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Recent Cases

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RECENT CASES

Constitutional Law—Armed Forces—Conrts-Martial Jurisdiction over Military Personnel Limited to Service-Connected Offenses

Petitioner, an army sergeant on leave, broke into a hotel room and criminally assaulted a young girl.[1] He was apprehended by civilian authorities, returned to military control, and subsequently convicted of attempted rape by general court-martial.[2] The Army Board of Review and, thereafter, the Court of Military Appeals affirmed.[3] Under confinement in federal prison, petitioner filed for a writ of habeas corpus in the District Court for the Middle District of Pennsylvania contending that the court-martial was without jurisdiction to try him for nonmilitary offenses committed off-post while on leave. The district court denied relief and the Court of Appeals for the Third Circuit affirmed.[4] On certiorari to the United States Supreme Court, *held*, reversed. A member of the Armed Forces, who has committed crimes cognizable in civilian courts which are not service-connected, is entitled to grand jury indictment and trial by petit jury, and cannot be tried by court-martial. *O'Callahan v. Parker*, 395 U.S. 258 (1969).

The Constitution grants to Congress the power to make "Rules for the Government and Regulation of the land and naval Forces"[5] and exempts "cases arising in the land and naval forces" from the requirement of prosecution by grand jury indictment.[6] These provisions form the constitutional basis[7] for a separate system of military courts

1. Petitioner was stationed at Fort Shafter, Oahu, in the Territory of Hawaii in July 1956. At the time of the offense, he was in Honolulu on an evening pass, attired in civilian clothes.

2. The court-martial found petitioner guilty of attempted rape, housebreaking, and assault with intent to rape in violation of Articles 80, 130, and 134 of the UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 880, 930, 934 (1964) [hereinafter cited as UCMJ].

3. United States v. O'Callahan, 7 U.S.C.M.A. 800 (1957). The sentence as approved provided for confinement at hard labor for ten years, forfeiture of all pay and allowances, and dishonorable discharge.

4. United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968), *aff'g* 256 F. Supp. 679 (M.D. Pa. 1966).

5. U.S. CONST. art. I, § 8, provides in part: "The Congress shall have Power . . . to raise and support Armies . . . To Provide and maintain a Navy . . . To make Rules for the Government and Regulation of the land and naval Forces . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."

6. U.S. CONST. amend. V, provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . ."

7. It was originally assumed that the fifth amendment was a source of military jurisdiction. Courts, therefore, sustained jurisdiction if the case had *arisen* in the land or naval forces. *See.*

which have historically denied the rights of grand jury indictment and trial by petit jury.[8] The Supreme Court early upheld congressional proscription of these constitutional guarantees as a valid exercise of regulatory power granted by the Constitution.[9] Moreover, civilian courts do not exercise direct review of court-martial sentences,[10] and the Supreme Court, in a number of early decisions,[11] developed the rule

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e.g., Kahn v. Anderson, 255 U.S. 1 (1921) (sustaining military jurisdiction over dishonorably discharged military prisoner). In United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955), Mr. Justice Black rejected that concept: "This provision [the fifth amendment] does not grant court-martial power to Congress; it merely makes clear that there need be no indictment for such military offenses as Congress can authorize military tribunals to try under its Article 1 power to make rules to govern the armed forces." 350 U.S. at 14 n.5. *See generally* F. WIENER, CIVILIANS UNDER MILITARY JUSTICE 305-14 (1967).

Some confusion still exists as to the effect of the fifth amendment exemption. Mr. Justice Douglas, speaking for the majority in the instant case states, "If the case does not arise *'in the land and naval forces,'* the accused gets *first* the benefit of an indictment by grand jury and *second*, a trial by jury . . . ." 395 U.S. at 262. *See also* MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. ed. 1969), which still cites the fifth amendment as a source of military jurisdiction.

8. The UCMJ provides for three types of courts-martial with varying jurisdiction, procedures, and sentencing powers. *See* UCMJ, arts. 16-54, 10 U.S.C. §§ 816-54 (1964), *as amended*, the Military Justice Act of 1968, 82 Stat. 1335. A general court-martial, at the time of petitioner's trial, consisted of at least five officers (analogous to a petit jury) and a law officer (analogous to a judge). The law officer, trial and defense counsel are required to be members of the Bar and certified by the Judge Advocate General. UCMJ, art. 25(c), 10 U.S.C. § 825(c) (1964), provides that at least one-third of the members of a court-martial trying an enlisted man are required to be enlisted men if the accused so requests. In practice the accused seldom makes this request. *See generally* Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial*, 15 CATH. U.L. REV. 171 (1966). Two-thirds of the members are required to concur for a finding of guilty and for purposes of determining the sentence. Special courts-martial (consisting of at least three officers) and summary courts-martial (one officer) take cognizance of less serious offenses and are empowered to award correspondingly lower punishments. *See generally* Note, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127 (1964); Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 56-57 (1961); Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 242-43, 248-50 (1960). For recent discussions of the effect of the Military Justice Act of 1968, 82 Stat. 1335, on courts-martial procedures, *see* Ervin, *The Military Justice Act of 1968*, 45 MILITARY L. REV. 77 (1969); Comments, 11 A.F. JAG. L. REV. (No. 2) 175-98 (1969).

9. *E.g.*, *Ex parte* Reed, 100 U.S. 13 (1879). "The constitutionality of the acts of Congress touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court." 100 U.S. at 21. "[T]he power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment." *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 138 (1866) (dictum).

10. *E.g.*, *In re* Yamashita, 327 U.S. 1, 8 (1946); *In re* Vidal, 179 U.S. 126 (1900); *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864); Administrative Procedure Act § 2(a), 5 U.S.C. § 1001(a) (1964) (courts-martial expressly excluded from appellate procedure); UCMJ, art. 76, 10 U.S.C. § 876 (1964).

11. *See, e.g.*, Hiatt v. Brown, 339 U.S. 103, 110-11 (1950); Humphrey v. Smith, 336 U.S. 695 (1949); Carter v. Roberts, 177 U.S. 496, 498 (1900); *Ex parte* Mason, 105 U.S. 696 (1882). *But see* Burns v. Wilson, 346 U.S. 137, 144 (1953) (opinion by Vinson, C.J. in which Justices

that in collateral proceedings brought in federal courts, inquiry would be limited to whether the military court had jurisdiction and possessed the power to impose the sentence. Jurisdiction of courts-martial was initially limited to trial and punishment of offenses having a direct impact on discipline.[12] Congress, however, in subsequent revisions of the Articles of War, gradually erased this limitation.[13] With the enactment of the Uniform Code of Military Justice in 1950,[14] court-martial jurisdiction extended to all crimes committed by servicemen

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Reed, Burton, and Clark concurred). Federal courts have power on habeas corpus by military prisoner to review claims of fundamental unfairness when military courts have manifestly refused to consider such claims. *See also* Kennedy v. Commandant, United States Disciplinary Barracks, 377 F.2d 339 (10th Cir. 1967). The court's inquiry would embrace the question of whether the petitioner was denied any basic constitutional right.

12. The first complete American Articles of War were adopted by the Act of April 10, 1806, ch. 20, § 1, arts. 1-101, 2 Stat. 359, *reprinted in* 2 W. WINTHROP, MILITARY LAW AND PRECEDENTS 1509 (2d ed. 1896) [hereinafter cited as WINTHROP]. No provision of the 1806 Articles specifically denounced common law crimes, such as murder and robbery. Article 59 expressly provides for the surrender of military personnel charged with civil offenses to civil authorities upon request. Although article 99 provided for court-martial punishment of all crimes not capital, and disorders and neglects to the prejudice of good order and military discipline, offenses cognizable under this "general" article had a "reasonably direct and palpable" impact on military discipline. 2 WINTHROP 1123. *See* Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 446 (1960). For discussions treating the separate Articles for the Government of the Navy, see Pasley & Larkin, *The Naval Court-Martial, Proposals for Its Reform*, 33 CORNELL L.Q. 195 (1947).

13. Courts-martial were authorized to try various civil crimes, in time of war, regardless of the impact on discipline. Act of March 3, 1863, ch. 75, § 30, 12 Stat. 736. The requirement of the 1806 Articles for delivery of military offenders to civil autborities in case of civil crimes was limited to peace-time situations. Articles of War, 1874, Rev. Stat. § 1342, art. 59 (1875), *reprinted in* 2 WINTHROP, *supra* note 12, at 1529. Military jurisdiction was extended to specific non-capital crimes committed in peace-time, regardless of the impact on discipline, to murder and rape committed outside the United States, and to civilians accompanying armed forces overseas. Articles of War, 1916, ch. 418, 39 Stat. 650. For general discussions of the gradual expansion of courts-martial jurisdiction, see Bisbop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 321-27 (1964); Duke & Vogel, *supra* note 12, at 449-55.

14. Act of May 5, 1950, ch. 169 64 Stat. 107, *as amended*, 10 U.S.C. §§ 801-940 (1964) The UCMJ was widely acclaimed as a significant advance in the administration of military justice. It established uniform court-martial procedures in all armed services, incorporated rules and practices similar to federal courts, and did much to alleviate situations of command influence, utilization of unqualified counsel, and other flagrant violations of due process. *See* Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953). *See generally* Symposium, *Professor Morgan and the Drafting of the Code*, 28 MILITARY L. REV. 1 (1965); *A Symposium on Military Justice*, 6 VAND. L. REV. 161 (1953); Spindler, *The Uniform Code of Military Justice*, 50 MICH. L. REV. 1084 (1952). Significant advances involved appellate procedure, including the establishment of the Court of Military Appeals, composed of three civilian judges appointed by the President with the advice and consent of the Senate. *See generally* Bishop, *supra* note 8, at 57 n.87; Quinn, *supra* note 8; Brosman, *The Court: Freer Than Most*, 6 VAND. L. REV. 166 (1953); Walker & Neibank, *The Court of Military Appeals—Its History, Organization, and Operation*, 6 VAND. L. REV. 228 (1953).

and civilians accompanying armed forces abroad, whether in time of peace or war.[15] In cases challenging the expanded jurisdiction, the Supreme Court consistently held a defendant's "status" as a member of the Armed Forces to be a sufficient basis for the exercise of court-martial jurisdiction.[16] Similarly, the Court, in a line of recent decisions, struck down military jurisdiction over civilians because requisite military status was lacking. In *United States ex rel. Toth v. Quarles*,[17] the Court held unconstitutional the Uniform Code provision authorizing trial by court-martial of a discharged serviceman[18] for offenses committed while an active member of the Armed Forces. In decisions following *Toth*,[19] the Court completely removed civilians from military jurisdiction except when in service with Armed Forces abroad in time of war. In no case, however, did the Court question the power of Congress to determine the type of offenses which render servicemen amenable to trial and punishment by court-martial.

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15. UCMJ, arts. 118, 120, 10 U.S.C. §§ 918, 920 (1964), made murder and rape occurring in the United States punishable by court-martial, thereby removing the one remaining restriction on the exercise of military jurisdiction. Military courts now acquired concurrent jurisdiction with civil courts over crimes of servicemen which were at the same time violations of the UCMJ and offenses cognizable by civil tribunals. The court whose jurisdiction first attached could proceed to try the offender. UCMJ, art. 14, 10 U.S.C. § 814 (1964), provides for delivery of servicemen charged with civil crimes to civil authorities upon request.

Since federal and state governments are separate "sovereigns," a prior conviction or acquittal by court-martial is no defense to subsequent proceedings in a state court, or vice-versa. All that is necessary is that the crime be in violation of military law and the law of the state. *See, e.g.*, Abbate v. United States, 359 U.S. 187 (1959); Caldwell v. Parker, 252 U.S. 376 (1920); Grafton v. United States, 206 U.S. 333 (1907).

16. *E.g.*, Grafton v. United States, 206 U.S. 333, 348 (1907); Johnson v. Sayre, 158 U.S. 109, 114 (1895); Smith v. Whitney, 116 U.S. 167, 184-85 (1886); Coleman v. Tennessee, 97 U.S. 509 (1879); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

17. 350 U.S. 11 (1955). Toth, a discharged airman, had brought habeas corpus proceedings against the Secretary of the Air Force to prevent his return to Korea to stand trial by court-martial on a charge of murder. Military authorities had not discovered Toth's complicity in the case until after his return to the United States and honorable discharge. Although his apprehension had been under the recapture provision. UCMJ, art. 3, 10 U.S.C. § 803 (1964), the Court concluded "status" as a member of the Armed Forces was the basis of jurisdiction and ruled the recapture provision unconstitutional. *See* note 7 *supra*.

