court held otherwise. It rejected formal distinctions pertaining to the law of real property as irrelevant criteria in this field of taxation. "Nothing is to be gained", it was said, "by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed." *Klein v. United States*, *supra*, at 234.

The inescapable rationale of this decision, rendered by a unanimous Court, was that the statute taxes not merely those interests which are deemed to pass at death according to refined technicali-

² Petitioner's Brief, *Klein v. United States*, pp. 11-13.

ties of the law of property. It also taxes *inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise. By bringing into the gross estate at his death that which the settlor gave contingently upon it, this Court fastened on the vital factor. It refused to subordinate the plain purposes of a modern fiscal measure to the wholly unrelated origins of the recondite learning of ancient property law. Surely the *Klein* decision was not intended to encourage the belief that a change merely in the phrasing of a grant would serve to create a judicially cognizable difference in the scope of § 302(c), although the grantor retained in himself the possibility of regaining the transferred property upon precisely the same contingency. The teaching of the *Klein* case is exactly the opposite.³

In 1935 the *St. Louis Trust* cases came here. A rational application of the principles of the *Klein* case to the situations now before us calls for scrutiny of the particulars in the *St. Louis* cases in order to extract their relation to the doctrine of the earlier decision.

In *Helvering v. St. Louis Trust Co.*, *supra*, the decedent had conveyed property in trust, the income of which was to be paid to his daughter during her life, but at her death "If the grantor still be living, the Trustee shall forthwith . . . transfer, pay, and deliver the entire estate to the grantor, to be his absolutely." But "If the grantor be then not living" then the income was to be devoted to the settlor's wife if she were living, and upon the death of both daughter and wife, if he were not living, the trust property was to go to the daughter's children, or if she left none, to the grantor's next of kin.

In *Becker v. St. Louis Trust Co.*, *supra*, the decedent had declared himself trustee of property with the income to be accumulated or, at his discretion, to be paid over to his daughter during her life. The instrument further provided that "If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or . . . if I should die before her death, then this property shall thereupon become hers immediately and absolutely"

³ Some indication of the influence of *Klein v. United States* upon the lower courts may be found in *Sargent v. White*, 50 F. (2d) 410 and *Union Trust Co. v. United States*, 54 F. (2d) 152, cert. denied, 286 U. S. 547. Cf. *Commissioner v. Schwarz*, 74 F. (2d) 712.

On the authority of the *Klein* case the Commissioner had included in the taxable estates the gifts to which, in the *St. Louis Trust* cases, the grantor's death had given definitive measure. If the wife had predeceased the settlor in the *Klein* case, he would have been repossessed of his property. His wife's interests were freed from this contingency by the husband's prior death, and because of the effect of his death this Court swept the gift into the gross estate. So in *Helvering v. St. Louis Trust Co.*, the grantor would have become repossessed of the granted corpus had his daughter predeceased him. But he predeceased her and by that event her interest ripened to full dominion. The same analysis applies to the *Becker* case. In all three situations the result and effect were the same. The event which gave to the beneficiaries a dominion over property which they did not have prior to the donor's death was an act of nature outside the grantor's "control, design or volition." 296 U. S. 39, 43. But it was no more and no less "fortuitous", so far as the grantor's "control, design or volition" was concerned, in the *St. Louis Trust* cases than it was in the *Klein* case. In none of the three cases did the dominion over property which finally came to the beneficiary fall by virtue of the grantor's will, except by his provision that his own death should establish such final and complete dominion. And yet a mere difference in phrasing the circumstance by which identic interests in property were brought into being—varying forms of words in the creation of the same wordly interests—was found sufficient to exclude the *St. Louis Trust* settlements from the application of the *Klein* doctrine.

Four members of the Court saw no difference. They relied on the governing principle of § 302(c) that Congress meant to include in the gross estate *inter vivos* gifts "which may be resorted to, as a substitute for a will, in making dispositions of property operative at death." 296 U. S. at 46. To effectuate this purpose practical considerations applicable to taxation and not the "niceties of the art of conveyancing" were their touchstone. "Having in mind", said the dissenters, "the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device—what particular string—the decedent selected to hold in suspense the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not to form However we label the device it is but a means by which the gift is rendered incomplete until the

donor's death." 296 U. S. at 47. For the majority in the *St. Louis Trust Company* cases, these practicalities had less significance than the formal categories of property law. The grantor's death, the majority said, in *Helvering v. St. Louis Trust Co.*, "simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility." 296 U. S. 39, 43. This was precisely the mode of argument which had been rejected in *Klein v. United States, supra*.

We are now asked to accept all three decisions as constituting a coherent body of law, and to apply their distinctions to the trusts before us.

In Nos. 110, 111 and 112 (*Helvering v. Hallock*) the decedent in 1919 created a trust under a separation agreement, giving the income to his wife for life, with this further provision:

"If and when Anne Lamson Hallock shall die and in such event . . . the within trust shall terminate and said Trustee shall . . . pay Party of the First Part if he then be living any accrued income, then remaining in said trust fund and shall . . . deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part, share and share alike"

When the settlor died in 1932, his divorced wife, the life beneficiary, survived him. The Circuit Court of Appeals held that the trust instrument had conveyed the "whole interest" of the decedent, subject only to a "condition subsequent," which left him nothing "except a mere possibility of reverter." *Commissioner v. Hallock*, 102 F. (2d) 1, 3-4.

In No. 183 (*Rothensies v. Cassell*) the decedent by an ante-nuptial agreement in 1925 conveyed property in trust, the income to be paid to his prospective wife during her life, subject to the following disposition of the principal:

"In trust if the said Rae Spektor shall die during the lifetime of said George F. Uber to pay over the principal and all accumulated income thereof unto the said George F. Uber in fee, free and clear of any trust.

"In trust if the said Rae Spektor after the marriage shall survive the said George F. Uber to pay over the principal and

all accumulated income unto the said Rae Spektor—then Rae Uber—in fee, free and clear of any trust.”

Mrs. Uber outlived her husband, who died in 1934. The Circuit Court of Appeals deemed *Becker v. St. Louis Trust Co.* controlling against the inclusion of the trust corpus in the gross estate.

Finally, in No. 399 (*Bryant v. Helvering*), the testator provided for the payment of trust income to his wife during her life and upon her death to the settlor himself if he should survive her. The instrument, which was executed in 1917, continued:

“Upon the death of the survivor of said Ida Bryant and the party of the first part, unless this trust shall have been modified or revoked as hereinafter provided, to convey, transfer, and pay over the principal of the trust fund to the executors or administrators of the estate of the party hereto of the first part.”

There was a further provision giving to the decedent and his wife jointly during their lives, and to either of them after the death of the other, power to modify, alter or revoke the instrument. The wife survived the husband, who died in 1930. The Board of Tax Appeals allowed the Commissioner to include in the decedent's gross estate only the value of a “vested reversionary interest” which the Board held the grantor had reserved to himself. On appeal by the tax-payer, the Circuit Court of Appeals sustained this determination.

The terms of these grants differ in detail from one another, as all three differ from the formulas of conveyance used in the *Klein* and *St. Louis Trust* cases. It therefore becomes important to inquire whether the technical forms in which interests contingent upon death are cast should control our decision. If so, it becomes necessary to determine whether the differing terms of conveyance now in issue approximate more closely those used in the *Klein* case and are therefore governed by it, or have a greater verbal resemblance to those that saved the tax in the *St. Louis Trust* cases. Such an essay in linguistic refinement would still further embarrass existing intricacies. It might demonstrate verbal ingenuity, but it could hardly strengthen the rational foundations of law. The law of contingent and vested remainders is full of casuistries. There are great diversities among the several states as to the conveyancing significance of like grants; sometimes in the same state there are conflicting lines of decision, one series ignoring the other. Attempts by the Board of Tax Appeals and the Circuit Courts of Appeal to ad-

minister § 302(c) by reference to these distinctions abundantly illustrate the inevitable confusion.⁴ One of the cases at bar, No. 399, reveals vividly the snares which inevitably await an attempt to base estate tax law on the "niceties of the art of conveyancing." In connection with the ascertainment of its own death duties, the Supreme Court of Errors of Connecticut defined the nature of the interest which the decedent in that case retained after his *inter vivos* transfer. *Bryant v. Hackett*, 118 Conn. 233. And yet the nature of that interest under Connecticut law and the scope of the Connecticut Court's adjudication of that interest were made the subject of lively controversy before us. The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes.⁵ These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin.⁶ Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth.

→ (Our real problem, therefore, is to determine whether we are to adhere to a harmonizing principle in the construction of § 302(c), or whether we are to multiply gossamer distinctions between the

⁴ See, for example, the attempts by the Board of Tax Appeals to deal with the peculiarities of New York law in the field of vested and contingent remainders. *Elizabeth B. Wallace*, 27 B. T. A. 902; *Louis C. Raegner, Jr.*, 29 B. T. A. 1243. In both of these cases limitations which would probably have been "contingent" at "common law" were held to be "vested" under the New York statutory rule. Cf. *Commissioner v. Schwarz*, 74 F. (2d) 712; *Flora M. Bonney*, 29 B. T. A. 45.

⁵ Cf. *Lyeth v. Hoey*, 305 U. S. 188, 194. See Paul, *The Effect on Federal Taxation of Local Rules of Property in Selected Studies in Federal Taxation* (2d Series), pp. 23-28; *Developments in the Law—Taxation*, 47 Harv. L. Rev. 1209, 1238-41; Note, 49 Harv. L. Rev. 462.

⁶ See, for example, *Fearn, Contingent Remainders*, (4th Am. Ed.), pp. 3-241; *Gray, Rule Against Perpetuities* (2d Ed.), pp. 99-118; VII Holdsworth, *History of English Law*, 81 *et seq.*; 1 Simes, *Future Interests*, §§ 64-96. The confusion apt to be engendered by judicial forays into this field is well illustrated by the use of the term "possibility of reverter" by the majority in *Helvering v. St. Louis Union Trust Co.* "A possibility of reverter" is traditionally defined as the interest remaining in a grantor who has conveyed a determinable fee. The definition has not been thought to have any relation to the reversionary interest of a grantor who has transferred either a vested or contingent remainder in fee. See *Gray, Rule Against Perpetuities* (2d Ed.), §§ 13-51.

present cases and the three earlier ones. Freed from the distinctions introduced by the *St. Louis Trust* cases, the *Klein* case furnishes such a harmonizing principle. Does, then, the doctrine of *stare decisis* compel us to accept the distinctions made in the *St. Louis Trust* cases as starting points for still finer distinctions spun out of the tenuousities of surviving feudal law? We think not. We think the *Klein* case rejected the presupposition of such distinctions for the fiscal judgments which § 302(c) demands.

We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Nor have we in the *St. Louis Trust* cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves. No such conjunction of circumstances requires perpetuation of what we must regard as the deviations of the *St. Louis Trust* decisions from the *Klein* doctrine. We have not before us interests created or maintained in reliance on those cases. We do not mean to imply that the inevitably empiric process of construing tax legislation should give rise to an estoppel against the responsible exercise of the judicial process. But it is a fact that in all the cases before us the settlements were made and the settlors died before the *St. Louis Trust* decisions.

Nor does want of specific Congressional repudiations of the *St. Louis Trust* cases serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with the *Klein* case, make for dissonance of doctrine. It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.⁷ Congress may not have had its attention di-

⁷ We are not unmindful of amendments to the estate tax law to which other decisions of this Court gave rise. Thus by § 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, Congress undid the construction which this Court gave the estate tax law in another connection by a decision rendered on the same day as were the *St. Louis Trust* cases. Cf. *White v. Poor*, 296 U. S. 98. This case arose under § 302(d) and not § 302(c). But, in any event, the fact of Congressional action in dealing with one problem while silent on the different

rected to an undesirable decision; and there is no indication that as to the *St. Louis Trust* cases it had, even by any bill that found its way into a committee pigeon-hole. Congress may not have had its attention so directed for any number of reasons that may have moved the Treasury to stay its hand. But certainly such inaction by the Treasury can hardly operate as a controlling administrative practice, through acquiescence, tantamount to an estoppel barring reëxamination by this Court of distinctions which it had drawn.³ Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

problems created by the *St. Louis Trust* cases, does not imply controlling acceptance by Congress of those cases.