18. Toth was an honorably discharged serviceman. Military authorities continue to exercise court-martial jurisdiction over dishonorably discharged military prisoners. The most recent Supreme Court decision, Kahn v. Anderson, 255 U.S. 1 (1921), upheld this practice and the Court has refused to review rulings of lower courts which have followed *Kahn v. Anderson*. *E.g.*, Ragan v. Cox, 320 F.2d 815 (10th Cir. 1963), *cert. denied*, 375 U.S. 981 (1964); Simcox v. Madigan, 298 F.2d 742 (9th Cir.), *cert. denied*, 370 U.S. 964 (1962).

19. McElroy v. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960) (denying military jurisdiction over peace-time civilian employees of Armed Forces overseas); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957) (denying military jurisdiction over civilian dependants of military personnel accompanying them overseas).

In the instant case, the Court recognized the necessity for a specialized system of military courts, but reasoned that the proscription of grand jury indictment and trial by jury required that jurisdiction be limited to a scope absolutely essential to the maintenance of discipline. The Court rejected the contention of the United States[20] that the petitioner's "status" as a soldier was in and of itself a sufficient basis for military jurisdiction regardless of the nature of the offense. Examining English and American military history, the Court determined that court-martial trials of soldiers were traditionally limited to crimes that bore a direct relationship to military discipline. Recognizing that Congress, in the exercise of its regulatory power, had purposely extended military jurisdiction to crimes of a civilian nature, the Court, nevertheless, concluded that "harmony" with the Bill of Rights required limiting jurisdiction to service-connected offenses.[21] Noting that the petitioner's offenses were committed while on leave from post in United States territory at a time of peace, bore no relation to his military duties, and were cognizable in accessible civil courts, the Court held that he could not be tried by court-martial. Mr. Justice Harlan, dissenting,[22] found adequate bases for sustaining military jurisdiction in the constitutional provisions empowering Congress to make regulations for the Armed Forces and under the Court's prior decisions holding "status" as a member of the Armed Forces to be sufficient for the exercise of court-martial jurisdiction.

The instant Court has abandoned a century of precedent[23] and restricted the heretofore unchallenged power of Congress to determine the type of offense which may be tried by courts-martial. In terms of immediate impact, the decision removes from military jurisdiction crimes of servicemen which, like the petitioner's, are of purely civilian character. Moreover, military prisoners serving court-martial sentences for crimes of this category have acquired a promising ground on which to base habeas corpus proceedings.[24] Beyond this, however, the decision

20. " 'Status' is necessary for jurisdiction; but it does not follow that ascertainment of 'status' completes the inquiry, regardless of the nature, time, and place of the offense." 395 U.S. at 267.

21. "For it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights." *Id.* at 273.

22. "[T]his Court has consistently asserted that military 'status' is a necessary *and sufficient* condition for the exercise of court-martial jurisdiction . . . [and] has never previously questioned . . . that, given the requisite military status, it is for Congress and not the Judiciary to determine the appropriate subject-matter jurisdiction of courts-martial." *Id.* at 275-76 (dissenting opinion).

23. *See* cases cited notes 16, 17 & 19 *supra*.

24. It is not clear whether the instant decision will have a retroactive application. Military

portends no small amount of confusion for military and civilian officials alike. The Court did not accurately define the scope of "service-connection" for purposes of determining court-martial jurisdiction. Although in its analysis of petitioner's offenses, the Court emphasized the presence of certain factors and the absence of others,[25] no general standard is provided. Nor does the Court indicate whether the "service-connected" test is to apply to crimes committed by servicemen stationed abroad. While pointing out that the petitioner's offenses occurred in United States territory, the Court did not expressly limit its holding to offenses committed within this country. Application of the instant ruling to United States forces overseas will cause practical problems of considerable magnitude.[26] In any case, military

authorities have flatly rejected the possibility. *See, e.g.*, United States v. Burkhart, 5 CRIM. L. REP. 2421 (U.S.A.F. Bd. Rev. July 27, 1969).

25. "In the present case petitioner was on leave when he committed the crimes with which he is charged. There was no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts. Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property." 395 U.S. at 273-74.

26. Under international law, foreign courts have jurisdiction over all crimes committed within their territorial borders. Where concurrent jurisdiction has been ceded to United States military authorities, it has been by mutual agreement and in terms defined by treaty. *See, e.g.*, NATO Status of Forces Agreement, June 19, 1951, [1953] 2 U.S.T. 1792, T.I.A.S. No. 2846. With overseas military commanders powerless to try and punish offenses which are not "service-connected," the foreign sovereign will probably assert its own jurisdiction unless Congress can provide other means for handling these cases. It is doubtful, however, that a practical alternative to military jurisdiction can be found. Congress would not likely attempt to constitute civil courts in the many foreign countries where American forces are deployed. Even if it is assumed that the foreign sovereign would consent, the problems inherent in administering a system of federal courts abroad militate strongly against such a course. Equally unattractive is the prospect of returning servicemen to the United States for trial. The large number of petty civil crimes involving servicemen would create an intolerable burden and ultimately impair military efficiency. Moreover, a proceeding in the United States would involve difficulties in insuring speedy trial, production of evidence, and compulsory process. In light of these considerations, it is probable that the serviceman charged with a civil offense would be tried by the foreign court of original jurisdiction. Delivery of American servicemen to foreign authorities for trial is constitutionally permissible. Wilson v. Girard, 354 U.S. 524 (1956). It is submitted, however, that this result was not within the contemplation of the instant Court, whose primary concern was that servicemen should not be denied basic constitutional rights. Clearly, trial by an American court-martial in which practices and procedures approach standards of due process, would be preferable to trial in many foreign courts. When United States forces are engaged in combat operations in a foreign country, the exercise of military jurisdiction over all offenses committed by servicemen can probably be sustained on the basis of the war powers of Congress. *But cf.* Latney v. Ignatius, 38 U.S.L.W. 2015 (D.C. Cir. June 30, 1969), discussed at note 28 *infra*.

authorities having custody of offenders will likely strain to find a service-connection when possible.[27] At the same time, the court-martial defendant, in all cases of questionable service-connection, now has a valid and promising ground for appeal.[28] Cases decided since *O'Callahan* suggest that the meaning of "service-connected" is to be the subject of much litigation.[29] The Court of Military Appeals will undoubtedly provide interpretative guidance at its earliest opportunity.[29.1]

The applicability of the Bill of Rights to members of the Armed

27. The Judge Advocate General of the Army on June 4, 1969, two days after the instant case was decided, advised army commands: "Pending clarification in future judicial decisions, *O'Callahan v. Parker* is construed to preclude trial by court-martial only in those cases arising within the territorial jurisdiction of the United States and which are unequivocally not, repeat not, service connected . . . ." Among the grounds for finding service connection suggested by the JAG opinion were "a factual relation to military effectiveness . . . [and] [t]he fact that defendant was in uniform or otherwise identified with the military . . . ." 5 CRIM. L. REP. 2229 (June 11, 1969).

28. *E.g.*, Latney v. Ignatius, 38 U.S.L.W. 2015 (D.C. Cir. June 30, 1969). In that case, the petitioner was a merchant seaman serving aboard a vessel chartered by the United States Navy Military Sea and Transportation Service engaged in supplying United States Forces in Vietnam. One evening, while on liberty in the port of DaNang, Vietnam, petitioner killed a fellow seaman in a knife-fight. The military exercised jurisdiction under UCMJ, art. 2 (10), 10 U.S.C. § 802 (10) (1964), which confers jurisdiction over persons serving with or accompanying armed forces "in the field" in time of war. The federal district court denied petitioner's application for habeas corpus, but the Court of Appeals for the District of Columbia reversed. The court held that under the "spirit" of *O'Callahan* and the precedents cited therein, the military was without jurisdiction to try petitioner even in time of "undeclared war."

29. In United States v. Reid, 5 CRIM. L. REP. 2329 (U.S. Navy Bd. Rev. June 11, 1969), military jurisdiction was sustained over a sailor's unlawful use of LSD off base; the Board finding service-connection in the Navy's obligation to furnish the sailor with medical care should the activity prove detrimental to his health and the possibility that the activity could render him unfit for military duties. In United States v. Muller, 5 CRIM. L.REP. 2401 (U.S. Army Bd. Rev. July 24, 1969), a soldier's off-base sale of marijuana to another soldier was an offense triable by court-martial under *O'Callahan*; the victim was not a civilian and wrongful possession and sale of marijuana is recognized conduct prejudicial to good order and discipline. In United States v. Burkhart, 5 CRIM. L. REP. 2421 (U.S.A.F. Bd. Rev. July 27, 1969), the many substantial benefits accorded servicemen's dependents by the Armed Forces, rendered the offense of bigamy "service-connected" under the *O'Callahan* test.

29.1 While this comment was at galley stage, the United States Court of Military Appeals handed down a group of decisions construing *O'Callahan*. In its expository opinion in United States v. Borys, 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969), the court, over the vigorous dissent of Chief Judge Quinn, held that a court-martial was without jurisdiction to try an army captain for rape and other offenses against civilians committed off-post in a non-duty status. The military court, in giving *O'Callahan* broad application, noted that "the Court's language in *O'Callahan* . . . indelibly returned military law to its earlier limited scope . . . ." Chief Judge Quinn, in an extended dissenting opinion, concluded that the decision's applicability was limited by the requirement that the serviceman's crime be cognizable in a federal court before military jurisdiction could be challenged. Illustrative of the divided court's interpretation of *O'Callahan* are the following recent decisions: United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969)

Forces has long been an unsettled question.[30] The instant Court was understandably concerned that citizens should not, by virtue of military service, be stripped of basic constitutional rights. The Court recognized, however, that the exigencies of military discipline require some distinction between the rights of soldiers and those of civilians. In determining the permissible scope of court-martial jurisdiction, the Court relied on a construction of the Constitution which requires that an express grant of power be exercised in "harmony" with the express guarantees of the Bill of Rights. The harmony contemplated by the Court presupposes a balancing of competing government and individual interests. It is submitted, however, that the Court largely ignored legitimate government interests in retaining military jurisdiction over civilian-type offenses.[31] Moreover, in its preoccupation with the plight of servicemen facing court-martial, the Court

(court-martial jurisdiction sustained for offenses of use and possession of marijuana since these offenses have a special military significance); United States v. Crapo, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969) (court-martial without jurisdiction to try offenses of attempted robbery which occurred in civilian community, but had jurisdiction to try the accused for robbery commenced on military reservation and completed in civilian community); United States v. Castro, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969) (court-martial without jurisdiction to try offense of carrying a concealed weapon where the accused was apprehended as an unauthorized absentee and delivered to military authorities prior to the weapon's disclosure); United States v. Henderson, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969) (court-martial without jurisdiction to try offenses of carnal knowledge which occurred off base even though victim was daughter of another serviceman); United States v. Riehle, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969) (court-martial without jurisdiction to try offense of larceny of an automobile in civilian community even though the accused was apprehended on a military base); United States v. Williams 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969) (court-martial had jurisdiction to try worthless check offenses based on checks cashed at military exchange, but not for checks cashed at grocery in the civilian community); United States v. Paxiao, 18 U.S.C.M.A. 608, 40 C.M.R. 320 (1969) (court-martial bad jurisdiction to try offense of wrongful appropriation of civilian owned vehicle where taking occurred on military base).

30. Mr. Justice Black, speaking for a plurality in *Reid v. Covert*, stated: "As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials." 354 U.S. at 37. Historically, servicemen have never enjoyed rights of freedom of speech, bail, and jury trial. On the other hand, the UCMJ preserves many constitutional rights to the court-martial defendant, including prohibitions against self-incrimination, cruel and unusual punishments, and command influence. *See* Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958), for a position that the Bill of Rights was never intended to apply to members of the Armed Forces, and Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) for the opposite view. *See also* Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 Harv. L. Rev. 1697 (1968); Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 186 (1962); Note, *Servicemen in Civilian Courts*, 76 YALE L.J. 380 (1966).

31. The Government interests ignored are aptly detailed in the dissenting opinion. 395 U.S. at 281-83. Basic to these interests is the advantage of retaining control over the serviceman, and if practical, having him continue to perform his duties. *See* MANUAL FOR COURTS-MARTIAL,

apparently overlooked two important considerations. First, substantial improvements in the administration of military justice have been realized in recent years,[32] and secondly, in many situations it could be to the advantage of a serviceman charged with an offense of a civilian nature to remain in military custody.[33] Finally, the Court's concern with the court-martial practice at the time of the Revolution seems out of place when considering the practical problem of maintaining discipline among the more than three million men in uniform today. These considerations suggest that the holding of the instant decision is overly broad. It is not contended that the disposition of this petitioner's claim is improper. Clearly his offenses could have been appropriately tried in civilian courts. On the other hand, there undoubtedly will be situations in which court-martial cognizance of offenses not "service-connected" will be in the best interests of the United States and the serviceman alike. It is hoped that the Court, in future litigation, will provide specific guidelines which will enable authorities to make a realistic determination of the appropriate subject matter for court-martial jurisdiction.[34]

UNITED STATES ¶ 20b (rev. ed. 1969). The offender who remains under military jurisdiction can also be transferred with this unit if the needs of the service dictate. *Id.* ¶ 8. If required to remain in the civil jurisdiction he is a loss to the military (*e.g.*, sailors required to remain in a port-of-call and miss their ship's movement). The flexibility of military punishments—such as forfeiture of pay, restriction to limits, and hard labor without confinement—permits many convicted servicemen to remain on the job. *Id.* ¶ 126(g), (h) & (k). Moreover, many servicemen confined in post brigs perform worthwhile functions for the command and undergo rehabilitative measures oriented toward returning them to full duty. Habitual offenders as well as persons charged with more serious crimes might well be turned over to civil authorities. There remains, however, a variety of situations in which the Government's interests are clearly served by retaining jurisdiction.

32. Military Justice Act of 1968, 82 Stat. 1335. *See, e.g.*, Butler, *The Revolution in Military Law*, 54 A.B.A.J. 1194 (1968) (for view that court-martial defendants now enjoy substantially the same rights as do civilians). *See generally* notes 8 & 14 *supra*.

33. The practical considerations outlined in note 31 *supra* apply as well to the serviceman. Moreover, a serviceman detained by civil authorities because of his own misconduct will be liable to trial by court-martial upon his return to military control for the offense of unauthorized absence. See UCMJ, art. 86, 10 U.S.C. § 886 (1964). Also to be considered is the likelihood that many servicemen would prefer to be tried by a military court rather than face a civilian jury whose members possess anti-military sentiments and, in some cases, racial prejudice.

34. It is hoped "that the searching criticism of the bench and bar may, as it has on other occasions, convince a new or future majority of the Supreme Court of the error of *O'Callahan*." United States v. Borys, 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969) (Quinn, C.J., dissenting).

Constitutional Law—Desegregation—Puhlic Housing Authority Required to Build Most Units in White Neighhorhoods

Plaintiffs, Negro tenants and applicants for public housing, sought a declaratory judgment against defendant Chicago Housing Authority, alleging that discriminatory tenant assignment and site selection practices violated their rights under the equal protection clause of the fourteenth amendment, section 16 of the 1870 Civil Rights Act,[1] and section 1 of the 1871 Civil Rights Act.[2] Plaintiffs also requested a permanent injunction against racial discrimination in public housing, an order requiring defendants to submit and implement a new non-discriminatory plan for site selection, and a declaratory judgment under Title VI of the 1964 Civil Rights Act allowing the plaintiffs to seek an injunction against the use of federal funds to perpetuate racial discrimination in public housing.[3] The district court granted defendant's motion to dismiss two counts in the complaint,[4] but ruled that plaintiffs had the right to prove defendant's site selection and tenant assignment policies were intentionally designed to maintain residential segregation. Defendant admitted imposing Negro quotas in four projects, but claimed the City Council was responsible for the selection of sites on the basis of the racial composition of the neighborhood.[5] On motions for summary judgment in the United States District Court for the Northern District of Illinois, *held*, judgment for plaintiffs. The equal protection clause of the fourteenth amendment is violated when a public housing authority's tenant

1. 42 U.S.C. § 1981 [1964): "All persons within the jurisdiction of the United States have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and propety as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exceptions of every kind, and to no other."

2. *Id.* § 1983 (1964): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. *Id.* § 2000(d) (1964): "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

4. Gautreaux v. Chicago Housing Auth., 265 F. Supp. 582 (N.D. Ill. 1967). The court granted defendant's motion to dismiss two counts in which plaintiffs failed to allege there was a deliberate effort to deprive them of their constitutional rights.

5. Illinois law provides that the City Council must approve all sites before they are acquired. ILL. ANN. STAT. ch. 67½, § 9 (Smith-Hurd Supp. 1969).

assignment and site selection policies are deliberately designed to maintain existing patterns of residential segregation. *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969). Granting relief, the court issued a specific and detailed plan for the defendant to follow in achieving integration in public housing, including provisions that three-fourths of all new housing projects must be located in white neighborhoods, and that only one-half of the dwelling units in housing projects can be made available to neighborhood residents. *Gautreaux v. Chicago Housing Authority*, Civil Action No. 66 C 1459 (N.D. Ill., filed July 1, 1969).

During the decade following passage of the Housing Act of 1937,[6] the Supreme Court's "separate but equal" doctrine[7] was adopted by the United States Housing Authority[8] and followed by several courts which ruled that racial segregation in public housing projects was not prohibited by the Constitution.[9] The Supreme Court's 1917 decision[10] that a racial zoning ordinance violated the fourteenth amendment was used as authority for holding some racial segregation laws unconstitutional,[11] but the decision did not affect the early cases involving discrimination in public housing.[12] A new trend developed in 1948 with the decision in *Shelley v. Kraemer* that states could not enforce racially restrictive covenants in leases.[13] Following this line of development, several courts held that segregation in public housing was a violation of the equal protection clause.[14] These decisions, coupled

6. United States Housing Act of 1937, 50 Stat. 888, *as amended*, 42 U.S.C. § 1401 (1964).

7. Plessy v. Ferguson, 163 U.S. 537 (1896).

8. Comment, *The Public Housing Administration and Discrimination in Federally Assisted Low-Rent Housing*, 64 MICH. L. REV. 871, 875-76 (1966). The United States Housing Authority administered the low-rent housing program from 1937 to 1947, when the Public Housing Administration was established. For a history of public housing in the United States, see *Special Project—Public Housing*, 22 VAND. L. REV. 875, 882-92 (1969).

9. *See, e.g.*, Favors v. Randall, 40 F. Supp. 743 (E.D. Pa. 1941); Denard v. Housing Auth., 203 Ark. 1050, 159 S.W.2d 764 (1942); Housing Auth. v. Higginbotham, 143 S.W.2d 95 (Tex. Civ. App. 1940).

10. Buchanan v. Warley, 245 U.S. 60 (1917).

11. *See, e.g.*, Jackson v. State, 132 Md. 311, 103 A. 910 (1918); Clinard v. City of Winston-Salem, 217 N.C. 119, 6 S.E.2d 867 (1940); Allen v. Oklahoma City, 175 Okla. 421, 52 P.2d 1054 (1935). All these cases involve racial zoning ordinances.

12. It has been suggested that the *Buchanan* decision could have been used as authority to prohibit intentionally segregated public housing, because in both cases—racial zoning and intentionally segregated public housing—the object of the state's action was to restrict each race to its own living accommodations. Note, *Racial Discrimination in Housing*, 107 U. PA. L. REV. 515, 517 (1959).

13. 334 U.S. 1 (1948).

14. *See, e.g.*, Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955); Jones v. City of Hamtramck, 121 F. Supp. 123 (E.D. Mich. 1954); Vann v. Metro. Housing Auth., 113 F. Supp. 210 (N.D. Ohio 1953); Banks v. Housing Auth., 120 Cal. App. 2d 1, 260 P.2d 668 (1953), *cert.*

with the desegregation cases of 1954,[15] made it clear that government-supported segregation would no longer be permitted.[16] Since 1954, federal and state decisions have held that states cannot provide "separate but equal" housing facilities.[17] Despite the developments in the case law, President Kennedy's Executive Order in 1962 represents the first time the federal government declared racial discrimination in public housing projects to be against public policy.[18] Legislation prohibiting segregation in public housing was included in the Civil Rights Act of 1964[19] and in the Fair Housing Act of 1968.[20] The Housing Assistance Administration supplemented the legislation with regulations designed to promote desegregation through tenant assignment[21] and site selection procedures.[22] Nevertheless, there has been little significant progress in efforts to achieve integration in public housing.[23]

Until recently, concern has centered on tenant assignment policies; the question of discrimination in site selection has received relatively little judicial attention. Several decisions, however, have held that local housing authorities have broad discretion in site selection and that courts should not interfere with or control the site selection procedure unless the local agency is acting in bad faith or in violation of the law.[24] These decisions have been supplemented by the holding that selection

denied, 347 U.S. 974 (1954); Seawell v. MacWithey, 2 N.J. Super. 255, 63 A.2d 542, *rev'd and remanded*, 2 N.J. 563, 67 A.2d 309 (1949) (matters brought out on appeal showed an absence of discrimination); Taylor v. Leonard, 30 N.J. Super. 116, 103 A.2d 632 (1954) (ruling that a racial quota system in admitting persons to public housing projects is discriminatory).

15. Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

16. *See* Comment, *supra* note 8, at 876.

17. Note, *supra* note 12, at 518.

18. *See* Exec. Order No. 11,063, 3 C.F.R. 652 (1962). The Executive Order was applied only to those projects entered into by the federal government and the local authority after the effective date of the order. Comment, *supra* note 8, at 879. *See also Special Project—Public Housing*, *supra* note 8, at 909-10, 938 (1969).

19. Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d-1 (1964).

20. Fair Housing Act of 1968, tit. VIII, 42 U.S.C.A. § 3603 (Supp. 1969).

21. 24 C.F.R. § 1.6(d) (1969) requires recipients of federal funds to inform applicants of the protections available against discrimination. For a survey of the various tenant assignment plans, see *Special Project—Public Housing*, *supra* note 8, at 938-40.

22. "Any proposal to locate housing only in areas of racial concentration will he prima facie unacceptable . . . [except on] a clear showing, factually substantiated, that no acceptable sites are available outside the areas of racial concentration." LOW-RENT HOUSING MANUAL § 205.1(2)(g) (1968).

23. *See Special Project—Public Housing*, *supra* note 8, at 937-44.

24. *See, e.g.*, Varnadoe v. Housing Auth., 221 Ga. 467, 145 S.E.2d 493 (1965) (involving city housing authority's action to condemn land for a low-rent housing project); *In re* Housing Auth., 235 N.C. 463, 70 S.E.2d 500 (1952) (involving proceeding to condemn a portion of a college campus as a site for a public housing project).

of a project site in an all-Negro area is not a violation of constitutional rights absent proof of an intent to promote racial segregation.[25] In addition, recent cases indicate that the equal protection clause and the supporting civil rights statutes[26] are being employed to attack alleged de facto residential segregation fostered by discriminatory urban renewal and zoning practices.[27] Traditionally, courts finding practices which promote racial segregation have issued declaratory and injunctive relief against the local housing authority.[28] Some courts have enjoined housing authorities from continuing their discriminatory practices;[29] others have issued mandatory injunctions compelling housing authorities to take affirmative action to integrate their facilities.[30] Some plaintiffs have been permitted to apply to the court at later dates for rehearings to determine if the defendants have acted in good faith to end the existing segregated facilities.[31] The responsibility for formulating and implementing a plan to correct an unconstitutional condition has fallen initially on the defendant;[32] the

25. Thompson v. Housing Auth., 251 F. Supp. 121 (S.D. Fla. 1966). An analogous situation, site selection for public schools, has resulted in the holding that it is unconstitutional to select sites in such a manner as to promote segregation. Kelley v. Altheimer, Ark., Pub. School Dist., 378 F.2d 483, 497 (8th Cir. 1967); *accord,* Betts v. County School Bd., 269 F. Supp. 593 (W.D. Va. 1967).