By the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, Congress displaced the construction which this Court put upon § 302(c) in those cases wherein it was held that the reservation by a decedent of a life estate in property conveyed *inter vivos*, did not constitute a sufficient postponement of the remainder to bring it into the grantor's gross estate. *May v. Heiner*, 281 U. S. 238; *Burnet v. Northern Trust Co.*, 283 U. S. 782; *Morsman v. Burnet*, 283 U. S. 783; *McCormick v. Burnet*, 283 U. S. 784. The speculative arguments that may be drawn from *ad hoc* legislation affecting one set of decisions and the want of such legislation to modify another set of decisions dealing with a somewhat different though cognate problem are well illustrated by this remedial amendment. For it may be urged with considerable plausibility that in 1931 Congress had in principle already rejected the general attitude underlying the *St. Louis Trust* cases, as illustrated by the fact that in those cases the majority, in part at least, relied upon the Congressionally discarded *May v. Heiner* doctrine.

Whatever may be the scope of the doctrine that re-enactment of a statute impliedly enacts a settled judicial construction placed upon the re-enacted statute, that doctrine has no relevance to the present problem. Since the decisions in the *St. Louis Trust* cases, Congress has not re-enacted § 302(c). The amendments that Congress made to other provisions of § 302 in connection with other situations than those now before the Court, were made without re-enacting § 302(c). Nor has Congress, under any rational canons of legislative significance, by its compilation of internal revenue laws to form the Internal Revenue Code of 1939, 53 Stat. 1, impliedly enacted into law a particular decision which, in the light of later experience, is seen to create confusion and conflict in the application of a settled principle of internal revenue legislation.

Here, unlike the situation in such cases as *National Lead Co. v. United States*, 252 U. S. 140, 146-47, and *Murphy Oil Co. v. Burnet*, 287 U. S. 299, 302-3, we have no conjunction of long uniform administrative construction and subsequent reenactments of an ambiguous statute to give ground for implying legislative adoption of such construction. See Preface, Internal Revenue Code, 53 Stat. III; compare *Smiley v. Holm*, 285 U. S. 355, 373, and *Warner v. Goldtra*, 293 U. S. 155, 161.

³ Since the Treasury has amended its regulations in an effort to conform administrative practice to the compulsions of the *St. Louis Trust* cases, it cannot be deemed to have bound itself by this change. Art. 17, Reg. 80 (1937 Ed.), p. 42. Cf. *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U. S. — (decided November 6, 1939).

This Court, unlike the House of Lords,⁹ has from the beginning rejected a doctrine of disability at self-correction. Whatever else may be said about want of Congressional action to modify by legislation the result in the *St. Louis Trust* cases, it will hardly be urged that the reason was Congressional approval of those distinctions between the *St. Louis Trust* and the *Klein* cases to which four members of this Court could not give assent. By imputing to Congress a hypothetical recognition of coherence between the *Klein* and the *St. Louis Trust* cases, we cannot evade our own responsibility for reconsidering, in the light of further experience, the validity of distinctions which this Court has itself created. Our problem then is not that of rejecting a settled statutory construction. The real problem is whether a principle shall prevail over its later misapplications. Surely we are not bound by reason or by the considerations that underlie *stare decisis* to persevere in distinctions taken in the application of a statute which, on further examination, appear consonant neither with the purposes of the statute nor with this Court's own conception of it. We therefore reject as untenable the diversities taken in the *St. Louis Trust* cases in applying the *Klein* doctrine—untenable because they drastically eat into the principle which those cases professed to accept and to which we adhere.

In Nos. 110, 111, 112 and 183, the judgments are

Reversed.

In No. 399, the judgment is

Affirmed.

The CHIEF Justice concurs in the result upon the ground that each of these cases is controlled by our decision in *Klein v. United States*, 283 U. S. 231.

A true copy.

Test:

Clerk, Supreme Court, U. S.

⁹ *London Street Tramways Co., Ltd. v. London County Council*, [1898] A. C. 375. But the rule is otherwise in the Privy Council. *Read v. Bishop of Lincoln*, [1892] A. C. 644, 655. For the rôle of precedent in English law, see, *inter alia*, 2 *Yorke, Life of Lord Chancellor Hardwicke*, pp. 425, 498; Goodhart, *Precedent in English and Continental Law*, 50 *L. Q. Rev.* 40; Holdsworth, *Case Law*, 6*th* ed. 180; Lord Wright in *Westminster Council v. Southern Ry. Co.*, [1936] A. C. 511, 562-63; Allen, *Law in the Making*, 3rd ed., pp. 224 *et seq.*

SUPREME COURT OF THE UNITED STATES.

Nos. 110, 111, 112.—OCTOBER TERM, 1939.

Helvering, Commissioner of Internal Revenue, Petitioner, <i>vs.</i> Hallock, et al.	} On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
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[January 29, 1940.]

Mr. Justice ROBERTS.

There is certainly a distinction in fact between the transaction considered in *Klein v. United States*, 283 U. S. 231, and those under review in *Helvering v. St. Louis Union Trust Company*, 296 U. S. 39, and *Becker v. St. Louis Union Trust Company*, 296 U. S. 48. The courts, the Board of Tax Appeals, and the Treasury have found no difficulty in observing the distinction in specific cases. I believe it is one of substance, not merely of terminology, and not dependent on the niceties of conveyancing or recondite doctrines of ancient property law.

But if I am wrong in this, I still think the judgments in Nos. 110-112, and 183 should be affirmed and that in 399 should be reversed. The rule of interpretation adopted in the *St. Louis Union Trust Company* cases should now be followed for two reasons: *First*, that rule was indicated by decisions of this court as the one applicable in the circumstances here disclosed, as early as 1927; was progressively developed and applied by the Board of Tax Appeals, the lower federal courts, and this court, up to the decision of *McCormick v. Burnett*, 283 U. S. 784, in 1931; and has since been followed by those tribunals in not less than fifty cases. It ought not to be set aside after such a history. *Secondly*. The rule was not contrary to any treasury regulation; was, indeed, in accord with such regulations as there were on the subject; was subsequently embodied in a specific regulation, and, with this background, Congress has three times reenacted the law without amending § 302(c) in respect of the matter here in issue. The settled doctrine, that reenactment of a

statute so construed, without alteration, renders such construction a part of the statute itself, should not be ignored but observed.

1. The Revenue Act of 1926 lays a tax upon the transfer of the net estate of a decedent. That estate is defined to embrace the value of all his property, real or personal, tangible or intangible (less certain deductions), at the time of his death.¹ As the Treasury Department stated in its earliest regulations: "The statute also includes only property rights existing in the decedent in his lifetime and passing to his estate."² In all the treasury regulations, from the earliest to the one now in force, applicable to the relevant sections of the successive Revenue Acts defining the "gross estate" of a decedent the Treasury has used this language:³

"The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder where [in the case] the contingency does not happen in the lifetime of the decedent, *and the interest consequently lapses at his death.*" (Italics supplied.)

The next sentence: "Nor should anything be included on account of a life estate in the decedent," has been repeated in substance in the corresponding article of all subsequent regulations.

If by the will of his grandmother A is given a life estate, with remainder to another, his executor is not bound to return anything on account of the life estate because, in respect of it, nothing passes on A's death. The estate simply ceases. The Treasury has never contended the contrary. If, however, A's grandmother gave a life estate to B, and the remainder to A, A has something which, at his death, will pass to someone else under his will, or under the intestate laws. The statute plainly taxes the value of the interest thus transferred at A's death.

If A's grandmother, by her will, gave interests in succession to specific persons and then provided that if A should outlive all these persons the property should pass to him, A would have a chance to receive and enjoy the property. If he did so receive it, it would pass as part of his estate. If he died before the other beneficiaries named by his grandmother his death would deprive him of that chance. The chance would not pass to any-

¹ Secs. 300-303, 44 Stat. 69-72.

² Regulations 37, Art. 12 (1917).

³ Regulations 37, Art. 12; Regulations 63, Art. 11; Regulations 68, Art. 11; Regulations 80, Art. 11.

one else. No tax would be laid on the supposed value of his contingent interest or chance, because the chance cannot, at his death, pass by his will, or the intestate laws, to another. I do not understand the Government has ever denied this.

Subsection (c) of § 302 lays down no different rule respecting similar interests created by irrevocable deed or agreement of the decedent. The subsection directs that there shall be included in the gross estate the value, at the time of the decedent's death, of any interest in property of which the decedent has at any time made a transfer "intended to take effect in possession or enjoyment at or after his death" (excluding sales for adequate consideration).

A transfer can only take effect, within the meaning of the statute, by the shifting of possession or enjoyment from the decedent to living persons. The fact that the terms of the gift bring about some other effect at the decedent's death is immaterial. The fact that something may happen in respect of the beneficial enjoyment of the property conditioned upon the decedent's death is irrelevant so long as that something is not the shifting of possession or beneficial enjoyment from the decedent. This is made clear by *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 347.

If A makes a present irrevocable transfer in trust, conditioned that he shall receive the income for life and, at his death, the principal shall go to B, B is at once legally invested with the principal. A's life estate ceases at his death. Nothing then passes. There is no tax imposed by the statute because there is no transfer any more than there would be in the case of a similar life estate given A by his grandmother. (This is *May v. Heiner*, 281 U. S. 238.) If, on the other hand, A creates an estate for years or for life in B, retaining the remaining beneficial interest in the property for himself, and, whether by the terms of the grant, or by the terms of A's will, or under the intestate law, that remainder passes to someone else at his death, such passage renders the transfer taxable. (This is *Klein v. United States*, *supra*.) If what A does is to transfer his property irrevocably, with provision that it shall be enjoyed successively by various persons for life and then go absolutely to a named person, but that if he, A, shall outlive that person, the property shall come back to him, and A dies in the lifetime of the person in question, A has merely lost the chance that the beneficial ownership of the property may revert to him. That chance cannot pass under his will or under the intestate laws.

As there is no transfer which can become effective at his death by the shifting of any interest from him, no tax is imposed. (This is *McCormick v. Burnet*, *supra*, and *Helvering v. St. Louis Union Trust Company*, *supra*.)

2. These governing principles were indicated as early as 1927⁴ and were thereafter developed, in application to specific cases, in a consistent line of authorities.

In *May v. Heiner*, *supra*, it was held that a transfer in trust under which the income was payable to the transferor's husband for his life and, after his death, to the transferor during her life, with remainder to her children, was not subject to tax as a transfer intended to take effect in possession or enjoyment at or after death. This court said (p. 243):

" At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event." (Italics supplied.)

It will be noted that this is the equivalent of the Treasury's statement, *supra*, that such an interest lapses at death.

That decision is indistinguishable in principle from the *St. Louis Union Trust Company* cases and the instant cases; and what was there said serves to distinguish the *Klein* case.

McCormick v. Burnet followed *May v. Heiner*. The court there held that neither a reservation by the grantor of a life estate with remainders over, nor a provision for a reverter in case all the beneficiaries should die in the lifetime of the grantor, made the gifts transfers intended to take effect in possession or enjoyment at or after the grantor's death. In the Circuit Court of Appeals the Commissioner urged that the provision for payment of the trust estate to the settlor in case she survived all the beneficiaries rendered the transfer taxable. That court dealt at length with the point and sustained his view. (43 F. (2d) 277, 279.) The Commissioner made the same contention in this court, but it was overruled upon the authority of *May v. Heiner*.

Then came the two *St. Louis Union Trust Company* cases, decided upon the authority of *May v. Heiner* and *McCormick v. Burnet*. Finally, the *McCormick* case was followed in *Bingham v. United States*, 296 U. S. 211.

⁴ *Shukert v. Allen*, 273 U. S. 545.