26. Civil Rights Act of 1870, § 16, 42 U.S.C. § 1981 (1964); Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1964). *See* notes 1 & 2 *supra.*

27. *See* Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich. 1969); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969).

28. *See* cases cited note 14 *supra.* Some courts have refused to grant injunctions against local housing authorities due to the abstention doctrine. *See Special Project—Public Housing, supra* note 8, at 935-36. Courts which have enjoined housing authorities from discriminatory policies generally have not based their injunctions on section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964). The Supreme Court, in Monroe v. Pape, 365 U.S. 167, 191 (1961), held that a municipality is not a "person" within the meaning of section 1983. In Randell v. Newark Housing Auth., 384 F.2d 151 (3d Cir. 1967), the Third Circuit cited *Monroe* as authority for affirming a district court decision that the public housing authority could not be enjoined under section 1983 from evicting the plaintiff tenants. The *Monroe* decision, however, has been attacked on several grounds, and an increasing number of federal district and appellate courts are enjoining municipalities and municipal agencies under section 1983 without even mentioning *Monroe.* 3 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 225, 228-30 (1967).

29. *See, e.g.,* Jones v. City of Hamtramck, 121 F. Supp. 123 (E.D. Mich. 1954); Taylor v. Leonard, 30 N.J. Super. 116, 103 A.2d 632 (1954); Seawell v. MacWithey, 2 N.J. Super. 255, 63 A.2d 542 (1949), *rev'd and remanded,* 2 N.J. 563, 67 A.2d 309 (1949) (matters brought out on appeal showed an absence of discrimination).

30. *See, e.g.,* Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955). *See also* Banks v. Housing Auth., 120 Cal. App. 2d 1, 260 P.2d 668 (Dist. Ct. App. 1953), *cert. denied,* 347 U.S. 974 (1954) (the trial court issued a writ of mandamus requiring the housing authority to apply the same set of standards in determining eligibility for all applicants).

31. *See, e.g.,* Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955); Vann v. Metropolitan Housing Auth., 113 F. Supp. 210 (N.D. Ohio 1953).

32. *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1141 (1969). In the first major school desegregation case, the Supreme Court ruled that "school authoritics have

responsibility shifts to the courts only if the defendant fails to meet his duty,[33] and conditions demand the immediate implementation of a court-adopted plan.

In the instant case, the court examined the evidence indicating the defendant limited the number of Negro tenants in the four family projects in predominantly white neighborhoods.[34] Concluding that a racial quota system was being used, the court held the plaintiffs were entitled to an appropriate remedy against the defendant's tenant assignment policies.[35] The court then addressed itself to the procedures used by the defendant in selecting sites for new projects. After examining statistical information concerning site selection,[36] the court reasoned that racial discrimination was the only explanation for the veto of more than 99.5 percent of the white sites initially selected for housing projects, while only 10 percent of the units in Negro neighborhoods were rejected during the same period.[37] The court stated that a deliberate policy to separate the races through discriminatory selection of sites for new housing projects cannot be justified under the equal protection clause of the fourteenth amendment. In granting relief, the court refused to enjoin the use of federal funds, contending this would be a less efficient remedy than an affirmative order.[38]

Four months after its decision, the court issued a judgment order outlining a plan for integration of the public housing system and

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the primary responsibility for elucidating, assessing, and solving these problems." Brown v. Board of Educ., 349 U.S. 294, 299 (1955). In Green v. County School Bd., 391 U.S. 430, 439 (1968), the Court held that the burden was on the school board to "come forward with a plan that promises realistically to work and promises realistically to work now."

33. *Developments in the Law—Equal Protection, supra* note 32, at 1141.

34. Almost 90% of the tenants in Chicago's public housing projects were Negroes, but proportionally Negroes accounted for only 7%, 4%, 6% and 1% of the tenants in these four projects.

35. Gautreaux v. Chicago Housing Auth., 296 F. Supp. 907, 909 (N.D. Ill. 1969). In rejecting defendant's contention that a history of tension, threats of violence, and violence could excuse government-supported racial segregation, the court relied on Cooper v. Aaron, 358 U.S. 1 (1958). The court indicated that a clear threat of violence might justify racial quotas as a temporary expedient, but it found there had been only remote incidents of violence when Negroes moved into white housing projects in Chicago. *Id.* at 909.

36. Of 41 sites in white neighborhoods initially selected for housing projects since 1955, only 2 were approved, both in 1966. One of the sites was located on vacant land bounded on one side by a predominantely Negro area and partially occupied by dilapidated Negro shacks. The other white site approved in 1966 was planned for 36 units. During the same period, 49 of 103 sites initially selected in predominantly Negro areas were approved. *Id.* at 911.

37. *Id.* at 912.

38. The court noted that the Public Housing Administration has questioned the appropriateness of cutting off federal funds. Also, the temporary denial of funds might impede the development of public housing, thus damaging the persons for whose benefit the suit was brought.

permanently enjoining the defendant from discrimination.[39] The court directed the defendant housing authority to build its next 700 dwelling units in white areas of the city, and thereafter to build 75 percent of all new public housing projects in predominantly white neighborhoods.[40] The judgment order prohibits the defendant from concentrating large numbers of dwelling units in or near a single location. Except in special circumstances, a public housing project cannot be designed for occupancy by more than 120 people,[41] and dwelling units for families with children cannot be provided above the third story in any structure.[42] The court also ordered the defendant to adopt a revised tenant assignment plan, including a provision that no more than 50 percent of the dwelling units in all public housing projects can be made available to eligible neighborhood residents. The judgment order requires the housing authority to file regular reports on its activities and its progress in complying with the order.[43] The court stated it would retain jurisdiction in the case for all purposes, including the issuance of new orders modifying or supplementing the judgment order.

The instant case represents the first time a federal court has adopted a specific and detailed formula to be followed by a local housing authority in eliminating racial discrimination in public housing. With its sweeping judgment order, this decision represents an unequivocal commitment on the part of the court to take positive action to insure that housing policies maintaining residential segregation are no longer tolerated. In the past, despite legislative and judicial mandates, public housing has had the effect of supporting segregation[44] and separating low-income families from the rest of the

39. Gautreaux v. Chicago Housing Auth., Civil No. 66 C 1459 (N.D. Ill., filed July 1, 1969).

40. *Id.* at 4. The court defined a predominantly white neighborhood as being within one mile of census tracts which have 30% or more non-white population. *Id.* at 2.

41. In special cases, the court indicated a project may be designed for occupancy by as many as 240 persons, *id.* at 5-6; but, in order to prevent large concentrations of public housing, the court declared that new public housing projects cannot be built in census tracts where the percentage of public housing would be more than 15% of the total number of apartments and single-family residences in the tract. *Id.* at 6.

42. Dwelling units can be provided above the third story if the public housing units comprise no more than 20% of the total number of apartments in the building. *Id.* at 6.

43. The reports must be filed with the court, the civil rights division of the Department of Justice, and the regional administrator of the Department of Housing and Urban Development. *Id.* at 7-9.

44. Grier, *The Negro Ghettos and Federal Housing Policy*, 32 LAW & CONTEMP. PROB. 551, 558 (1967).

community.[45] By concentrating the poor into the ghettos, a critical gap has grown between the needs of the people and the public resources to deal with them.[46] Under the court-adopted plan, these and other equally serious problems should be at least partially eliminated. In addition to providing for the integration of public housing projects, the court has followed the recommendation of the Kerner Commission that the traditional slum-based, high-rise public housing projects be changed to small units on scattered sites outside the ghetto area.[47] Consequently, the court's judgment order, taken as a whole, will have significant social effects far beyond the immediate goal of integrating public housing. The court's plan should make a positive and direct contribution to programs designed to achieve integration in the schools. The plan also should increase employment opportunities for the poor, since most new jobs are being created in suburbs and outlying areas where the new units will be located.[48] In addition, the environment in public housing should become less impersonal and institutionalized.[49] Hopefully, the social changes resulting from the court's ruling will help stem the nation's movement "toward two societies, one black, one white—separate and unequal."[50] Integration in public housing projects should help dispel current misconceptions concerning hostility that results from commingling Negroes and whites,[51] thus reducing the amount of malevolence between the races.[52]

Despite its positive aspects, several arguments can be advanced against the judgment order. There undoubtedly will be concern that the court abused its power and discretion in adopting such a comprehensive

45. Ledbetter, *Public Housing—A Social Experiment Seeks Acceptance*, 32 LAW & CONTEMP. PROB. 490, 501 (1967).

46. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 260 (1968) [hereinafter cited as KERNER COMMISSION REPORT].

47. *Id.* at 257-63.

48. *Id.* at 217.

49. In 1965, the Chicago Daily News referred to a Chicago public housing project as a "$70 Million Ghetto." The article said the project was an "all-Negro city within a city" and a "civic monument to misery, bungling and a hellish way of life." Friedman, *Public Housing and the Poor: An Overview*, 54 CAL. L. REV. 642, 644 (1966), *citing* Chicago Daily News, April 10, 1965, at 1, col. 1.

50. KERNER COMMISSION REPORT, *supra* note 46, at 1.

51. After Negroes enter formerly all-white projects, personal interracial associations cause prejudicial attitudes to diminish considerably. DEUTSCH & COLLINS, INTERRACIAL HOUSING: A PSYCHOLOGICAL EVALUATION OF A SOCIAL EXPERIMENT (1951); WILNER, WACKLEY & COOK, HUMAN RELATIONS IN INTERRACIAL HOUSING (1955), *cited in* Comment, *supra* note 8, at 887 n.77.

52. The Kerner Commission reported that the corrosive and degrading effect of forced confinement of Negroes in segregated housing is at the center of the problem of racial disorder. KERNER COMMISSION REPORT, *supra* note 46, at 91.

plan, but courts have often found it necessary to issue detailed orders to executive officials. Ending large concentrations of public housing units may be questionable, since desegregation in tenant assignments and site selection probably could be achieved without this provision. Also, the scarcity and expense of land may not justify small, scattered projects in metropolitan areas.[53] The expense of such a diffused system might make it impossible for the housing authority to abide by the order without additional funds. Since little flexibility has been written into the order, implementation may be extremely difficult, if not impossible.[54] However, such problems may be easily cured since the court has indicated it will closely scrutinize implementation of the plan and make any necessary modifications. Because of the relative immobility of lower income families, construction of most new projects outside the ghetto may have the adverse effect of denying adequate housing to those with the greatest need.[55] The court apparently reasoned that this immobility will be overcome when new housing facilities become available in outlying areas.

Implementation of the judgment order will require a re-evaluation of other government-sponsored programs in which public housing is involved, such as model cities and urban renewal programs. Since local land use planning regulations control the extent that low-cost housing can be built in any particular location,[56] the order may cause conflicts between the housing authority and the local zoning board. Although many zoning devices have had the effect of restricting public housing projects to certain areas,[57] this court undoubtedly will strike down any obstruction to implementation of its plan. Indeed, several courts already have ruled against zoning devices designed to keep low-rent housing projects from outlying residential areas.[58] Finally, the decision may have the effect of increasing the fears of residents of white

53. Ledbetter, *supra* note 45, at 502.

54. The Chairman of the Chicago Housing Authority expressed doubts as to his ability to implement the order. NEWSWEEK, July 14, 1969, at 74, col. 2; however, CHA's governing board unanimously agreed not to appeal the court order. Chicago Tribune, July 11, 1969, at 1, col. 5.

55. The strongest justification for selection of sites in racially concentrated areas is that such areas are in desperate need of public housing projects because a large proportion of existing housing is seriously substandard. Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 999 (1968).

56. Grinstead, *Overcoming Barriers to Scattered-Site Low-Cost Housing*, 2 PROSPECTUS 327, 329 (1969).

57. These devices include minimum lot size requirements, density zoning, frontage requirements, single family restrictions, and minimum living space requirements. *Id.*

58. Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969); Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich. 1969); Grinstead, *supra* note 56, at 336.

neighborhoods who have opposed public housing in the past because of the possibility that it would bring racial integration.[59] If opponents gain enough support, the very future of the housing program, which depends on public funds for its existence, could be threatened.[60]

In balance, however, the failure of past legislative and judicial efforts to achieve desegregation of public housing facilities indicates the court was justified in developing its broad integration formula. Generally, legislative remedies are more effective than court-ordered remedies, and legislators and administrators usually are more competent to draft comprehensive plans to attack specific problems. But until the government agencies administering the housing program are willing to develop and implement comprehensive and effective desegregation plans on their own, there may be no alternative to strict judicial supervision if integration in public housing facilities is to occur.[61]

Constitutional Law—Donble Jeopardy—Fiftb Amendment's Gnarantee against Double Jeopardy is Applicable to the States tbrough tbe Fonrteenth Amendment

Petitioner was acquitted of a larceny charge but convicted of burglary in a Maryland state court and sentenced to ten years imprisonment. On appeal to the Maryland Court of Appeals, the case was remanded because both the grand and petit juries had been unconstitutionally selected,[1] and petitioner elected to be reindicted and retried.[2] At a second trial for both larceny and burglary, the court

59. *See Special Project—Public Housing, supra* note 8, at 900-01.

60. The editorial voice of The Chicago Tribune criticized the court's judgment order, saying "the present muddle shows it would be entirely desirable if the government could be cleared out of housing entirely." Chicago Tribune, July 3, 1969, at 12, col. 2.

61. The instant case already has been followed by at least one court holding that Negroes have the right to have public housing project sites selected without regard to the racial composition of the neighborhood. Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969). (The court enjoined the Department of Housing and Urban Development from making further payments of funds to the local housing authority for a project in an all-Negro neighborhood).

1. Petitioner's appeal was filed shortly after the case of Schowgurow v. State, 240 Md. 121, 213 A.2d 475 (1965), had invalidated a section of the Maryland Constitution requiring jurors to swear their belief in God.

2. Petitioner was given the option of retaining the burglary conviction or being retried under a new indictment.

overruled petitioner's objection that retrial on the larceny count, of which he had previously been acquitted, was a violation of the constitutional protection against double jeopardy. Petitioner was found guilty on both counts and given concurrent sentences of fifteen years for burglary and five years for larceny. The Maryland Court of Special Appeals rejected petitioner's double jeopardy claim on the merits, holding that an invalid indictment will not support a double jeopardy plea;[3] the Court of Appeals denied discretionary review. On certiorari to the United States Supreme Court, *held*, reversed. The double jeopardy clause of the fifth amendment is applicable to the states through the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784 (1969).

The principle that a man cannot twice be put in jeopardy for the same offense[4] can be traced to its Greek and Roman origins[5] and is deeply entrenched in English common law.[6] The prohibition is preserved in the fifth amendment of the Constitution of the United States[7] and in most state constitutions.[8] Although early case law intimated that the double jeopardy clause applied to the states,[9] the Supreme Court indicated that the fifth amendment pertained only to federal proceedings and did not limit state action.[10] Prior to 1937, divergent state double jeopardy standards developed largely because the

3. Benton v. Maryland, 1 Md. App. 647, 232 A.2d 542 (1967).

4. Although courts have differed in their determination of when one has been placed "twice in jeopardy," Sigler, *Federal Double Jeopardy Policy*, 19 VAND. L. REV. 375, 377-78 (1966), there seems to be general agreement that the objectives of the policy are to prevent unnecessary harassment, to avoid the social stigma incident to repeated criminal trials, to conserve time and money, to equalize the grossly unequal adversary capabilities of the state and defendant, and to preserve psychological security. *See, e.g.*, Green v. United States, 355 U.S. 184, 187-88 (1957); United States v. Candelaria, 131 F. Supp. 797 (S.D. Cal. 1955); Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339 (1956).

5. *See* J. SIGLER, DOUBLE JEOPARDY 1-37 (1969) [hereinafter cited as SIGLER].

6. Blackstone noted that there had developed "this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offense." 4 W. BLACKSTONE, COMMENTARIES 335. *See* Bartkus v. Illinois, 359 U.S. 121, 150-55 (1959) (dissenting opinion).

7. U.S. CONST. amend. V: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

8. *See* Brock v. North Carolina, 344 U.S. 424, 435 n.6 (1953) (dissenting opinion); SIGLER, *supra* note 5, at 78-79.

9. State v. Moor, 1 Miss. 134 (1823). "It was properly admitted in argument, that this provision of the Constitution was binding in the United States, as well as the state courts of the Union, for I take it, it has never been questioned, but that the Constitution of the United States is the paramount law of the land, any law usage or custom of the several states to the contrary notwithstanding. *Id.* at 138. *Contra*, Phillips v. McCauley, 92 F.2d 790 (1937).

10. Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833).

Supreme Court was never confronted with a factual situation which it chose to term double jeopardy. Since no double jeopardy issue was recognized, it was unnecessary to determine whether the double jeopardy guarantee extended to the states.[11] In 1937, the Supreme Court in *Palko v. Connecticut*[12] held that the fourteenth amendment did not extend the fifth amendment's guarantee against double jeopardy to the states. On the other hand, *Palko* did not repudiate the possibility of situations in which the fourteenth amendment would prevent the states from imposing double jeopardy.[13] The *Palko* ruling sanctioned a multiplicity of solutions to the problem of double jeopardy, permitting each state to develop a standard[14] while the federal courts developed another.[15] Since *Palko*, there has been a Supreme

11. Even when squarely presented with the issue, the Court avoided the double jeopardy question. *See, e.g.*, Murphy v. Massachusetts, 177 U.S. 155 (1900); *accord*, Dreyer v. Illinois, 187 U.S. 71 (1902) (defendant was not denied due process when his conviction was set aside and he was later retried for the same offense). *See also* Brantley v. Georgia, 217 U.S. 284 (1910) (state could permit a new trial for murder after an appealed conviction of manslaughter had been reversed); Keerl v. Montana, 213 U.S. 135 (1909) (discharge of jury results in mistrial, and the accused cannot on subsequent trial interpose the plea of once in jeopardy); Shoener v. Pennsylvania, 207 U.S. 188 (1907) (defendant is not put in double jeopardy if the indictment under which he is tried is so radically defective that it will not support a judgment).

12. 302 U.S. 319 (1937). Defendant was convicted of second degree murder and upon retrial after state appeal was found guilty of first degree murder.

13. States do not enjoy carte blanche with respect to reprosecution. *Palko* held that due process is violated when the jeopardy to which the defendant is subjected is "shocking," and it appears that a sufficiently flagrant example of harassment or multiple punishment would be deemed a violation of due process. Brock v. North Carolina, 344 U.S. 424, 429 (1953) (concurring opinion).

14. The states have developed their own versions of double jeopardy policy with some states giving more effect to double jeopardy policies than do the federal norms, while other states give less. Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1287 (1964). The validity of the *Palko* decision influenced the Court to accord states continued broad discretion. *E.g.*, North Carolina v. Pearce, 395 U.S. 711 (1969) (state judges may impose more severe sentences on retrial when factual data supporting the more severe sentence is present); Bartkus v. Illinois, 359 U.S. 121 (1959) (state conviction after federal acquittal does not violate the fourteenth amendment); Hoag v. New Jersey, 356 U.S. 464 (1958), and Ciucci v. Illinois, 356 U.S. 571 (1958) (states are not forbidden by the fourteenth amendment from prosecuting different offenses at consecutive trials even though they arise out of the same occurrence); Brock v. North Carolina, 344 U.S. 424 (1953) (retrial for the same offense after a first trial had been interrupted by the refusal of two of the state's witnesses to give testimony does not violate due process); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (the issuance of a new death warrant subsequent to the failure of an execution attempt pursuant to a death penalty was held not to infringe the double jeopardy guarantee); Hill v. Texas, 316 U.S. 400 (1942) (a prisoner whose conviction is reversed by the state supreme court may be indicted and tried again).

15. The federal standard incorporated the following general rules: (1) A verdict of acquittal is final, United States v. Ball, 163 U.S. 662 (1896). (2) The government may not secure a new trial by means of an appeal even though an acquittal may appear to be erroneous, Kepner v. United States, 195 U.S. 100 (1904). (3) The defendant is placed in jeopardy once he is put to

Court trend toward selective incorporation of the specific guarantees of the Bill of Rights into the protections of the fourteenth amendment.[16] Although the Court has continued to reject the incorporation argument in double jeopardy cases,[17] several courts have assumed that the commands of the fifth amendment were binding on the states.[18] The Second Circuit was the first court to hold that the federal double jeopardy standards were incorporated into the fourteenth amendment and applied to the states.[19] *Duncan v. Louisiana*[20] raised the most serious challenge to the *Palko* decision when it noted that the approach used in *Palko* to determine whether a right is "fundamental" and "essential to a fair trial" was not the approach used by recent courts in making the same determination.[21]

In the instant case, the Court found that *Palko v. Connecticut* was based on an approach to constitutional rights which had been rejected in the Court's most recent decisions. Noting that a number of cases relied upon in the *Palko* decision had been overruled,[22] the Court

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trial and a jury is sworn, so that if the jury is discharged without his consent, he cannot be tried again, Wade v. Hunter, 336 U.S. 684 (1949); Kepner v. United States, *supra*. (4) If unforeseeable circumstances arise, making a verdict impossible, the defendant may be retried because his jeopardy is not regarded as having come to an end, Green v. United States, 355 U.S. 184 (1957). (5) After a successful appeal, defendant may not be retried for a greater offense than that for which he was originally convicted, *id.* (6) Federal courts may not retry one who has been tried in the courts of another nation, United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820). (7) After a state trial for the same offense, federal courts may prosecute one who has violated both state and federal laws, United States v. Lanza, 260 U.S. 377 (1922). (8) Judges may not impose multiple punishments for the same criminal act. *See, e.g.*, Albrecht v. United States, 273 U.S. 1 (1926). *See generally* Sigler, *Federal Double Jeopardy Policy*, 19 VAND. L. REV. 375, 384-85 (1966).

16. These rights include: the fourth amendment provisions against unreasonable searches and seizures and the exclusion of illegally seized evidence, Mapp v. Ohio, 367 U.S. 643 (1961); the fifth amendment protection against self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964); the sixth amendment right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); the right to a speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967); the right to confrontation of witnesses, Pointer v. Texas, 380 U.S. 400 (1965); the compulsory process for obtaining witnesses, Washington v. Texas, 388 U.S. 14 (1967); the right to trial by jury, Duncan v. Louisiana, 391 U.S. 145 (1968).

17. *See* Cichos v. Indiana, 385 U.S. 76 (1966); United States v. Ewell, 383 U.S. 116 (1966).

18. *See* People v. Laws, 29 Ill. 2d 221, 193 N.E.2d 806 (1963); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677 (1963).

19. United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965).

20. 391 U.S. 145 (1968). The right to trial by jury in criminal cases is a fundamental right applicable to the states by the fourteenth amendment.

21. *Id.* at 149-50 n.14. The *Palko* approach was to ask if any "civilized system could be imagined that would not accord the particular protection." The more recent approach is to determine if such a "procedure is necessary to an Anglo-American regime of ordered liberty."

22. The Court's decision in Twining v. New Jersey, 211 U.S. 78 (1908), that the fifth amendment guarantee against self-incrimination did not extend to the states, was overruled in

expressly overruled *Palko v. Connecticut* and rejected the notion that the fourteenth amendment applied against the states only when the jeopardy to which the defendant was subjected was "a hardship so acute and shocking" that society could not tolerate it. The Court, recognizing that the guarantee against double jeopardy is deeply rooted in the Anglo-American system of justice, concluded that the double jeopardy prohibition of the fifth amendment represents a fundamental right and should apply to the states through the fourteenth amendment. Considering whether petitioner's conviction was a violation of the federal double jeopardy standard, the Court stated that petitioner was forced to suffer retrial for larceny in order to appeal his burglary conviction and that such a procedure violated the guarantee against double jeopardy as formulated in *Green v. United States*.[23] Moreover, the Court rejected the state's argument that the indictment was absolutely void and ruled that the indictment was voidable only at defendant's option. Relying upon *United States v. Ball*,[24] the Court held that the government could not allege its own error to deprive the defendant of the benefit of an acquittal by jury. The majority held that petitioner had a valid double jeopardy plea which he could not be forced to waive, and that the larceny conviction could not stand. Dissenting, Mr. Justice Harlan asserted that by failing to dismiss for lack of jurisdiction, the Court had disregarded the well-established principle that constitutional questions should be considered only when absolutely necessary. Mr. Justice Harlan further stated that selective incorporation has no support in history or reason and concluded that the case could have been decided with the same result using the *Palko* rationale.[25]

The instant Court has taken a significant step toward the goal of fundamental fairness in state criminal proceedings. Incorporation of the fifth amendment's guarantee against double jeopardy and the overruling of *Palko* marked the demise of the outdated approach to constitutional liberties which required that they be preserved only in cases of shocking state action. The Court's decision was a logical

Malloy v. Hogan, 378 U.S. 1 (1964). The *Palko* Court also relied on West v. Louisiana, 194 U.S. 258 (1904), which refused to apply the sixth amendment right to confrontation of witnesses to the states. *West* was overruled in Pointer v. Texas, 380 U.S. 400 (1965). *See* Comment, *Double Jeopardy: Its History, Rationale and Future*, 70 DICK. L. REV. 377 (1966).