Since the opinion of the court appears to treat the *St. Louis* cases as the origin of the principle there announced, it is important to emphasize the fact that the rule had been settled by this court as early as 1930; and to note other decisions rendered prior to the *St. Louis* cases. In seven, intervening between *May v. Heiner* and the *St. Louis* cases, the Board of Tax Appeals reached the same conclusion as that announced in the *St. Louis* cases.⁵ The Board's action was affirmed in four of them.⁶ Four other decisions by Circuit Courts of Appeal were to the same effect.⁷ In practically all, reliance was placed upon *Shukert v. Allen*, *Reinecke v. Northern Trust Company*, *May v. Heiner*, and *McCormick v. Burnet*, or some of them. Thus, when the question came before this court again in the *St. Louis* cases, there was a substantial body of authority following and applying the *Heiner* and *McCormick* cases.

Since the *St. Louis* cases were decided, the principle on which they went has been repeatedly applied by the Board of Tax Appeals and the courts. The Board has followed the cases in no less than seventeen instances.⁸

The record is the same in the courts. The *St. Louis* cases have been followed in fourteen cases.⁹ In some of these the Government has sought review in this court but in none, except those now presented, has it asked the court to overrule those decisions.

⁵ *Wheeler v. Commissioner*, 20 B. T. A. 695; *Duke v. Commissioner*, 23 B. T. A. 1104; *Peabody v. Commissioner*, 24 B. T. A. 787; *Dunham v. Commissioner*, 26 B. T. A. 286; *Taylor v. Commissioner*, 27 B. T. A. 220; *Wallace v. Commissioner*, 27 B. T. A. 902; *Bonney v. Commissioner*, 29 B. T. A. 45.

⁶ *Commissioner v. Duke*, 62 F. (2d) 1057 (affirmed by an equally divided court, 290 U. S. 591); *Commissioner v. Wallace*, 71 F. (2d) 1002; *Commissioner v. Dunham*, 73 F. (2d) 752; *Commissioner v. Bonney*, 75 F. (2d) 1008.

⁷ *Commissioner v. Austin*, 73 F. (2d) 758; *Tait v. Safe Deposit & Trust Co.*, 74 F. (2d) 851; *Tait v. Safe Deposit & Trust Co.*, 78 F. (2d) 534; *Helvering v. Helmholtz*, 75 F. (2d) 245. I have been able to find only one case decided *contra*: *Commissioner v. Schwarz*, 74 F. (2d) 712.

⁸ *Taft v. Commissioner*, 33 B. T. A. 671; *Guaranty Trust Company v. Commissioner*, 33 B. T. A. 1225; *Kneeland v. Commissioner*, 34 B. T. A. 816; *Kienbusch v. Commissioner*, 34 B. T. A. 1248; *Schneider v. Commissioner*, 35 B. T. A. 183; *Van Sicklen v. Commissioner*, 35 B. T. A. 306; *Patterson v. Commissioner*, 36 B. T. A. 407; *Rushmore v. Commissioner*, 36 B. T. A. 480; *Bryant v. Commissioner*, 36 B. T. A. 669; *Wetherill v. Commissioner*, 36 B. T. A. 1259; *Mitchell v. Commissioner*, 37 B. T. A. 1; *Stone v. Commissioner*, 38 B. T. A. 51; *Harter Bank v. Commissioner*, 38 B. T. A. 387; *White v. Commissioner*, 38 B. T. A. 593; *Donnelly v. Commissioner*, 38 B. T. A. 1234; *Pyatt v. Commissioner*, 39 B. T. A. 774; *Dravo v. Commissioner*, 40 B. T. A. 309.

⁹ *Old Colony Trust Co. v. United States*, 15 F. Supp. 417; *Myers v. Magruder*, 15 F. Supp. 488; *Chase National Bank v. United States*, 28 F. Supp. 947; *Commissioner v. Brooks*, 87 F. (2d) 1000; *Bullard v. Commissioner*, 90 F. (2d)

If there ever was an instance in which the doctrine of *stare decisis* should govern, this is it. Aside from the obvious hardship involved in treating the taxpayers in the present cases differently from many others whose cases have been decided or closed in accordance with the settled rule, there are the weightier considerations that the judgments now rendered disappoint the just expectations of those who have acted in reliance upon the uniform construction of the statute by this and all other federal tribunals; and that, to upset these precedents now, must necessarily shake the confidence of the bar and the public in the stability of the rulings of the courts and make it impossible for inferior tribunals to adjudicate controversies in reliance on the decisions of this court. To nullify more than fifty decisions, five of them by this court, some of which have stood for a decade, in order to change a mere rule of statutory construction, seems to me an altogether unwise and unjustified exertion of power. As I shall point out, there is no necessity for such action because it has been, and still is open to Congress to change the rule by amendment of the statute, if it deems such action necessary in the public interest.

3. § 301 of the Revenue Act of 1926 imposes a tax upon the value of the net estate of a decedent. § 302 provides the method for determining the value of the gross estate. Subsections (c) (d) (e) (f) and (g) require inclusion in the gross estate of interests which otherwise might be held not to form a part of the decedent's estate or not to pass from him to others at his death. These subsections sweep such interests into the gross estate in order to forestall tax avoidance. § 302(c) was the successor of analogous sections in earlier acts and the predecessor of similar sections in later acts.¹⁰ The subsection has been amended in successive Revenue Acts. As a result of the Treasury's experience in the enforcement of the law, Congress has from time to time thought it necessary to extend the scope of the subsection in the interest of more efficient

144; Welch v. Hassett, 90 F. (2d) 833; United States v. Nichols, 92 F. (2d) 704; Mackay v. Commissioner, 94 F. (2d) 558; Commissioner v. Grosse, 100 F. (2d) 37; Commissioner v. Hallock, 102 F. (2d) 1; Commissioner v. Kaplan, 102 F. (2d) 329; Rothensies v. Cassell, 103 F. (2d) 834; Corning v. Commissioner, 104 F. (2d) 329; Rheinstrom v. Commissioner, 105 F. (2d) 642.

¹⁰ Revenue Act of 1916, § 202(b), 39 Stat. 756, 777; Revenue Act of 1918, § 402(c), 40 Stat. 1057, 1097; Revenue Act of 1924, § 302(c), 43 Stat. 253, 304; Revenue Act of 1932, § 803(a), 47 Stat. 169, 279; Internal Revenue Code of 1939, § 811(c), 53 Stat., Part 1, 1, 121.

administration. Within constitutional limits such extension is a matter of legislative policy for Congress alone.¹¹

It is familiar practice for Congress to amend a statute to obviate a construction given it by the courts. The legislative history of § 302(c) demonstrates that Congress has elected not to make such an amendment to meet the construction placed upon it by this court in the *St. Louis* cases.

May v. Heiner was decided in 1930. The Treasury was dissatisfied with the decision and in three later cases attacked the ruling, amongst them *McCormick v. Burnet*. The court announced its judgments in these cases on March 2, 1931, reaffirming *May v. Heiner*. On the following day Congress adopted a joint resolution amending § 302(c) to tax a transfer with reservation of a life estate to the grantor, but, in so doing, it omitted to deal with a contingent interest reserved to the grantor or the possibility of reverter remaining in him, involved in both *Heiner* and *McCormick*. See *Hassett v. Welch*, 303 U. S. 303, 308-9. The omission is significant.

It may be argued that in the haste of preparing and passing the amendment the point was overlooked. But the joint resolution was reenacted by § 803 of the Revenue Act of 1932,¹² without any alteration to cover the point. The Revenue Act of 1934¹³ amended § 302(d) of the Revenue Act of 1926 but did not change § 302(c) as it then stood.

The day the *St. Louis* cases were decided, this court announced its opinion in *White v. Poor*, 296 U. S. 98, construing § 302(d) of the Act of 1926. In order to make the section apply to such a situation as was disclosed in that case¹⁴ the Congress, on June 22, 1936, by the Act of 1936,¹⁵ amended it to preclude the construction the court had given it. Again Congress let § 302(c) stand as before and as construed in the *St. Louis* cases. Three revenue acts have since been adopted,¹⁶ in none of which has the wording of § 302(c) been altered. If there is any life in the doctrine often an-

¹¹ *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85.

¹² 47 Stat. 169, 279.

¹³ 48 Stat. 680, 752.

¹⁴ House Report on H. R. 12793.

¹⁵ 49 Stat. 1648, 1744.

¹⁶ Revenue Act of 1937, 50 Stat. 813; Revenue Act of 1938, 52 Stat. 447; Internal Revenue Code, 53 Stat., Part 1, p. 1.

nounced that reenactment of a statute as uniformly construed by the courts is an adoption by Congress of the construction given it, this legislative history ought to be conclusive that the statute, as it now stands, means what this court has said it means.

Little weight can be given to the argument of the Government that the Treasury has not applied to Congress for alteration of the section because of the difficulty of wording a satisfactory amendment. A moment's reflection will show that it would be easy to phrase such an amendment. Whatever the reason for the failure to amend § 302(c), whether hesitancy on the part of the Treasury to recommend such action, or the satisfaction of Congress with the construction put upon the section by this court, or mere inadvertence, the fact remains that the section has been reenacted again and again with the courts' construction plain for all to read.

4. As shown by the matter above quoted from the Treasury Regulations affecting the estate tax,¹⁷ a contingent interest is not to be included in the taxable estate. In the light of this construction, estate tax provisions were reenacted or amended in 1921, 1924, 1926, 1928, 1931, 1932, 1934, 1935, 1936 and 1937.

At the bar counsel for the Government stated that it had always been the view of the Treasury that the article in question applied only to § 302(a) and had no application to § 302(c). But we are not concerned with what the Treasury thought about the matter. The regulations were issued to guide taxpayers in complying with the Act. Section 302 is an entirety. Subsections (a) and (c) were not intended to contradict each other, but the latter was to supplement the former. The gross estate was to be computed according to the section as a whole. It is hard to understand how the taxpayer was expected to discriminate between a contingent interest of a decedent under the will of his grandmother and a similar interest under an absolute deed executed by him *inter vivos*. If the one did not pass from the decedent at death neither did the other.

After the decisions in the *St. Louis* cases, the Treasury rendered its regulations even more explicit. In Regulations 80 (Revised), promulgated October 26, 1937, a new Article 17 was inserted which is:

"The statutory phrase, 'a transfer . . . intended to take effect in possession or enjoyment at or after his death,' includes a transfer

¹⁷ See Note 3, *supra*.

by the decedent . . . whereby and to the extent that the beneficial title to the property . . . or the legal title thereto . . . remained in the decedent at the time of his death and the passing thereof was subject to the condition precedent of his death. . . .

"On the other hand, if, as a result of the transfer, there remained in the decedent at the time of his death no title or interest in the transferred property, then no part of the property is to be included in the gross estate merely by reason of a provision in the instrument of transfer to the effect that the property was to revert to the decedent upon the predecease of some other person or persons or the happening of some other event."

If theretofore doubt could have been entertained, it then must have vanished. And with this regulation in force, Congress reenacted § 302(c) as so interpreted.

What, then, is to be said of the principle that reenactment of a statute which the Treasury, by its regulations, has interpreted in a given sense is an embodiment of the interpretation in the law as reenacted? Surely the principle cannot be avoided, as the Government argues, because the Treasury felt bound so to interpret § 302(c) by reason of this court's decisions. That fact should make application of the principle the more urgent.

Mr. Justice McREYNOLDS joins in this opinion.

Supreme Court of the United States.

Memorandum.

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SUPREME COURT OF THE UNITED STATES.

No. 265.—OCTOBER TERM, 1939.

Federal Communications Commission,
Petitioner,
vs.
The Pottsville Broadcasting Company. } On Writ of Certiorari to
the United States Court
of Appeals for the Dis-
trict of Columbia.

[January 29, 1940.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The court below issued a writ of mandamus against the Federal Communications Commission, and, because important issues of administrative law are involved, we brought the case here. 308 U. S. —. We are called upon to ascertain and enforce the spheres of authority which Congress has given to the Commission and the courts, respectively, through its scheme for the regulation of radio broadcasting in the Communications Act of 1934, c. 652, 48 Stat. 1064, as amended by the Act of May 20, 1937, c. 229, 50 Stat. 189; 47 U. S. C. § 151.

Adequate appreciation of the facts presently to be summarized requires that they be set in their legislative framework. In its essentials the Communications Act of 1934 derives from the Federal Radio Act of 1927, c. 169, 44 Stat. 1162, as amended, 46 Stat. 844. By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry.¹ The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927.

Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might

¹ For the legislative history of the Act of 1927, see H. Rep. No. 464, S. Rep. No. 772, 69th Cong., 1st Sess.; 67 Cong. Rec. 5473-5504, 5555-86; 5645-47; 12335-59; 12480, 12497-12508, 12614-18; 68 Cong. Rec. 2556-80, 2750-51, 2869-82, 3025-39, 3117-34, 3257-62, 3329-36, 3569-71, 4109-55. A summary of the operation of previous regulatory laws may be found in Herring and Gross, *Telecommunications*, pp. 239-45.

2 *Fed. Communications Comm. vs. Pottsville Broadcasting Co.*

be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. Licenses were not to be granted for longer than three years. Communications Act of 1934, Title iii, § 307(d). No license was to be "construed to create any right, beyond the terms, conditions, and periods of the license." *Ibid.* § 301. In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, "public convenience, interest, or necessity" was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest. *Ibid.*, Title I, § 4(j). Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors. Thus, it is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three years; and in deciding whether to renew the license, just as in deciding whether to issue it in the first place, the Commission must judge by the standard of "public convenience, interest, or necessity." The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.²

² Since the beginning of regulation under the Act of 1927 comparative considerations have governed the application of standards of "public convenience, interest, or necessity" laid down by the law. ". . . the commission desires to point out that the test—'public interest, convenience, or necessity'—becomes a matter of a comparative and not an absolute standard when applied to broad-

Fed. Communications Comm. vs. Pottsville Broadcasting Co. 3

Against this background the facts of the present case fall into proper perspective. In May, 1936, The Pottsville Broadcasting Company, respondent here, sought from the Commission a permit under § 319 *Ibid.*, Title iii, for the construction of a broadcasting station at Pottsville, Pennsylvania. The Commission denied this application on two grounds: (1) that the respondent was financially disqualified; and (2) that the applicant did not sufficiently represent local interests in the community which the proposed station was to serve. From this denial of its application respondent appealed to the court below. That tribunal withheld judgment on the second ground of the Commission's decision, for it did not deem this to have controlled the Commission's judgment. But, finding the Commission's conclusion regarding the respondent's lack of financial qualification to have been based on an erroneous understanding of Pennsylvania law, the Court of Appeals reversed the decision and ordered the "cause . . . remanded to the . . . Communications Commission for reconsideration in accordance with the views expressed." *Pottsville Broadcasting Co. v. Federal Communications Commission*, 98 F. (2d) 288.

Following this remand, respondent petitioned the Commission to grant its original application. Instead of doing so, the Commission set for argument respondent's application along with two rival applications for the same facilities. The latter applications had been filed subsequently to that of respondent and hearings had been held on them by the Commission in a consolidated proceeding, but they were still undisposed of when the respondent's case returned to the Commission. With three applications for the same facilities thus before it, and the facts regarding each having theretofore been explored by appropriate procedure, the Commission directed that all three be set down for argument before it to determine which, "on a comparative basis" "in the judgment of the Commission will best serve public interest." At this stage of the proceedings, respondents sought and obtained from the Court of Appeals the writ

casting stations. Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser." *Second Annual Report, Federal Radio Commission, 1928*, pp. 169-70.

4 *Fed. Communications Comm. vs. Pottsville Broadcasting Co.*

of mandamus now under review. That writ commanded the Commission to set aside its order designating respondent's application "for hearing on a comparative basis" with the other two, and "to hear and reconsider the application" of The Pottsville Broadcasting Company "on the basis of the record as originally made and in accordance with the opinions" of the Court of Appeals in the original review (98 F. (2d) 288), and in the mandamus proceedings. *Pottsville Broadcasting Co. v. Federal Communications Commission*, 105 F. (2d) 36.

The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest. See *In re Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, 255-56. That proposition is indisputable, but it does not tell us which issues are laid at rest. Cf. *Sprague v. Ticonic Bank*, 307 U. S. 161. Nor is a court's interpretation of the scope of its own mandate necessarily conclusive. To be sure the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes. But it is not even true that a lower court's interpretation of its mandate is controlling here. Cf. *United States v. Morgan*, 307 U. S. 183. Therefore, we would not be foreclosed by the interpretation which the Court of Appeals gave to its mandate, even if it had been directed to a lower court.

A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of

their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those.³ To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. That this movement was natural and its extension inevitable was a quarter century ago the opinion of eminent spokesmen of the law.⁴ Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services.⁵ These differences in origin and function preclude

³ See Maitland, *The Constitutional History of England*, pp. 415-18; Landis, *The Administrative Process*, *passim*.

⁴ See, for instance, the address of Elihu Root as President of the American Bar Association:

"There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. . . . There will be no withdrawal from these experiments. . . . We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation." 41 A. B. A. Rep. 355, 368-69.

⁵ See *United States v. Lowden*, *ante*, p. —, decided December 4, 1939; *Herring*, *Public Administration and the Public Interest*, *passim*.

6 *Fed. Communications Comm. vs. Pottsville Broadcasting Co.*

wholesale transplantation of the rules of procedure, trial and review, which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agencies, "should not be too narrowly constrained by technical rules as to the admissibility of proof," *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44, should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.⁶ Compare *New England Divisions Case*, 261 U. S. 184. To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.

Under the Radio Act of 1927 as originally passed, the Court of Appeals was authorized in reviewing action of the Radio Commission to "alter or revise the decision appealed from and enter such judgment as to it may seem just." § 16 of the Radio Act of 1927, 44 Stat. 1169. Thereby the Court of Appeals was constituted "a superior and revising agency in the same field" as that in which the Radio Commission acted. *Radio Comm. v. General Electric Co.*, 281 U. S. 464, 467. Since the power thus given was administrative rather than judicial, the appellate jurisdiction of this Court

⁶ The Communications Commission's Rules of Practice, Rule 106.4, provided that "the Commission will, so far as practicable, endeavor to fix the same date . . . for hearing on all applications which . . . present conflicting claims . . . excepting, however, applications filed after any such application has been designated for hearing." Respondent contends, and the court below seemed to believe that this rule bound the Commission to give respondent a non-comparative consideration because its application had been set down for hearing before the later and rival applications were filed. The Commission interprets this rule simply as governing the order in which applications shall be heard, and not touching upon the order in which they shall be acted upon or the manner in which they shall be considered. That interpretation is binding upon the courts. *A. T. & T. Co. v. United States*, 299 U. S. 232.

Fed. Communications Comm. vs. Pottsville Broadcasting Co. 7

could not be invoked. *Radio Comm. v. General Electric Co., supra.* To lay the basis for review here, Congress amended §16 so as to terminate the administrative oversight of the Court of Appeals. c. 788, 46 Stat. 844. In "sharp contrast with the previous grant of authority" the court was restricted to a purely judicial review. "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision." *Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 276.

On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. *Fed. Power Comm'n v. Pacific Co.*, 307 U. S. 156. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. Cf. *Ford Motor Co. v. Labor Board*, 305 U. S. 364.

The Commission's responsibility at all times is to measure applications by the standard of "public convenience, interest, or necessity." The Commission originally found respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania. The Court of Appeals laid bare that error, and, in compelling obedience to its correction, exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of "public convenience, interest, or necessity." The fact that in its first disposition the Commission had committed a legal error did not create rights of priority in the respondent, as against the later applicants, which it would not have otherwise possessed. Only Congress could confer such a priority. It has not done so. The Court of Appeals cannot write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors in the first of an allowable series of administrative actions. Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute. It would mean that for practical purposes the contingencies of judicial review and of litigation,

8 *Fed. Communications Comm. vs. Pottsville Broadcasting Co.*

rather than the public interest, would be decisive factors in determining which of several pending applications was to be granted.

It is, however, urged upon us that if all matters of administrative discretion remain open for determination on remand after reversal, a succession of single determinations upon single legal issues is possible with resulting delay and hardship to the applicant. It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U. S. 267, 270. Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies. Anglo-American courts as we now know them are themselves in no small measure the product of a historic process.

The judgment is reversed, with directions to dissolve the writ of mandamus and to dismiss respondent's petition.

Reversed.

Mr. Justice McREYNOLDS concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 316.—OCTOBER TERM, 1939.

J. Lawrence Fly, et al., Petitioners,
vs.
Paul R. Heitmeyer. } On Writ of Certiorari to the
United States Court of Ap-
peals for the District of
Columbia.

[January 29, 1940.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

On March 25, 1935, Heitmeyer, respondent here, applied for a permit from the Federal Communications Commission under § 319 of the Communications Act of 1934, c. 652, 48 Stat. 1089, 47 U. S. C. 319, to construct a broadcasting station at Cheyenne, Wyoming. His application and a competing one were heard by an examiner. The Commission, on May 1, 1936, denied respondent's application on the sole ground that he was financially disqualified. He appealed to the United States Court of Appeals for the District of Columbia and the Commission's decision was reversed. *Heitmeyer v. Federal Communications Commission*, 95 F. (2d) 91. To proceed in conformity with this opinion, the case was remanded to the Commission.

After Heitmeyer's appeal two other applications for the same facilities were filed with the Commission. Following intermediate litigation, needless here to recount, the Commission directed that respondent's case be reopened in conjunction with the pending rival applications. Before this hearing could be had, respondent obtained from the Court of Appeals a writ of mandamus directing the Commission to restrict consideration of his application to the record originally before it. *McNinch v. Heitmeyer*, 105 F. (2d) 41. Because important questions of administrative law were involved, we granted certiorari. 308 U. S. —.

This case is controlled by our decision in No. 265, *Federal Communications Commission v. Pottsville Broadcasting Co.*, decided this day.

The only relevant difference between the two cases is that here the Commission proposed on remand not only to reconsider respondent's application on oral argument with subsequently filed rival applications, but to reopen the record and take new evidence on the comparative ability of the various applicants to satisfy "public convenience, interest, or necessity." But the Commission's duty was to apply the statutory standard in deciding which of the applicants was to receive a permit after it fell into legal error as well as before. If, in the Commission's judgment, new evidence was necessary to discharge its duty, the fact of a previously erroneous denial should not, according to the principles enunciated in the *Pottsville* case, *ante*, bar it from access to the necessary evidence for correct judgment.

The judgment is reversed, with directions to dissolve the writ of mandamus and to dismiss respondent's petition.

Reversed.

Mr. Justice McREYNOLDS concurs in the result.

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SUPREME COURT OF THE UNITED STATES.

No. 195.—OCTOBER TERM, 1939.

Isiah (Izell) Chambers, Jack Williamson, Charlie Davis and Walter Woodward (Woodard), Petitioners,
vs.
The State of Florida.

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

[February 12, 1940.]

Mr. Justice BLACK delivered the opinion of the Court.

The grave question presented by the petition for certiorari, granted in forma pauperis,¹ is whether proceedings in which confessions were utilized, and which culminated in sentences of death upon four young negro men in the State of Florida, failed to afford the safeguard of that due process of law guaranteed by the Fourteenth Amendment.²

¹ — U. S. —.

² Petitioners Williamson, Woodward and Davis pleaded guilty of murder and petitioner Chambers was found guilty by a jury; all were sentenced to death, and the Supreme Court of Florida affirmed. 111 Fla. 707, 151 So. 499. Upon the allegation that, unknown to the trial judge, the confessions on which the judgments and sentences of death were based were not voluntary and had been obtained by coercion and duress, the State Supreme Court granted leave to present a petition for writ of error coram nobis to the Broward County Circuit Court, 111 Fla. 786, 152 So. 437. The Circuit Court denied the petition without trial of the issues raised by it and the State Supreme Court reversed and ordered the issues submitted to a jury. 117 Fla. 642, 158 So. 153. Upon a verdict adverse to petitioners, the Circuit Court re-affirmed the original judgments and sentences. Again, the State Supreme Court reversed, holding that the issue of force, fear of personal violence and duress had been properly submitted to the jury, but the issue raised by the assignment of error alleging that the confessions and pleas "were not in fact freely and voluntarily made" had not been clearly submitted to the jury. 123 Fla. 734, 737, 167 So. 697. A change of venue, to Palm Beach County, was granted, a jury again found against petitioners and the Broward Circuit Court once more re-affirmed the judgments and sentences of death. The Supreme Court of Florida, one judge dissenting, affirmed, — Fla. —, — So. —. While the petition thus seeks review of the judgments and sentences of death rendered in the Broward Circuit Court and reaffirmed in the Palm Beach Circuit Court, the evidence before us consists solely of the transcript of proceedings (on writ of error coram nobis) in Palm Beach County Court wherein the circumstances surrounding the obtaining of petitioners' alleged confessions were passed on by a jury.