23. 355 U.S. 184 (1957). "[C]onditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." 395 U.S. at 796.

24. 163 U.S. 662 (1896).

25. 395 U.S. at 801 (dissenting opinion). Mr. Justice Stewart joined in the dissent.

extension of the recent trend toward total incorporation and had been considered inevitable by numerous commentators.[26] The immediate result of *Benton* will be to relieve defendants of the necessity of gambling with their futures by conditioning an appeal on the forced surrender of a lesser sentence or an acquittal. *Benton*, combined with *North Carolina v. Pearce*,[27] will protect the successful criminal appellant from the often harsher sentence which may follow a second trial, and will act as a deterrent to the discretionary powers of the prosecutor who has numerous criminal charges upon which to base a prosecution.[28] The case may result in a re-examination of successive municipal-state and state-federal prosecutions for the same offense, such as occur, for example, under federal and state marijuana laws.[29] Now that the constitutional protection against double jeopardy is applicable to the states, it will become necessary to re-examine federal decisional law in order to determine which rules are constitutionally compelled and which are merely the result of the supervisory power of the federal courts.[30] In view of the Court's recent imposition of federal fourth amendment interpretations upon the states, it is unlikely that the Court would exercise restraint in the double jeopardy context.[31] The problem of determining whether one has been subjected to double jeopardy has led to numerous divergent conclusions, and the result of a plea of double jeopardy is usually in doubt.[32] Therefore, it would have been beneficial for the Court to discuss in greater detail the criteria used in reaching its holding that petitioner had twice been put in

26. *See* Justice Marshall's opinion in United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844 (1965); SIGLER, *supra* note 5, at 50; Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 80-81 (1963); Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606, 636 (1965).

27. 395 U.S. 711 (1969). State judges may impose more severe sentences on retrial, but the due process clause requires that judges set forth factual data supporting the increased penalty.

28. *See* SIGLER, *supra* note 5, at 187. Another possible outgrowth of this decision may be an increased splitting of offenses, resulting from the extension to the states of the prohibition against the state's appeal and retrial of an erroneous verdict. Such splitting of offenses would increase the state's chances of prosecution. *See, e.g.*, Jones, *What Constitutes Double Jeopardy?*, 38 J. CRIM. L. C. & P. S. 379, 384-90 (1947); Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 14 (1960).

29. *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121, 150 (1959) (Black, J., dissenting); Gross, Successive Prosecution by City and State, 43 ORE. L. REV. 281 (1964); Kneier, *Prosecution Under State Law and Municipal Ordinance as Double Jeopardy*, 16 CORNELL L.Q. 201 (1931).

30. *See* Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1289 (1964); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

31. Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1289 (1964).

32. Sigler, *supra* note 4, at 378.

jeopardy. By relying on *Green*, however, the Court could be deemed to have endorsed the *Green* approach of considering the particular factual situation in relation to the underlying policy considerations.[33] The concept of double jeopardy will require considerable clarification and elucidation in future opinions, and this may overburden the federal courts since double jeopardy is a commonly claimed defense.[34] Drastic legislative revision of criminal statutes and case law may be required to reconcile the divergent state and federal standards,[35] but, regardless of the approach used by legislatures or courts, it is apparent that a uniform national policy concerning what constitutes double jeopardy has been initiated. It is hoped that the new national standard will remove the inconsistencies from double jeopardy law and thereby increase its significance as a constitutional protection.

Constitutional Law—Garnishment—Prejudgment Wage Garuishment, in Absence of Conditions Requiring tbe Special Protection of a State or Creditor Interest, Violates the Due Process Clause of tbe Fourteenth Amendment

An action was initiated[1] by the respondent finance corporation against the petitioner garnishing a portion of petitioner's wages before trial of the principal suit.[2] The petitioner moved that the garnishment proceedings be dismissed on the grounds that the Wisconsin prejudgment garnishment procedure was unconstitutional for failure to satisfy the procedural due process requirements of the fourteenth amendment. The respondent contended that the procedure did not

33. The underlying idea of the fifth amendment's protection against double jeopardy "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment expense and ordeal, and compelling him to live in a continuing state of anxicty and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 187-88 (1957).

34. *See* SIGLER, *supra* note 5, at 225.

35. "As it is now the outcome of a double jeopardy plea in the federal courts is not always predictable. Even where it is relatively certain, the legal rule seems often unrelated to any conscious goal. History will not cure the deficicncies of law. The social policy of double jeopardy requires a more conscious consideration by Congress and the federal courts." SIGLER, *supra* note 5, at 75-76.

1. The action was filed in accordance with Wisconsin prejudgment garnishment procedure: WIS. STAT. ANN. §§ 267.02, 267.05, 267.07 (Supp. 1969).

2. Respondent's garnishment action was ancillary to an action brought to collect damages from petitioner for default on a promissory note.

involve a final determination of the title of petitioner's property, and, since the due process requirements of notice and a hearing would be fulfilled before the petitioner was permanently deprived of her property, prejudgment garnishment was constitutionally permissible. The trial court's ruling upheld the constitutionality of the procedure, and the Circuit Court of Milwaukee County affirmed. Upon appeal the Wisconsin Supreme Court affirmed both decisions.[3] On certiorari to the United States Supreme Court, *held*, reversed. In the absence of conditions requiring the special protection of a state or creditor interest, prejudgment garnishment procedures providing for the interim attachment of a debtor's wages without notice or a hearing violate the due process clause of the fourteenth amendment. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

Although the origins of garnishment and attachment can be traced to medieval England[4] and colonial America,[5] garnishment and attachment today are entirely statutory remedies.[6] Since prejudgment garnishment was an outgrowth of attachment, the two actions are quite similar. When used prior to adjudication of the principal suit both proceedings are creditor remedies, which involve an involuntary dispossession of the defendant-debtor. The two remedies, however, are distinguishable. First, an attachment seizes the debtor's property which is in his possession, whereas garnishment seizes funds, effects, and credits belonging to the defendant which are in the possession of a third person. Although the purposes of the remedies are identical—to obtain

3. Family Fin. Corp. v. Sniadach, 37 Wis. 2d 163, 154 N.W.2d 259 (1967). The Wisconsin Supreme Court based its decision on the following grounds: (1) Since prejudgment garnishment does not involve any final determination of title to property, defendant suffered no constitutional deprivations because her property was temporarily attached pending final determination of the principal suit. (2) There was no denial of the due process requirement of a prior hearing since, independently of the statute, potential abuses of prejudgment garnishment were subject to judicial review before trial of the principal action. (3) The defendant had no standing to attack the constitutionality of the Wisconsin prejudgment garnishment statute on grounds based on injustices and deprivations which have been or are likely to be suffered by others, but which she had not personally experienced. (4) There was no denial of equal protection of the law because the statutes apply to all debtors.

4. In the Middle Ages garnishment originated as the offspring of "foreign attachment," a process designed to provide an action against non-resident merchants whereby their property, which was under the control of a third party, was seized. 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 387 (3d ed. 1923).

5. B. MORRIS, SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, at 19 (1934). For a detailed history of the development of garnishment in medieval England and the United States, see Mussman & Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1, 7-10 (1942).

6. *See* Sanders v. Armour Fertilizer Works, 292 U.S. 190 (1934).

the debtor's property as security for an anticipated judgment—the rationale behind their use differs. Attachment serves a dual function[7]—to gain jurisdiction[8] and to avoid the perpetration of fraud.[9] Garnishment, however, does not primarily serve either of these functions.[10] Its chief importance is as a collection device[11] that frequently avoids adjudication of the principal suit. Despite the out-of-court settlements which result from a threat of wage garnishment, there has been a significant increase in the number of wage garnishment actions[12] because of expansion of consumer credit.[13] Accompanying wage garnishment are serious social and economic consequences, such as termination of employment, loss of income, and bankruptcy.[14] Although prejudgment garnishment and attachment in theory conflict with the procedural requisites of notice[15] and hearing,[16] the courts that have considered the due process issue have concluded that these

7. Comment, *Attachment and Garnishment—Prejudgment Garnishment—Study and Proposed Revisions*, 9 NATURAL RESOURCES J. 119, 120 (1969).

8. Attachment most often is used to seize the property of a non-resident debtor, thereby forcing him either to appear and defend his property, or default both the suit and the property. Attachment of real property, an in rem proeedure, confers jurisdiction on the court. *Id.* at 120.

9. Attachment prevents fraudulent concealment or disposal of the property. *Id.*

10. The garnisbment procedure is not used as a means to obtain jurisdiction. Garnishment is an in personam action (*e.g.*, Hollywood Credit Clothing Co. v. Hundley, 118 A.2d 515 (D.C. Mun. App. 1955)) whereby personal jurisdiction must be obtained over the garnishee. In addition, garnishment is seldom used to prevent fraud for it is quite unlikely that a wage earner would leave his job and the state in order to protect a portion of his salary. Comment, *supra* note 7, at 120.

11. Faced with the threat of wage garnishment, many debtors basten to settle their accounts outside of court, often having to enter into a new payment contract which incorporates additional charges. The threat of wage garnishment, therefore, collects more money than the amount collected through the use of the remedy in court. Note, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, 749 (1968).

12. In Chicago, the Cook County Circuit Court issued 84,513 garnishments in 1965, an increase of 15% over 1964 and 72% over 1961. Wall Street Journal, Marcb 15, 1966, at 1, col. 6. The San Francisco sheriff's office made more than 5,900 services in the first 2 months of 1965, including 3,700 levies under writs of attachment and execution—of which 75% to 80% were wage garnishments. Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965). In 1964, the Seattle District Justice Court processed 12,280 writs of garnishment. This number increased to 14,332 in 1965, and to 15,624 in 1966. About 85% of these were wage garnishments. Note, *supra* note 11, at 744 & n.7.

13. In 1955, consumer installment debt was $29 billion. By 1965, that figure had increased by almost 44%, to $66 billion. At the current rate of growth, it is estimated that in 1970 installment debt will approach $100 billion. *See* D. CAPLOVITZ, THE POOR PAY MORE xvi (1967).

14. Note, *Wage Garnishment As a Collection Device*, 1967 WIS. L. REV. 759, 760-62.

15. *E.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950): "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

16. *See, e.g.*, Grannis v. Ordean, 234 U.S. 385, 394 (1914): "The fundamental requisite of due process of law is the opportunity to be heard."

remedies do not violate due process of law. In *McInnes v. McKay*[17] the court stated that prejudgment attachment is not a deprivation of property as contemplated in the Constitution because there is no deprivation of title and the deprivation is temporary and conditioned upon a process which gives notice to the debtor and provides him with an opportunity to be heard.[18] The court's reluctance to address the due process issue may be attributed to the established constitutional doctrine that when justified by compelling public interest, one may be deprived of his property by summary action subject to later judicial review of its validity.[19] Since the creditor interest served by wage garnishment affects the public, the deprivation, under the above doctrine, may be justified.[20] Although this argument is of relatively recent origin, similar considerations influenced the Supreme Court's decisions in two prior cases.[21]

In the instant case the Court noted that the sole question for decision was whether there had been a deprivation of petitioner's property without due process.[22] The Court found that the Wisconsin prejudgment garnishment procedure deprived the petitioner of her property without sufficient notice or hearing, and that this case presented no special circumstances, such as those requiring the protection of a state or creditor interest, which would justify the deprivation. The majority further found that the Wisconsin statute was not narrowly drawn to meet any such special situations. The Court,

17. 127 Me. 110, 141 A. 699, *aff'd per curiam*, 279 U.S. 820 (1928). The Supreme Court affirmed on the authority of Ownbey v. Morgan, 256 U.S. 94 (1921), which upheld a Delaware statute conditioning the appearance of a non-resident debtor to defend his attached property on the posting of a bond equal in value to the property attached, and Coffin Bros. v. Bennett, 277 U.S. 29 (1928), which approved the placement of a lien, without prior hearing, on the property of stockholders of an insolvent bank.

18. The Supreme Court of Appeals of West Virginia used this same reasoning, citing *McInnes* as supporting authority. Byrd v. Rector, 112 W. Va. 192, 163 S.E. 845 (1932).

19. *See* Yakus v. United States, 321 U.S. 414, 442-43 (1944); *cf.* Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947); Bowles v. Willingham, 321 U.S. 503, 519-21 (1944); North American Cold Storage Co. v. Chicago, 211 U.S. 306, 320 (1908).

20. The argument has been made that it is in the public interest that wage garnishment be maintained as a viable creditor remedy. The proponents of this position contend that the immediate effect of a restriction on wage garnishment would be an increase in the number of uncollectable debts, thus forcing creditors to restrict the granting of credit by eliminating marginal risks. This in turn would have an adverse effect on the economy by reducing the number of sales. This argument, however, is not conclusive, and there is some evidence that credit extension is unrelated to wage garnishment. Note, *supra* note 11, at 771-72.

21. *See* note 17 *supra*.

22. *See* note 3 *supra*. The Wisconsin Supreme Court holding was based on the determination of several issues, whereas the Court in the instant case found it necessary to consider only one issue.

noting that this case dealt with a specialized type of property presenting distinct problems,[23] rejected the respondent's contention that the rule derived from *McInnes* was applicable to prejudgment wage garnishment. Therefore, the Court concluded that the Wisconsin prejudgment garnishment procedure, in the absence of justifying circumstances, was unconstitutional as a deprivation of property without due process of law.[24]

The Court's decision not to eliminate prejudgment wage garnishment, but only to limit its use to certain situations, represents a compromise between the debtor's due process rights and the creditor's interest in collecting unpaid accounts. While the instant case does represent a distinct break with the precedents of the last 40 years that have upheld prejudgment wage garnishment, the holding will not fulfill the Court's manifest desire[25] to eliminate the injustices and hardships associated with prejudgment wage garnishment. Although substantial changes will be required in those states whose statutes are similar to the Wisconsin prejudgment garnishment statutes,[26] the effect of the changes may be diminished by the Court's failure to specify the standards by which the states are to revise their garnishment statutes.[27] Without specific criteria the trial courts will be left to their own judgment to determine whether a state's garnishment procedure has

23. 395 U.S. at 340-42. The Court noted some of the social and economic consequences of prejudgment wage garnishment—termination of employment, loss of income often resulting in bankruptcy, and unscrupulous practices of many creditors.

24. In a concurring opinion Mr. Justice Harlan, pointing out the precise basis on which he joined the majority, stated that the "property" of which petitioner had been deprived was the *use* of the garnished portion of her wages. This deprivation could not be characterized as *de minimis*; therefore, procedural due process was required. He further found that the due process requirements of notice and hearing had not been satisfied, even though the petitioner had been notified simultaneously with the garnishee and would receive a hearing before being permanently deprived of her property.

In dissent Mr. Justice Black expressed his opinion that the Court's holding was based solely on the view that prejudgment wage garnishment was bad state policy and an inhumane doctrine. He pointed out that such judgments were for the state legislatures to make, not this Court, and concluded that the Court's holding amounted to a judicial usurpation of state legislative power.

25. In its opinion the Court went to considerable length to show the socio-economic problems created by prejudgment wage garnishment. 395 U.S. at 340.

26. The states with statutes similar to the Wisconsin prejudgment garnishment law are: Alaska, Arizona, California, Idaho, Iowa, Minnesota, Montana, New Hampshire, Oregon, Rhode Island, Vermont, and Washington. The statutes in at least three other states are questionable: Arkansas, New Mexico, and Wyoming.

27. The cases cited by the Court in support of the position that summary procedures will be approved in some cases and rejected in others do not adequately illuminate the distinction between the interests involved to provide a standard by which to judge the constitutionality of any revised statutes. 395 U.S. at 339.

met the broad mandate of the instant case. Appropriate standards could have been set forth by adopting the conditions requiring special protection that are embodied in the state statutes approved by the Court.[28] Because situations requiring the special protection of a state or creditor interest justify prejudgment garnishment, the states whose statutes are drawn to meet these special circumstances will be unaffected.[29] Changes brought about by this decision[30] will only modify, not eliminate, prejudgment wage garnishment. The problems which exist under the present procedures will still exist under revised procedures conforming to the mandate of the instant case.[31] Thus the Court has taken only one step in the direction of eliminating the harsh effects of prejudgment garnishment. Not even complete prohibition of prejudgment wage garnishment will eliminate the injustices and hardships mentioned earlier because they are also created by post-judgment garnishment.[32] Thus, to eliminate these problems would require the complete prohibition of all wage garnishment.[33] Although no judicial or legislative body has gone this far, the recent trend has been to place restrictions on wage garnishment. State legislatures throughout the country have been unusually active in amending garnishment statutes.[34] The Uniform Consumer Credit Code, which has been enacted in only Oklahoma and Utah, prohibits prejudgment wage garnishment, but allows post-judgment garnishment of a limited portion of the debtor's wages.[35] After extensive committee hearings and

28. Typical conditions justifying prejudgment garnishments are: (1) The debtor or defendant resides out of state; or (2) he is about to remove, or he has removed himself or property from the state; or (3) he conceals himself so the ordinary process of law cannot be served upon him; or (4) he fraudulently disposes of or is about to fraudulently dispose of his property; or (5) the debtor or defendant is a foreign corporation. The Court, by mentioning that Wisconsin's statute was not drawn to meet any such unusual conditions, inferred that those state statutes which are so drawn meet the requisites of due process. *See* 395 U.S. at 339.

29. 2 CCH CONSUMER CREDIT GUIDE ¶ 99,904 (1969).

30. The changes most likely to be incorporated into the existing garnishment statutes are similar to those cited in note 28 *supra*. For a writ of garnishment to be issued before judgment on the principal suit, the creditor will be required to satisfy one of the conditions.

31. Even when prejudgment wage garnishment is justified on grounds of protection of a state or creditor interest, the debtor's wages still will be garnished, resulting in loss of income, possible termination of employment, possible bankruptcy, and often new payment contracts incorporating additional charges.

32. Note, *supra* note 14.

33. Kerr, *Wage Garnishment Should Be Eliminated*, 2 PROSPECTUS 371 (1969). The author vigorously states his belief that prohibition of wage garnishment will be the only solution to the problems created by wage garnishment.

34. Note, *supra* note 11, at 744 n.9.

35. UNIFORM CONSUMER CREDIT CODE §§ 5.104, 5.105.

several compromises,[36] Congress enacted as part of the Consumer Credit Protection Act, a provision which establishes a maximum percentage of wages subject to garnishment and forbids the discharge of employees because of garnishment.[37] The instant case represents a continuation of this trend, and because of the importance which historically has been attached to Supreme Court decisions, it may serve as the impetus for further and more significant restrictions on wage garnishment.

Constitutional Law—State Taxation—State Use Tax Invalidly Applied to Fuel Gas Used as an Integral Part of Interstate Commerce

Complainants, three foreign corporations engaged in the operation of interstate natural gas pipe lines,[1] were assessed use tax deficiencies by the State of Tennessee for failure to account for the value of gas used in operating compressors that transport the gas along their lines.[2] After paying the taxes under protest, complainants brought suits to recover, contending that the imposition of the use tax contravened a Tennessee statute which exempted interstate commerce from taxation[3]

36. The original House Bill (H.R. 11601, 90th Cong., 1st Sess. (1967)) provided a blanket prohibition against wage garnishment, and the Senate Bill (S. 5, 90th Cong., 1st Sess. (1967)) had no provision dealing with garnishment. The House Bill was sent to the House Committee on Banking and Currency which reported out a Bill that restricted wage garnishment to 10% of gross earnings in excess of $30 per week. The committee's hearings brought out the urgent need for some basic regulation of wage garnishment; at the same time, however, it was clear that the creditor must have some instrument of last resort for collecting legitimate debts. The Bill reported out was offered and generally supported by the minority as being a reasonable compromise of a very complex problem. This Bill was sent to a Senate-House conference from which emerged Title III of the Consumer Credit Protection Act. *See* H.R. REP. NO. 1040, 90th Cong., 2d Sess. (1968).

37. Consumer Credit Protection Act §§ 303-04, 82 Stat. 146 (1968).

1. All three corporations own and operate natural gas pipe lines which originate in Louisiana and Texas, traverse Tennessee, and extend into the northern and eastern states. The pipe lines transport natural gas in continuous flow from the gathering points in Louisiana and Texas to delivery points outside of Tennessee.

2. As part of the transportation system, complainants operate compressor stations along their lines in Tennessee. The stations are essential to maintain the pressure that propels the natural gas to its ultimate destination. The compressors consist of engines which consume natural gas drawn from the mains.

3. "It is not the intention of this chapter to levy a tax upon articles of tangible personal property imported into this state or produced or manufactured in this state for export; nor is it the intention of this chapter to levy a tax on bona fide interstate commerce. It is, however, the

and that the tax constituted a burden upon interstate commerce within the prohibition of the commerce clause. The Commissioner argued that the fuel gas ceased to be in interstate commerce when it was diverted from the mains and its use was taxable.[4] The Chancery Court, Davidson County, Tennessee, held that the consumption of the gas in the compressors was an integral part of interstate commerce and granted each complainant the relief sought.[5] On appeal to the Supreme Court of Tennessee, *held*, affirmed. Natural gas used as an integral part of interstate commerce in the operation of interstate pipe line compressors does not come to rest in the state and is exempted from state use taxes. *Benson v. Texas Gas Transmission Corp.*, 444 S.W.2d 137 (Tenn. 1969).

States lack the power to tax the privilege of engaging in interstate commerce.[6] Consequently, state privilege taxes[7] cannot be validly applied to privileges or activities regarded as an integral part of that commerce.[8] In *Helson & Randolph v. Kentucky*,[9] the United States Supreme Court held that the prohibition of the commerce clause invalidated state taxation upon the use of a medium by which interstate transportation is effected. Subsequently, the Court has upset a number of state privilege taxes imposed upon the use of supplies and equipment

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intention of this chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state." TENN. CODE ANN. § 67-3007 (1956).

4. The gas is withdrawn from the mains which run through the stations; it is metered and run through pipes to pressure regulators, then to the engines. The State contended that a taxable moment occurred during the interval of time from separation from the mains to consumption in the engines.

5. The suits were consolidated for trial. The Chancellor was of the opinion that "as a matter of fact and logic" the consumption was an integral part of the interstate transportation system and any tax assessed thereon was an invalid burden under the commerce clause. Texas Gas Transmission Corp. v. Benson, No. 89725 (Ch. Ct. Davidson Cty., Tenn. Oct. 24, 1968).

6. The doctrine is based upon the postulate that the privilege is given by the national government and not by the state governments. *E.g.*, Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925); Atlantic & Pac. Tel. Co. v. Philadelphia, 190 U.S. 160 (1903).

7. The term privilege tax as used in this comment is a generic one, encompassing all taxes for the privilege of engaging in certain activities. The term includes excise, franchise, occupation, license, and use taxes.

8. "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically he separated from it." Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954).

9. 279 U.S. 245 (1929). Kentucky attempted to tax all gasoline used within the state. Helson, an Illinois resident, did an exclusively interstate ferry business between Kentucky and Illinois. The gas used to furnish the motive power was purchased outside of Kentucky, although

actually employed in conducting interstate business.[10] Later developments in cases of state privilege taxation reflect a limitation on the zone of tax immunity provided by *Helson* and a greater awareness by the Court of the needs of the states for revenue.[11] The distinction between taxable and nontaxable activities or events has been made to depend on whether the activity is an attribute of the privilege of engaging in interstate commerce or of a local privilege. One criterion employed by the Court in making this determination has been the chronological relationship of the taxable event with the interstate movement—whether the tax was imposed on an activity conducted before the movement started, after it had ended, or during some stages of the movement.[12] The principles of *Helson* have no applicability to state privilege taxes on the use of articles that have not begun to move interstate[13] or have ended their interstate journey.[14] However, the Supreme Court has uniformly denied the competence of the states to tax the use of articles in continuous interstate transit.[15] When the interstate transit is interrupted, the Court has had difficulty in deciding the validity of local privilege taxes; under certain circumstances there may be a taxable moment before transportation is resumed.[16] In

75% of it actually was used there. The Kentucky tax, as applied to the use of the gasoline, was held to be invalid as a direct burden upon the privilege of using an instrumentality of interstate commerce.