First. The State of Florida challenges our jurisdiction to look behind the judgments below claiming that the issues of fact upon which petitioners base their claim that due process was denied them have been finally determined because passed upon by a jury. However, use by a State of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment.³ Since petitioners have seasonably asserted the right under the Federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns.⁴

Second. The record shows—

About nine o'clock on the night of Saturday, May 13, 1933, Robert Darcy, an elderly white man, was robbed and murdered in Pompano, Florida, a small town in Broward County about twelve miles from Fort Lauderdale, the County seat. The opinion of the Supreme Court of Florida affirming petitioners' conviction for this crime stated that "It was one of those crimes that induced an enraged community"⁵ And, as the dissenting judge pointed out, "The murder and robbery of the elderly Mr. Darcy . . . was a most dastardly and atrocious crime. It naturally aroused great and well deserved indignation."⁶

Between 9:30 and 10 o'clock after the murder, petitioner Charlie Davis was arrested, and within the next twenty-four hours from twenty-five to forty negroes living in the community, including petitioners Williamson, Chambers and Woodward, were arrested without warrants and confined in the Broward County jail, at Fort Lauderdale. On the night of the crime, attempts to trail the murderers by bloodhounds brought J. T. Williams, a convict guard, into the proceedings. From then until confessions were obtained and petitioners were sentenced, he took a prominent part. About 11 P. M. on the following Monday, May 15, the sheriff and Williams

³ *Brown v. Mississippi*, 297 U. S. 278.

⁴ *Pierre v. Louisiana*, 306 U. S. 354, 358; *Norris v. Alabama*, 294 U. S. 587, 590.

⁵ — Fla. —, —.

⁶ *Id.*, —.

took several of the imprisoned negroes, including Williamson and Chambers, to the Dade County jail at Miami. The sheriff testified that they were taken there because he felt a possibility of mob violence and "wanted to give protection to every prisoner . . . in jail." Evidence of petitioners was that on the way to Miami a motorcycle patrolman drew up to the car in which the men were riding and the sheriff "told the cop that he had some negroes that he . . . taking down to Miami to escape a mob." This statement was not denied by the sheriff in his testimony and Williams did not testify at all; Williams apparently has now disappeared. Upon order of Williams, petitioner Williamson was kept in the death cell of the Dade County jail. The prisoners thus spirited to Miami were returned to the Fort Lauderdale jail the next day, Tuesday.

It is clear from the evidence of both the State and petitioners that from Sunday, May 14, to Saturday, May 20, the thirty to forty negro suspects were subjected to questioning and cross questioning (with the exception that several of the suspects were in Dade County jail over one night). From the afternoon of Saturday, May 20, until sunrise of the 21st, petitioners and possibly one or two others underwent persistent and repeated questioning. The Supreme Court of Florida said the questioning "was in progress several days and all night before the confessions were secured" and referred to the last night as an "all night vigil." The sheriff who supervised the procedure of continued interrogation testified that he questioned the prisoners "in the day time all the week," but did not question them during any night before the all night vigil of Saturday, May 20, because after having "questioned them all day . . . [he] was tired." Other evidence of the State was "that the officers of Broward County were in that jail almost continually during the whole week questioning these boys, and other boys, in connection with this" case.

The process of repeated questioning took place in the jailer's quarters on the fourth floor of the jail. During the week following their arrests and until their confessions were finally acceptable to the State's attorney in the early dawn of Sunday, May 21st, petitioners and their fellow prisoners were led one at a time from their cells to the questioning room, quizzed, and returned to their cells to await another turn. So far as appears, the prisoners at no time during the week were permitted to see or confer with counsel

or a single friend or relative. When carried singly from his cell and subjected to questioning, each found himself, a single prisoner, surrounded in a fourth floor jail room by four to ten men, the county sheriff, his deputies, a convict guard, and other white officers and citizens of the community.

The testimony is in conflict as to whether all four petitioners were continually threatened and physically mistreated until they finally, in hopeless desperation and fear of their lives, agreed to confess on Sunday morning just after daylight. Be that as it may, it is certain that by Saturday, May 20th, five days of continued questioning had elicited no confession. Admittedly, a concentration of effort—directed against a small number of prisoners including petitioners—on the part of the questioners, principally the sheriff and Williams, the convict guard, began about 3:30 that Saturday afternoon. From that hour on, with only short intervals for food and rest for the questioners—"They all stayed up all night." "They bring one of them at a time backwards and forwards . . . until they confessed." And Williams was present and participating that night, during the whole of which the jail cook served coffee and sandwiches to the men who "grilled" the prisoners. Sometime in the early hours of Sunday, the 21st, probably about 2:30 A. M., Woodward apparently "broke"—as one of the State's witnesses put it—after a fifteen or twenty minute period of questioning by Williams, the sheriff and the constable "one right after the other." The State's attorney was awakened at his home, and called to the jail. He came, but was dissatisfied with the confession of Woodward which he took down in writing at that time, and said something like "tear this paper up, that isn't what I want, when you get something worth while call me." This same State's attor-

† A constable of the community, testifying about this particular incident, said in part:

"Q. Were you there when Mr. Maire [State's Attorney] talked to Walter Woodward the first time he came over there?

"A. Yes, sir.

"Q. Take his confession down in writing?

"A. Yes.

"Q. If he made a confession why did you all keep on questioning him about it. As a matter of fact, what he said that time wasn't what you wanted him to say, was it?

"A. It wasn't what he said the last time.

"Q. It wasn't what you wanted him to say, was it?

"A. We didn't think it was all correct.

" . . .

ney conducted the State's case in the circuit court below and also made himself a witness, but did not testify as to why Woodward's first alleged confession was unsatisfactory to him. The sheriff did, however:

"A. No, it wasn't false, part of it was true and part of it wasn't; Mr. Maire [the State's attorney] said there wasn't enough. It wasn't clear enough.

"Q. . . . Was that voluntarily made at that time?

"A. Yes, sir.

"Q. It was voluntarily made that time.

"A. Yes, sir.

"Q. You didn't consider it sufficient?

"A. Mr. Maire.

"Q. Mr. Maire told you that it wasn't sufficient, so you kept on questioning him until the time you got him to make a free and voluntary confession of other matters that he hadn't included in the first?

"A. No, sir, we questioned him there and we caught him in lies.

"Q. Caught all of them telling lies?

"A. Caught every one of them lying to us that night, yes, sir.

"Q. Did you tell them they were lying?

"Q. What part of it did you think wasn't correct. Would you say what he told you there at that time was freely and voluntarily made?

"A. Yes, sir.

"Q. What he freely and voluntarily told you in the way of a confession at that time, it wasn't what you wanted?

"A. It didn't make up like it should.

"Q. What matter didn't make up?

"A. There was some things he told us that couldn't possible be true.

"Q. What did Mr. Maire say about it at that time; did you hear Mr. Maire say at this time 'tear this paper up, that isn't what I want, when you get something worth while call me,' or words to that effect?

"A. Something similar to that.

"Q. That did happen that night?

"A. Yes, sir.

"Q. That was in the presence of Walter Woodward?

"A. Yes, sir."

And petitioner Woodward testified on this subject as follows:

"A. . . . I was taken out several times on the night of the 20th . . . So I still denied it. . . .

"A. He said I had told lies and kept him sitting up all the week and he was tired and if I didn't come across I would never see the sun rise.

"A. . . . then I was taken back to the private cell. . . . and shortly after that they come back, shortly after that, twenty or twenty-five minutes, and bring me out. . . . I [told Williams] if he would send for the State

"A. Yes, sir.

"Q. Just how would you tell them that?

"A. Just like I am talking to you.

"Q. You said 'Jack, you told me a lie'?

"A. Yes, sir."

After one week's constant denial of all guilt, petitioners "broke." Just before sunrise, the State officials got something "worthwhile" from petitioners which the State's attorney would "want"; again he was called; he came; in the presence of those who had carried on and witnessed the all night questioning, he caused his questions and petitioners' answers to be stenographically reported. These are the confessions utilized by the State to obtain the judgments upon which petitioners were sentenced to death. No formal charges had been brought before the confessions. Two days thereafter, petitioners were indicted, were arraigned and Williamson

attorney he could take down what I said, I said send for him and I will tell him what I know. So he sent for Mr. Maire some time during Saturday night, must have been around one or two o'clock in the night, it was after midnight, and so he sent for Mr. Maire, I didn't know Mr. Maire then, but I know him now by his face.

"A. Well he come in and said 'this boy got something to tell me' and Captain Williams says 'yes, he is ready to tell you.' . . ."

" . . . Mr. Maire had a pen and a book to take down what I told him, which he said had to be on the typewriter, but I didn't see any typewriter, I saw him with a pen and book, so whether it was shorthand or regular writing I don't know, but he took it down with pen. After I told him my story he said it was no good, and he tore it up. . . ."

"Q. What was it Mr. Maire said?

"A. He told them it wasn't no good, when they got something out of me he would be back. It was late he had to go back and go to bed.

"A. . . . I wasn't in the cell long before they come back. . . ."

"Q. How long was that from the time you was brought into that room until Mr. Maire left there?

"A. Something like two or three hours, I guess, because it was around sunrise when I went into the room.

"Q. Had you slept any that night, Walter?

"A. No, sir. I was walked all night, not continually, but I didn't have no time to sleep except in short spaces of the night.

"Q. When Mr. Maire got there it was after daylight?

"A. Yes, sir.

"Q. Why did you say to them that morning anything after you were brought into the room?

"A. Because I was scared, . . ."

and Woodward pleaded guilty; Chambers and Davis pleaded not guilty. Later the sheriff, accompanied by Williams, informed an attorney who presumably had been appointed to defend Davis that Davis wanted his plea of not guilty withdrawn. This was done, and Davis then pleaded guilty. When Chambers was tried, his conviction rested upon his confession and testimony of the other three confessors. The convict guard and the sheriff "were in the Court room sitting down in a seat." And from arrest until sentenced to death, petitioners were never—either in jail or in court—wholly removed from the constant observation, influence, custody and control of those whose persistent pressure brought about the sunrise confessions.

Third. The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history.⁸ However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter,⁹ to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scape goats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat criminally punishable without legisla-

⁸ There have been long-continued and constantly recurring differences of opinion as to whether general legislative acts regulating the use of property could be invalidated as violating the due process clause of the Fourteenth Amendment. *Munn v. Illinois*, 94 U. S. 113, 125, dissent 136-154; *Chicago, Milwaukee & St. Paul R. Co. v. Minnesota*, 134 U. S. 418, dissent 461-466. And there has been a current of opinion—which this court has declined to adopt in many previous cases—that the Fourteenth Amendment was intended to make secure against State invasion all the rights, privileges and immunities protected from Federal violation by the Bill of Rights (Amendments I to VIII). See, e. g., *Twining v. New Jersey*, 211 U. S. 78, 98-9, Mr. Justice Harlan, dissenting, 114; *Maxwell v. Dow*, 176 U. S. 581, dissent 606; *O'Neill v. Vt.*, 144 U. S. 323, dissent 361; *Palko v. Conn.*, 302 U. S. 319, 325, 326; *Hague v. C. I. O.*, 307 U. S. 496.

⁹ Cf. *Weems v. United States*, 217 U. S. 349, 372, 373, and dissent setting out (p. 396) argument of Patrick Henry, 3 Elliot, Debates, 447.

tion. And a liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by "the law of the land" forbidden when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the "law of the land" evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve "the blessings of liberty", wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.¹⁰

The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's

¹⁰ As adopted, the Constitution provided, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." (Art. I, Sec. 9.) "No Bill of Attainder or ex post facto Law shall be passed" (*Id.*), "No State shall . . . pass any Bill of Attainder, or ex post facto Law. . . ." (*Id.*, Sec. 10), and "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court" (Art. III, Sec. 3). The Bill of Rights (Amend. I to VIII). Cf. Magna Carta, 1297 (25 Edw. 1.); The Petition of Right, 1627 (3 Car. 1, c. 1.); The Habeas Corpus Act, 1640 (16 Car. 1, c. 10.); An Act for [the Regulating] the Privie Councell and for taking away the Court commonly called the Star Chamber; Stat. (1661) 13 Car. 2, Stat. 1, C. 1 (Treason); The Bill of Rights (1688) (1 Will. & Mar. sess. 2, c. 2.); all collected in "Halsbury's Stat of Eng." (1929) Vol. 3.

noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.¹¹

This requirement—of conforming to fundamental standards of procedure in criminal trials—was made operative against the States by the Fourteenth Amendment. Where one of several accused had limped into the trial court as a result of admitted physical mistreatment inflicted to obtain confessions upon which a jury had returned a verdict of guilty of murder, this Court recently declared, *Brown v. Mississippi*, that "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."¹²

Here, the record develops a sharp conflict upon the issue of physical violence and mistreatment, but shows, without conflict, the drag net methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these ignorant young colored tenant farmers by State officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisers or counselors, and under circumstances calculated to break the strongest nerves and the stoutest resistance. Just as our decision in *Brown v. Mississippi* was based upon the fact that the confessions were the result of compulsion, so in the present case, the admitted practices were such as to justify the statement that "The undisputed facts showed that compulsion was applied."¹³

¹¹ "In all third degree cases, it is remarkable to note that the confessions were taken from 'men of humble station in life and of a comparatively low degree of intelligence, and most of them apparently too poor to employ counsel and too friendless to have any one advise them of their rights.'" Filamor, "Third Degree Confession", 13 *Bombay L. J.*, 339, 346. "That the third degree is especially used against the poor and uninfuential is asserted by several writers, and confirmed by official informants and judicial decisions." IV National Commission on Law Observance and Enforcement, Reports, (1931) Ch. 3, p. 159. Cf. *Morrison v. Calif.*, 291 U. S. 82, 95.

¹² 297 U. S. 278, 286.

¹³ See *Ziang Sung Wan v. United States*, 266 U. S. 1, 16. The dissenting Judge below noted, — Fla. —, —, that, in a prior appeal of this same case, the Supreme Court of Florida had said: "Even if the jury totally disbelieved the testimony of the petitioners, the testimony of Sheriff Walter Clark, and one or two of the other witnesses introduced by the State, was sufficient to show

For five days petitioners were subjected to interrogations culminating in Saturday's (May 20th) all night examination. Over a period of five days they steadily refused to confess and disclaimed any guilt. The very circumstances surrounding their confinement and their questioning without any formal charges having been brought, were such as to fill petitioners with terror and frightful misgivings.¹⁴ Some were practical strangers in the community; three were arrested in a one-room farm tenant-house which was their home; the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation. From virtually the moment of their arrest until their eventual confessions, they never knew just when any one would be called back to the fourth floor room, and there, surrounded by his accusers and others, interrogated by men who held their very lives—so far as these ignorant petitioners could know—in the balance. The rejection of petitioner Woodward's first "confession", given in the early hours of Sunday morning, because it was found wanting, demonstrates the relentless tenacity which "broke" petitioners' will and rendered them helpless to resist their accusers further. To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol.

that these confessions were only made after such constantly repeated and persistent questioning and cross-questioning on the part of the officers and one J. T. Williams, a convict guard, at frequent intervals . . . [while] they were in jail, over a period of about a week, and culminating in an all-night questioning of the petitioners separately in succession, throughout practically all of Saturday night, until confessions had been obtained from all of them, when they were all brought into a room in the jailer's quarters at 6:30 on Sunday morning and made their confessions before the state attorney, the officers, said J. T. Williams, and several disinterested outsiders, the confessions, in the form of questions and answers, being taken down by the court reporter, and then type-written.

¹⁴ Under the principles laid down in *Nickles v. State*, 90 Fla. 659, 106 So. 497; *Davis v. State*, 90 Fla. 317, 105 So. 843; *Deiterle v. State*, 98 Fla. 739, 124 So. 47; *Mathieu v. State*, 101 Fla. 94, 133 So. 550, these confessions were not legally obtained."

¹⁴ Cf. the statement of the Supreme Court of Arkansas, *Bell v. State*, 180 Ark. 79, 89: "This negro boy was taken, on the day after the discovery of the homicide while he was at his usual work, and placed in jail. He had heard them whipping Swain in the jail; he was taken from the jail to the penitentiary at Little Rock and turned over to the warden, Captain Todhunter, who was requested by the sheriff to question him. This Todhunter proceeded to do day after day, an hour at a time. There Bell was, an ignorant country boy surrounded by all of those things that strike terror to the negro heart; . . ."
See Münsterberg, *On the Witness Stand*, (1927) 137 *et seq.*

We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws.¹⁵ The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.

The Supreme Court of Florida was in error and its judgment is

Reversed.

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

¹⁵ The police practices here examined are to some degree widespread throughout our country. See Report of Comm. on Lawless Enforcement of the Law (Amer. Bar Ass'n.) 1 Amer. Journ. of Pol. Sci., 575; Note 43 H. L. R. 617; IV National Commission On Law Observance And Enforcement, *supra*, Ch. 2, Sec. 4. Yet our national record for crime detection and criminal law enforcement compares poorly with that of Great Britain where secret interrogation of an accused or suspect is not tolerated. See, Report of Comm. on Lawless Enforcement of the Law, *supra*, 588; 43 H. L. R., *supra*, 618. It has even been suggested that the use of the "third degree" has lowered the esteem in which administration of justice is held by the public and has engendered an attitude of hostility to and unwillingness to cooperate with the police on the part of many people. See, IV National Commission, etc., *supra*, p. 190. And, after scholarly investigation, the conclusion has been reached "that such methods, aside from their brutality, tend in the long run to defeat their own purpose; they encourage inefficiency on the part of the police." Glueck, Crime and Justice, (1936) 76. See IV National Commission, etc., *supra*, 5; cf. 4 Wigmore, Evidence, (2d ed.) § 2251. The requirement that an accused be brought promptly before a magistrate has been sought by some as a solution to the problem of fostering law enforcement without sacrificing the liberties and procedural rights of the individual. 3, Wig., *supra*, § 851, IV National Commission, etc., *supra*, 5.

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PSF

Davis
10-3-39

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

October 3, 1939

Dear Mr. President:

The enclosed letter comes from an old and, in view of the international situation, a renewed admirer of yours, that grand old pirate, Fred Dumaine. He is much worried, as he told me when he was down here the other day, about the danger of an amiable, but not very effective Bostonian, being sent to Europe as the representative of the Red Cross. Dumaine's daughter, Betty - who is a chip of the old block - is very conversant with Red Cross matters, and has, I have found in the past, good judgement. The enclosed letter indicates the person whom doubtless you know or know about, the Reverend E. McKee, who, in Miss Dumaine's judgement, is uncommonly qualified for such leading work by the Red Cross in Europe. I have no knowledge of the matter whatever, but I thought you would be interested in seeing this letter of Dumaine.

Faithfully yours,

Felix Frankfurter

324
SEARS BUILDING
BOSTON

October 2nd, 1939

Dear Felix:

Rev. Elmore McNeill McKee, the man Betty Dumaine says knows more of the Red Cross wants than any one, was born in 1896, graduated from Yale '19, the Divinity School in '21, spent some time at General Theological School, New York City, a year in Edinburg School of Theology, made a Deacon in '21, a Priest in '22, Curate in St. John's Church, Waterbury, Conn. for two years, Rector of St. Paul's in New Haven for three years, Chaplain at Yale University from 1927 to 1930, Rector of Trinity Church in Buffalo for five or six years and now is at St. George's, Third Avenue, New York City.

Rev. McKee is said to be a very active and efficient social worker.

It was nice to see you for a minute and to know you have a comfortable domicile, to which you

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are entitled.

I had a very pleasant and, I hope, satisfactory talk with Christie. He seemed the sort well liked by a certain group, with whom you and I are familiar.

Always my best to you,



Mr. Justice Frankfurter
United States Supreme Court
Washington, D. C.

file personal

WHITE HOUSE
OCT 4 2 56 PM '39
RECEIVED

THE WHITE HOUSE
WASHINGTON

PRIVATE

October 4, 1939.

MEMORANDUM FOR

HON. NORMAN H. DAVIS

FOR YOUR INFORMATION AND
RETURN FOR MY FILES.

F. D. R.

To the President: -

I agree with the estimate of
E. M. Kee. He is an unusually
fine man and very able -
Also a good friend of mine

NHD

P.D. 2. 24.

By B

See: Norman H. Davis-Gen corres-
Drawer 2-1939 for F.F. letter
and one of Dumaine

PSF 4 Oct '39
Frankfurt

THE WHITE HOUSE
WASHINGTON

F F
2

PRIVATE

October 4, 1939.

MEMORANDUM FOR

HON. NORMAN H. DAVIS

FOR YOUR INFORMATION AND
RETURN FOR MY FILES.

F. D. R.

Letter from F. F. enclosing
letter from Fred Dumaine in re
Rev. Elmore McNeill McKee who
would make a good European repre-
sentative of the Red Cross.

PSF: Frankfurter

THE WHITE HOUSE
WASHINGTON

October 5, 1939.

MEMORANDUM FOR

F. F.

Here is my latest. I send it to you for correction or editing.

A radical is a man with both feet firmly planted -- in the air.

A conservative is a man with two good legs who has never learned to walk.

A reactionary is a somnambulist walking backwards.

A liberal is a man who uses his legs and hands at the command of his intelligence.

F. D. R.

PSF: Frankfurter

THE WHITE HOUSE
WASHINGTON

September 4, 1939.

MEMORANDUM FOR

THE PRESIDENT

A radical is a man with both feet planted firmly in the air. A conservative is a man with two ~~perfectly~~ good legs who has never learned to walk. A reactionary is a somnambulist walking backwards. A liberal is a man who uses his legs and hands and, ~~simultaneously~~, his head.

~~Duff A~~ *Transfer*
Supreme Court of the United States PSF
Washington, D.C. *March 47*

See being 1939

*Be good enough
to pass this on.
My best regards
R.C.*

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

Wednesday

[10-8-39]

Dear Frank -

This spells out
what I thought might
be good for Henry M.
to consider. You will
know best what this is
in any case.

Please do look at
the Aquino quotation
on page 2. That is so
pertinent for your situation
I wish it a release

That would have gone
out over the radio
that "Mr. Justice
Frankfurter has re-
mained in the Army"
I suppose that is
for foreign corruption
to affect the European
war situation.

Ever faithfully
J. Edgar Hoover

SOME OBSERVATIONS REGARDING TAXES

*file
confidential*

1. This Problem of Confidence.

BF

No earthly government is free from error, but the people of the United States have a confidence in government today which they did not have in 1933. Nor can there be serious doubt that confidence in government today is much more deserved, much more justified, than it was in 1928 and 1929 when government abdicated its responsibility to the rulers of business and finance.

It is unfortunate from the viewpoint of true conservatism that business and finance do not more fully recognize that in a changing world a truly liberal government is a very real assurance that the orderly processes of government will not break down because of stubborn resistance to change or unreasoning insistence on change. Liberal government cannot afford to lose the confidence of the mass of the people in its willingness to concern itself with their needs. In their "Life of Lord Oxford and Asquith", (Vol. 1, p. 103), J. A. Spender and Cyril Asquith wisely observe:

"It is of course a much easier thing to lead their [the Tory] party than ours, as you and I will find if we ever have a share in the work. The function of the Tories in these days is neither to originate nor to resist a outrance, but to forestall inevitable changes by judicious compromises in the interest of threatened classes and institutions. They have, just as much as the old Tories had and even more, wealth, property and the vis inertiae on their side, and as their game is a difficult one and full of intellectual interest, they admit a vast deal more than they used to do of the higher intelligence of the country. But they need neither intuition, initiative, constructive power (except of a low kind), nor (what is rarest of all) the ability to organise and concentrate the scattered discontent and diffuse enthusiasm of a half-educated society."

2. In a modern industrial state, the problems of taxation are difficult and complicated. And there is no one simple key to their solution.

It has sometimes been urged that taxes should be levied for revenue only. But nearly all taxes affect revenues in some way. Even a prohibitive protective tariff may be justified on the ground that protected industries may yield more tax revenues to the government than unprotected industries. One cannot be indifferent to the fact that some taxes for revenues may fall upon those least able to bear them and other taxes for revenues may fall upon those best able to bear them. Some taxes for revenues may have a more adverse effect upon consumer's purchasing power than other taxes for revenue. And some taxes for

revenue may have a more adverse effect on industry than other taxes for revenue. Tax measures cannot be judged simply by the amount of revenue they produce, but must be appraised in light of their effect on the economic system.

Generally speaking, a modern industrial society must increasingly rely upon progressive taxation which is graduated according to ability to pay and must avoid regressive taxation which curtails the purchasing power of the great mass of consumers. There is respectable economic authority for the view that purchasing power and employment could be increased by shifting some of the tax burden, particularly the burden of indirect taxes from those least able to pay to those whose surplus savings are not fully absorbed in new investments. In rehauling our tax system we cannot be unmindful of the fact that there is inadequate purchasing power among the lower income groups and that there is over-saving, i. e., savings which do not find their way into new investment among the higher income groups. Government must be concerned with obtaining a permanently higher standard of life for all the

people as the only sure way of securing recovery, in any abiding sense, for business.

The need for increased government revenues during a period of business recession and faltering recovery has retarded a comprehensive revision of our revenue laws in conformity with progressive standards of taxation. In fact the need for increased revenues has to some extent made necessary further indirect consumption of taxes.

The Government has not been unmindful of the inequities of our tax system. The undistributed profits tax, while imperfect and faulty in operation, was intended to turn surplus corporate savings into purchasing power and to prevent the avoidance of the individual surtaxes. The proposed elimination of tax-exempt securities is also intended to prevent the avoidance of the individual surtaxes and to make it possible for private enterprise to compete for the funds of those who have sufficient means to be able to afford to take business risks.

Only a beginning, and not a wholly successful beginning, has been made in rehauling a system of taxation which is much more regressive than might be supposed because of the nominally high individual surtax

rates which are in theory prescribed by the statutes, but which are in practice avoided through the corporate accumulation of undistributed profits and the holding of tax-exempt securities.

Unquestionably there are other inequities in our tax system which should be attacked. And in attacking these inequities, the advice and counsel of really disinterested experts not under retainer, within and without the government, should be obtained.

3. Much can be said in favor of a frank lowering of the nominally and deceptively high surtaxes on high-bracket incomes. It is quite possible that these surtaxes are too high to yield their maximum productivity, and their very severity in a sense puts a premium on evasion. The retention of high individual surtaxes and the virtual repeal of the undistributed profits tax suggests that there is a political school which favors high surtaxes only because they can be evaded.

But if the deceptively high surtaxes are to be reduced, wholehearted cooperation ought to be ensured in advance to ensure that the

reduced surtaxes are really to be effective in practice. That means the elimination of all future tax-exempt securities and the application of the so-called Glass plan so that even the income from existing tax-exempt securities will not be ignored in assessing the surtaxes against income from other sources. That means a genuine undistributed profits tax, made workable by treating all stock-dividends as distributed profits taxable in the hands of the stockholder. That means a strengthening rather than a weakening of the capital gains taxes. That means plugging up every other device which may be used to evade the surtaxes. That means limiting the contingent fees which lawyers take in order to discover new devices of evasion.

4. The capital gains tax is inherently not an unjust tax. It is a tax which falls on those best able to bear the burden of taxation and at a time when they are best able to bear that burden. A great amount of the proceeds of the tax comes from dealings in securities, and the tax may to a very considerable degree be regarded as a windfall tax. The present rates are in many instances much lower than they should be. It is difficult to avoid some cases of individual hardship under almost

any tax law. A few cases of individual hardship ^{do} ~~does~~ not justify tax-immunities for rich speculators. Last year much of the taxes on capital gains ^{had} ~~were~~ given away under claims that modifications would help business. The small capital gains tax now in force on securities held for more than 18 months may some time lead to stock market liquidations which will imperil rather than help recovery. The mere encouragement of speculation in old existing securities is of very doubtful help to a program of sustained recovery.

Generally speaking, the capital gains tax should be strengthened, not weakened. Capital gains on assets held for a long or short period ought not to be taxed at a rate lower than the highest surtax rate the taxpayer pays on his income, exclusive of capital gains. Greater liberality might, however, be allowed in carrying over capital losses to be applied against capital gains in subsequent years.

5. It is claimed that the capital gains tax makes it more difficult for new enterprise to get capital. The validity of this contention is open to grave question. The present rates on capital gains

are not in fact substantially higher than those prevailing under the Mellon - Mills - Hoover regime. But if we want to help new enterprise, the way to do it is modify the tax as it relates to the assumption of equity risks in new enterprise and not to put a further premium on speculation in old securities which may make it harder for new enterprise to get risk-assuming capital.

If we want to encourage the assumption of risks in new enterprise we might permit capital gains to be invested within a given period in unsecured equities in new enterprises (as defined under Treasury regulations) without those gains being taxed until after the new investment in the new enterprise is liquidated. This privilege could be continued indefinitely so that there would be in effect no tax collected on capital gains as long as those gains continued to be promptly invested in new enterprise. Such a law would create a reservoir of funds specifically seeking outlet in new enterprises. Of course there are administrative difficulties in the application of such a tax, but certainly it is better to face those difficulties than to consider dropping the

tax entirely. It would be an unhappy paradox if the present Congress should eliminate taxes on capital gains which not even Mellon, Mills and Hoover could get even their Congress to eliminate.

6. The health of the economic system depends upon the smooth functioning of its interrelated parts. Intimate knowledge and understanding of the working of a small segment of the economic system does not necessarily connote knowledge or understanding of the delicate interrelations upon which the smooth functioning of the system as a whole depends. One part of a machine may fail to function not because of any defect in its own but because some other part of the machine is clogged or broken. A business man caught with excessive inventories for which he cannot find a ready market, may think that he needs bank credit and in a sense he does, but he and everyone else would be better off if he had ready customers for his wares.

The problem of government in relation to economic recovery is not an ordinary business problem. Economic recovery requires the full employment of labor as well as capital. To understand the forces

which will make or break economic recovery requires an understanding of something more than how to meet a payroll.

The sustentation of economic recovery may depend much more upon the predicability of the federal spending policy to which the economic system has become accustomed than upon any so-called appeasement policy. There may be much more ground to fear an interruption of recovery from the sterilization of the increased social security payroll taxes which become effective in January 1940, than from any of the taxes against which complaint is made.

~~W. J. P. H.~~ PSF
Frankfurter F F
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THE WHITE HOUSE
WASHINGTON

October 19, 1939.

MEMORANDUM FOR

F. F.

You got off mighty easy. All your friend Fred Phillips says is that your bottom button was unbuttoned. A few years ago I got a letter from an admirer complaining that my bottom button was not only unbuttoned but was off. Marion is hereby appointed "button-upper" to little Felix before he goes to school every morning.

F. D. R.

151
Supreme Court of the United States
Washington, D. C.

Oct. 1971

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

Dear Henry

Perhaps the President
would like to know
the kind of life to which
he sentenced me by putting
me on the Court. Evidently
I'm free neither to get
fat - nor even to leave
a button unbuttoned!

Ever yours

FF.

~~July 10~~ 192 Frank
Law School of Harvard University, Oct. Nov. 1939

Cambridge, Mass.

PSF Frankfurter best

Dear being

file
personal
1-✓

Be good enough
to pass this on to the
President — and
happy warm friends
Thanksgiving days
to you. Most cordially
BT

192 Brattle St.

Late School of Harvard University,
Cambridge, Mass. Wednesday.

Dear Hans

You must let me
express gratitude for
the logic quality of
your statement and
the masterly eloquence
of your action. No
wonder that even the
Herald-Tribune says
that "this country will
look back with pride
at its forthright example
so admirably set by
President Roosevelt".

how do I feel in the
slightest that I am
speaking here as
a proud American
because I am also
a Jew.

Ever gratefully,
W.S.

file
this one

PSF
Frankfurter ~~today file~~
yesterday

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

1939

Dear France:

The following is from a
letter that I've just had from
Harold Cass:

"Please tell F. D. R. from me
that I like Louis, and
that when my book comes
out it will be seen that
I'm not as covetous of the
significance of the last copy.

And I'm also sending you
a bit of reading-matter —
not a bed-time story, but
guaranteed to bring sleep. It
affords, however, some proof
of the great importance of
the quality of the leader

Court judges.

Marianne had
a joyous time on
Sunday. Her decreasing
Eye found you un-
commonly fit.

Affectionately,

SUPREME COURT OF THE UNITED STATES.

No. 7.—OCTOBER TERM, 1939.

Howard S. Palmer, James Lee Loomis
and Henry B. Sawyer, Trustees, etc.,
Petitioners,
vs.
The Commonwealth of Massachusetts.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Second Circuit.

[November 6, 1939.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

October 23, 1935, opened another chapter in the long history of the vicissitudes of the New York, New Haven and Hartford Railroad Company.¹ By filing a petition for reorganization under § 77 of the Bankruptcy Act (47 Stat. 1474, as amended by 49 Stat. 911 and 49 Stat. 1969, 11 U. S. C. § 205), the New Haven invoked the shelter of the United States District Court for the District of Connecticut. There it has since remained. An episode in this new chapter, already four years old, is presented by this case. We brought it here, 306 U. S. 627, because it raises important questions under the railroad bankruptcy law, particularly where it intersects the regulatory systems of the states. The District Court assumed power to supplant the relevant authority of the state—an authority which, apart from proceedings under § 77, has not been conferred by Congress either upon the federal courts or the Interstate Commerce Commission. The Circuit Court of Appeals, one judge dissenting, reversed the District Court, *Convers v. Commonwealth*, 101 F. (2d) 48.

A summary of the facts will lay bare the legal issues. On December 28, 1937, the bankruptcy Trustees of the New Haven, acting

¹ Brandeis, "Financial Condition of the New York, New Haven and Hartford Railroad Co." (1907); *The New England Investigation*, 27 I. C. C. 560 (1912); *In re Financial Transactions of the New York, New Haven and Hartford Railroad Co.*, 31 I. C. C. 32 (1914); Report of the Joint New England Railroad Committee to the Governors of the New England States. (Sterrow Report.) (1923.)

under the requirements of Massachusetts law,² applied to that Commonwealth's Department of Public Utilities for leave to abandon eighty-eight passenger stations.³ Twenty-one hearings were held by the Department on the questions raised by this application. During the pendency of these hearings and before the Department had taken any action, the present litigation was initiated in the New Haven bankruptcy proceedings by creditors of the debtor for an order directing the Trustees to abandon these local services. The Trustees joined in the prayer, while the Commonwealth denied the jurisdiction of the District Court and asked that the proceedings before the Department be allowed to reach fruition. The District Judge ruled that § 77 gave him the responsibility of disposing of the petition on its merits and, having taken evidence, gave the very relief for which the Trustees had applied to the Department and which was still in process of orderly consideration.

Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our fed-

² Mass. Gen. Laws (Ter. Ed.) c. 160, § 128, provides: "A railroad corporation which has established and maintained a passenger station throughout the year for five consecutive years at any point upon its railroad shall not abandon such station . . . nor substantially diminish the accommodation furnished by the stopping of trains thereat as compared with that furnished at other stations on the same railroad, except with the written approval of the department [of Public Utilities] after notice posted in and on said station for a period of thirty days immediately preceding a public hearing thereon."

See also Mass. Gen. Laws (Ter. Ed.) c. 159, § 16, vesting general control over intrastate railway services in the Department of Public Utilities.

³ The application also sought permission to effect certain other curtailments of passenger service. Some of the stations were situated on the lines of the New Haven, most of them on the lines of the Old Colony Railroad, and some on the lines of the Boston and Providence Railroad.

The New Haven in 1893 leased for 99 years all the properties of the Old Colony, including the Boston and Providence lines which the Old Colony had leased for 99 years in 1888. On June 1, 1936, the New Haven Trustees disaffirmed, as they were empowered to do under § 77, the Old Colony lease. After the disaffirmance the New Haven operated the lines on account of the Old Colony. On June 3, 1936, the Old Colony itself commenced proceedings under § 77. The Trustees of the New Haven were then appointed trustees for the Old Colony.

eralism and involves striking a balance between national and state authority in one of the most sensitive areas of government.

To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere.⁴ But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.⁵ Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. *Minnesota Rate Cases*, 230 U. S. 352; cf. *Kelly v. Washington ex rel. Foss Co.*, 302 U. S. 1.

The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the states.⁶ Even when the Transportation Act in 1920 gave the Interstate Commerce Commission power to permit abandonment of local lines when the over-riding interests of interstate commerce required it, *Colorado v. United States*, 271 U. S. 153,⁷ this was not deemed to confer upon the Commission jurisdiction over curtailments of service and partial discontinuances. *Public Convenience Application of Kansas City Southern Ry.*, 94 I. C. C. 691; see *Proposed Abandonment, Morris and*

⁴ E. g., *The Shreveport Cases*, 234 U. S. 342; *Wisconsin E. E. Comm. v. C. & N. W. R. Co.*, 257 U. S. 563. See I Sharfman, "The Interstate Commerce Commission", pp. 82-86, 219-225. For the careful observance of state interests in applying the Shreveport doctrine, see *Ill. Cent. E. E. Co. v. Public Utilities Comm.*, 245 U. S. 493 and *Florida v. United States*, 282 U. S. 194.

⁵ See Clark, "The Rise of a New Federalism", *passim*.

⁶ The controlling Massachusetts statute has been in force since 1911. But Massachusetts has exercised control over its railroads through administrative machinery ever since the famous Adams Commission in 1869. See First Annual Report, Board of Railroad Commissioners of Massachusetts, Public Document No. 40, pp. 3-12 (1870); Hadley, "Railroad Transportation" (1885 ed.) pp. 136-139.

⁷ For illustration of the scrupulous regard for local authority and local interests shown by the Commission in the exercise of its control over abandonments, see II Sharfman, "The Interstate Commerce Commission", pp. 264-269.

Essex Ry. Co., 175 I. C. C. 49. If this old and familiar power of the states was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change.

We are asked to find it in § 77(a) granting to the bankruptcy court "exclusive jurisdiction of the debtor and its property wherever located",⁸ and in § 77(c)(2) permitting the trustees, subject to the Court's control, "to operate the business of the debtor".⁹ In order to expedite the reorganization of insolvent railroads, such broad and general provisions doubtless suffice to confer upon the district courts power appropriate for adjusting property rights in the railroad debtor's estate and, as to such rights, beyond that in ordinary bankruptcy proceedings. *Cf. Continental Bank etc. v. Rock Island Ry.*, 294 U. S. 648. But the District Court claimed power over the carrier's relation to the state. It has become the settled social policy both of the states and the nation to entrust the type of public interest here in question to expert administrative agencies because of "the notion", as Judge Learned Hand pointed out below, "that a judge is not qualified for such duties."¹⁰

Not only is there no specific grant of the power which the District Court exercised, but the historic background of § 77, the considerations governing Congress in its enactment, and the scheme of the legislation as disclosed by its specific provisions reject the claim. Until the amendment of March 3, 1933, railroads were outside the Bankruptcy Act.¹¹ But the long history of federal railroad receiverships, with the conflicts they frequently engendered between the federal courts and the public, left an enduring convic-

⁸ § 77(a), 47 Stat. 1474, as amended in 1935 by 49 Stat. 911, 11 U. S. C. § 205(a) provides so far as here relevant: "If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

⁹ "The trustee or trustees so appointed . . . shall have . . . subject to the control of the judge and the jurisdiction of the Commission as provided . . . the power to operate the business of the debtor." § 77(c)(2), 47 Stat. 1475, as amended by 49 Stat. 914-15, 11 U. S. C. § 205(c)(2).

¹⁰ See *Conover v. Commonwealth*, 101 F. (2d) 48, at 51.

¹¹ See H. Rep. No. 1897, 72d Congress, 2d Session, p. 5.

tion that a railroad was not like an ordinary insolvent estate.¹² Also an insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge it with the Interstate Commerce Commission.¹³ Congress stopped short of this remedy. But the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates.

The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the Court to the Commission's approval of the Court's plan of reorganization the authority of the Court is intertwined with that of the Commission.¹⁴ Thus, in § 77(c) and

¹² See Chapter XXII "Railroad Receiverships" in I Gresham, "The Life of Walter Quintin Gresham," pp. 366-378; Jacobs "The Interstate Commerce Commission and Interstate Railroad Reorganizations", 45 Harv. L. Rev. 855; Lowenthal "The Investor Pays", See also remarks by Senator Wheeler, as Chairman of the Committee on Interstate Commerce, introducing the amendment of 1935, 79 Cong. Rec., Pt. 13, p. 13764.

¹³ See 76 Cong. Rec., Pt. 5, p. 5358 (remarks of Representative LaGuardia): "I would like to see the entire reorganization taken from the courts and placed in the Interstate Commerce Commission." The suggestion for administrative receiverships originated with the late Chief Justice Taft, when Circuit Judge, in an address before the American Bar Association. Taft, "Recent Criticism of the Federal Judiciary", Reports of the American Bar Association (1895) 237, 264.

¹⁴ § 77(e)(1) requires the appointment of trustees to be ratified by the Commission; § 77(c)(2) gives the Commission supervision over the compensation paid to trustees and their counsel; § 77(c)(3) permits the issuance of trustees' certificates only with the Commission's approval; § 77(c)(9) permits the Commission, on request of the court, to investigate facts pertaining to mismanagement of the debtor; § 77(e)(10) empowers the Commission to set up accounts for the allocation of earnings among the various portions of the debtor's lines; § 77(c)(11) empowers the Commission to file reports as to the debtor's property, prospective earnings, etc., and gives to the facts stated in such reports a presumption of correctness; § 77(c)(12) gives the Commission supervision over allowances for the expenses of various parties in interest in connection with the reorganization proceedings; §§ 77(d) and 77(e) give to the Commission control over any proposed plan of reorganization; § 77(p) gives to the Commission control over the solicitation of proxies or deposit agreements.

See also H. Rep. No. 1897, 72d Congress, 2d Session, pp. 5-8; H. Rep. No. 1283, 74th Congress, 1st Session, pp. 3-5; S. Rep. No. 1326, 74th Cong., 1st Session, pp. 4-6; Report, Federal Coordinator of Transportation, 1934, H. Doc. No. 69, 74th Cong., 1st Session, pp. 100-101; 76 Cong. Rec., Pt. 5, pp. 5108-5110; 79 Cong. Rec., Pt. 13, p. 13301, Pt. 13, pp. 13764, 13767.

§ 77(o) the power of the district courts to permit abandonments is specifically conditioned on authorization of such abandonments by the Commission. In view of the judicial history of railroad receiverships and the extent to which § 77 made judicial action dependent on approval by the Interstate Commerce Commission, it would violate the traditional respect of Congress for local interests and for the administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, except as part of a complete plan of reorganization for an insolvent road.¹⁵ About a fourth of the railroad mileage of the country is now in bankruptcy.¹⁶ The petitioners ask us to say that district judges in twenty-nine states have effective power, in view of the weight which often attaches to findings at *sibi prius*, to set aside the regulatory systems of these twenty-nine states with all the consequences implied for those communities. Congress gave no such power.

Arguments of convenience against denial of the existence of this power have been strongly pressed upon us. Continuance of state control over these local passenger services will, it is urged, impair the bankruptcy court's power to formulate a reorganization plan for the approval of the Interstate Commerce Commission. Such embarrassments, due either to the time required for exhaustion of the orderly state procedure or to the financial losses that may be involved in the continuance of local services until duly terminated by the state, may easily be exaggerated. It is not without significance that after four years no reorganization plan for the New Haven has yet been evolved. Perhaps it is no less true that amenability to state laws will serve as incentive to the formulation of

¹⁵ "Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto . . . the laws of any State or the decision or order of any State authority to the contrary notwithstanding." § 77(f).

The records of the Interstate Commerce Commission disclose that eight plans of reorganization have thus far been filed with the District Court in the New Haven proceedings and transmitted to the Interstate Commerce Commission. Proceedings before the Commission had progressed to the point where an examiner's report was filed; but the report was withdrawn for further hearings. The present record fails to show what, if any, disposition of the Old Colony lines any of these plans proposed to make.

¹⁶ On October 23, 1939, there were 61,392.89 miles of railroad in bankruptcy proceedings under § 77. This mileage includes lines in 29 states.

reorganization plans which, on approval by the Commission, do supplant state authority. But, in any event, against possible inconveniences due to observance of state law we must balance the feelings of local communities, the dislocation of their habits and the over-riding of expert state agencies by a single judge sitting, as in this case, in another state, removed from familiarity with local problems, and not necessarily gifted with statesman-like imagination that transcends the wisdom of local attachments.

Other arguments, drawn from the legislative history of § 77 and from the general equity powers conferred by § 77(a) and § (77) (c) (2),¹⁷ were urged but we deem it unnecessary to say more.

The decree below is

Affirmed.

Mr. Justice BUTLER took no part in the consideration and decision of this cause.

A true copy.

Test:

Clerk, Supreme Court, U. S.

¹⁷ *In Re Tyler*, 149 U. S. 164, and other decisions of this Court cited by petitioners deal with attempts at "physical invasion" of the properties held in the custody of a Federal court. See 149 U. S. at 182. § 65 of the Judicial Code (38 Stat. 1104, 28 U. S. C. § 194) decisively indicates that Congress did not intend that those who operate a business under the control of a federal court should be immune from the regulatory authority of the several states any more than they are from their taxing power.

~~_____~~
PSF
Frankfurter

FF
✓

November 21, 1939.

Dear Felix:

I am perfectly thrilled by your memorandum to Missy and I cannot tell you how happy I am in the thought that your correspondence and papers will be resting for all time beside mine. Incidentally, they will give a far better picture of our day than mine because you, in your work, have had so much greater opportunity to analyze and suggest on paper, whereas, I have been compelled to work, in great part, by word of mouth or through the medium of stodgy orders, proclamations and political speeches.

It is really a marvelous thing that you propose to do and I am made very happy by it.

Archie MacLeish was perfect. I lived up to the agreement but while he was speaking I was watching like a hawk for that sixteen word sentence. It was well worth waiting for.

As ever yours,

Honorable Felix Frankfurter,
Supreme Court of the United States,
Washington, D. C.

See: Hyde Park Library - Drawer ~ - 1939

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

November 20, 1939

Dear Missy:

One can never tell - therefore I wish to put into your safe-keeping this letter as an expression of my wish that all my correspondence, books, pamphlets, memoranda and papers of every sort, pertaining to the period which will be known to history as the New Deal should permanently be deposited in the Franklin D. Roosevelt Library at Hyde Park. An original duplicate of this letter will be found in the file of my papers marked "F.F. Private", in a sealed envelope bearing the following: "Instructions regarding disposition of all my papers, books, etc. pertaining to the New Deal."

Faithfully yours,

Felix Frankfurter

Miss Marguerite A. LeHand.

For the original of this letter and the President's ack of it on Nov 21, 1939----See: Library folder-Drawer 2-1939.

F.F.
12

5.

*F. D. I.
L. J. 13
Frankfurter*

Dec 11, 1939.

At Felix Frankfurter's suggestion, the President sends Mr. Louis A. Simon a memorandum, asking him what he thinks of putting quotation from MacLeish's speech on Nov. 19th at bottom of bronze tablet which is to go into the hall of Hyde Pk Library.

See: Library folder-Drawer 2-1939