10. Bingaman v. Golden Eagle W. Lines, Inc., 297 U.S. 626 (1936) (tax upon the importation and use of gasoline in interstate motor carrier invalid); Cooney v. Mountain States Tel. & Tel. Co., 294 U.S. 384 (1935) (striking down tax on telephones used in interstate communications).

11. One writer argues that the authority of *Helson* is doubtful and another suggests that the case has been substantially overruled. *See* Brown, *The Future of Use Taxes*, 8 LAW & CONTEMP. PROB. 495, 496 (1941); Lockhart, *The Sales Tax in Interstate Commerce*, 52 HARV. L. REV. 617 (1939).

12. P. HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 99 (1953).

13. Practical continuity of manufacture or production with interstate transportation has not prevented the imposition of non-discriminatory privilege taxes. *E.g.*, Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) (license tax on manufacture, generation, or production of electricity upheld); Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) (upholding privilege tax on production of gas sold interstate).

14. *Compare* Southern Natural Gas Corp. v. Alabama, 301 U.S. 148 (1937) (gas transported interstate and sold subject to tax on ground it had lost its interstate character) *and* East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465 (1931) (gas transported interstate and sold to consumers held to have lost its interstate character) *with* State Tax Comm'n v. Interstate Nat. Gas Co., 284 U.S. 41 (1931) (where interstate gas had not yet lost its tax immunity).

15. *See* Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469 (1926); Champlain Realty Co. v. Brattleboro, 260 U.S. 366 (1922). The cases cited involved property taxation but contain analogous principles.

16. Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 VA. L. REV. 1051, 1089 (1960); *see, e.g.*, Susquehanna Coal Co. v. South Amboy, 228 U.S. 665 (1913) (discussion of taxable moment for property taxation).

Nashville, C. & St. L. Ry. v. Wallace,[17] state storage and withdrawal taxes were upheld after the Court found that a break in transit caused the property to rest within the state for a taxable moment. The purpose of the interruption has been regarded by the Court as the crucial question in determining the existence of a taxable moment.[18] When the journey comes to a halt for the owner's business reasons, the commerce clause does not immunize the commerce from privilege taxation.[19] Once business reasons have been established, even practical continuity of movement does not preclude a taxable moment.[20] A second criterion used by the Court in discerning taxability has been the geographical nature of the taxable event—whether there is present some local activity which may serve as a taxable privilege. Taxes that have as an operative incident any local activity which the Court considers separate and distinct from the flow of commerce have been validated.[21] Many localized aspects of interstate commerce, although indispensable to such commerce and not amounting to intrastate commerce, have been held to afford a sufficient predicate for the imposition of state taxes.[22] The Supreme Court has upheld a privilege tax on the production of mechanical power used by a pipe line company to operate its

17. 288 U.S. 249 (1933). Tennessee levied a tax on the storage of gasoline within the state and its withdrawal for sale or use. The taxpayer argued that the tax was on the use of gasoline in taxpayer's business as an interstate carrier.

18. *See* Coe v. Errol, 116 U.S. 517 (1886) (the first enunciation of this method of analysis); P. HARTMAN, *supra* note 12, at 138.

19. If commerce has come to rest within the state at the pleasure of the owner, for his disposal or use, the state has a taxable grip during the pause. *E.g.*, Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947) (sustaining tax even though business reason was the impossibility of carrying on business any other way). A mere temporary interruption to facilitate interstate transportation or for the purpose of convenience and safety does not permit taxation. *E.g.*, Kelley v. Rhoads, 188 U.S. 1 (1903) (sheep grazing held a necessary incident of method of travel).

20. The Court has sustained state taxes on storage and use when there was a very brief interval after the articles had reached the end of an interstate trip and before consumption in interstate operations. *See* Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939) (sustaining tax applied to railroad equipment brought into state in interstate commerce for the use in operation of interstate railroad); Pacific Tel. & Tel. Co. v. Gallagher, 306 U.S. 182 (1939) (tax on equipment shipped in interstate commerce to be used in interstate communications upheld).

21. *Compare* McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940) (act of transfering articles to purchaser at end of interstate journey is not part of commerce) *with* Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947) (stevedoring is an integral part of commerce, exempt from privilege taxation).

22. *E.g.*, Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947); Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932); Eastern Air Transp., Inc. v. Tax Comm'n, 285 U.S. 147 (1932). The state tax must be nondiscriminatorily applied to the local incident. *See, e.g.*, Henneford v. Silas Mason Co., 300 U.S. 577 (1937) (upholding a use tax where equality was the theme of the taxing statute).

compressors for transporting natural gas in interstate commerce.[23] A privilege tax levied on the activities of maintaining, keeping in repair, and otherwise manning pipe line facilities has been sustained.[24] In a recent decision the Court again approved a privilege tax by isolating various facets of interstate activity to find sufficient local incidents to warrant the levy.[25] These decisions illustrate a tendency to fragment interstate activity in order to find taxable local activities.[26] When single events or the performance of single acts as local incidents upon which a privilege tax can be imposed are found, the tax will be upheld.

The instant court, rejecting the contention that a taxable moment had occurred in Tennessee, found that the fuel gas did not come to rest in the state after it left the mains; the gas was in continuous flow and never stopped moving until consumed.[27] Therefore, the court held that the gas was exempt from use taxation by the legislative declaration to tax only property that had come to rest in the state.[28] Since the fuel gas furnished the energy which operated the compressors required for the interstate transportation of gas, the court determined that the fuel gas was an integral part of interstate commerce.[29] Suggesting that *Helson* was controlling, irrespective of the statutory exemption, the instant court concluded that the tax had been invalidly applied to the privilege of using an instrumentality of interstate commerce.

The instant decision of the Tennessee Supreme Court is demonstrative of the need for resolving the plethora of constitutional approaches that have arisen in attempting to balance the competing interests of the state's need for revenue with the necessity for a free flow

23. Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604 (1938). Louisiana imposed a privilege tax on the use of mechanical power. The pipe line company had a number of compressor stations within Louisiana operated by engines that used natural gas as fuel. Reasoning that the tax was on the privilege of produeing power, the Court held the tax was validly imposed upon operations in connection with interstate movement.

24. Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948). Upholding a Mississippi franchise tax based on the capital used within the state by an interstate business, the Court adopted a cumulative burdens test to determine whether the activities were so much a part of the interstate business as to be under the protection of the commerce clause. *See* P. HARTMAN, *supra* note 12, at 43.

25. General Motors Corp. v. Washington, 377 U.S. 436 (1964) (Washington tax on the privilege of doing business).

26. *See* Note, *State Taxation of Interstate Commerce: Roadway Express, the Diminishing Privilege Tax Immunity, and the Movement Toward Uniformity in Apportionment*, 36 U. CHI. L. REV. 186 (1968).

27. 444 S.W.2d at 139.

28. *See* note 3 *supra.*

29. 444 S.W.2d at 139.

of commerce among the states. In this attempt, courts have paid little heed to the measure of the tax involved or the economic consequences of its application,[30] and, instead, have utilized as analytical tools such phraseology as "taxable moment" and "local activity." While the instant court's insistence upon a realistic distinction between taxable privileges and privileges integral to interstate commerce is borne out by judicial pronouncements,[31] a mechanical conception of the continuity of interstate movement is espoused. Concerning itself with the physical fluidity of the gas and the continuity of its movement until consumption, the court erroneously concluded that the gas did not come to rest within the state.[32] Although this finding of fact abrogated the necessity for any further determinations, the instant court felt constrained to address the issue of whether the tax was constitutionally permissible. Unfortunately, the court fails to consider whether the exemption provision is an expression by the state legislature of an intention to tax interstate commerce consistent with the Constitution or an election not to exhaust its full power to tax.[33] Furthermore, in view of the criticism aimed at the preferential treatment afforded interstate business[34] and the trend toward expansion of state taxing power discernible in other areas of privilege taxation,[35] it is regrettable that the decision does not attempt to distinguish the number of analogous cases that have found taxable local activities even though the activities were indispensable to interstate commerce.[36] The court thus

30. *See, e.g.*, Freeman v. Hewit, 329 U.S. 249 (1946) (any tax was invalid despite its economic effect).

31. *See* note 8 *supra*.

32. This finding was despite the fact that the gas is diverted from the interstate mains and is consumed. It appears that the court neglected any consideration of the purpose for such diversion, a factor which should be more important than material properties of the subject of the diversion. *See* notes 16-20 *supra* and accompanying text. For additional reference to the preoccupation with physical fluidity, see 32 TEXAS L. REV. 760 (1954).

33. Only one other state, Georgia, has an exemption statute similar to that of Tennessee. GA. CODE ANN. § 92-3406a (1961). This statute was construed by the Georgia Supreme Court as an election by the legislature not to exhaust its full power to tax. *See* Undercofler v. Eastern Airlines, Inc., 221 Ga. 824, 147 S.E.2d 436 (1966) (holding that fuel and parts purchased and brought into the state for use in interstate commerce were not subject to the state use tax).

34. *See, e.g.*, P. HARTMAN, *supra* note 12, at 146-47.

35. *See, e.g.*, General Motors Corp. v. Washington, 377 U.S. 436 (1964) (sustaining a tax measured by gross receipts from interstate sales); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) (approving a state income tax levied on the income from an exclusively interstate business).

36. The facts are largely indistinguishable from the case cited in note 23 *supra*. While the instant case involves a use tax upon an article which is itself the subject of interstate carriage and more closely proximates the facts of *Helson*, both taxes are privilege taxes and have the same effect upon the interstate transportation of gas.

reaches the harsh result of restricting state sources of revenue on the basis of an ambiguous legislative declaration and without any satisfactory determination of constitutional power.[37] A more desirable resolution would have been a careful analysis of the competing economic factors in the tax and a determination of whether the free flow of commerce would in fact be burdened.

Corporations—Corporate Director Accountable to Corporation Under State Law for Profits Realized from Insider Stock Trading Without a Showing of Damage to the Corporation

Plaintiffs, corporate stockholders, brought a derivative action against the chairman of the board and the president of Management Assistance, Inc. (MAI), alleging breach of fiduciary duty in the sale of personal securities while in the possession of material inside information.[1] Plaintiffs claimed that by use of the undisclosed information, the defendants acquired large personal profits which rightfully belonged to the corporation.[2] Admitting that a corporate director cannot use his position to obtain trading profits in corporation stock, the defendants contended that MAI should not recover the profits from the transaction in a derivative suit without an allegation of damage to the corporation.[3] The Supreme Court, New York County, granted defendant's motion for dismissal, holding that the

37. This abstinence from determining constitutional power by the instant court is inconsistent with its other decisions extending state taxation of interstate commerce. *See* Mid-Valley Pipeline Co. v. King, 221 Tenn. 724, 431 S.W.2d 277 (1968) (upholding an excise tax on local activities of interstate business although incidental to the conduct of interstate commerce); Texas Gas Transmission Corp. v. Atkins, 197 Tenn. 123, 270 S.W.2d 384, *cert. denied*, 348 U.S. 883 (1954) (holding valid a privilege tax for doing business in state even though exclusively interstate).

1. MAI, involved in the leasing of computer installations to various business concerns, lacked the capacity to maintain these installations as required by their lease agreements. International Business Machines (IBM), the corporation engaged by MAI to perform this function, sharply raised its rates for such service in August 1966. As a result, MAI's net earnings dropped from $262,253 in July 1966 to $66,233 in August 1966. The defendants sold their shares of MAI with full knowledge of the earnings drop, but prior to its public release.

2. The defendants sold 56,500 shares of MAI stock at its high of $28 per share. Once the earnings drop was announced, the stock declined to $11 per share. By selling before the drop, they avoided a loss in excess of $900,000. All the stock was sold to outsiders; neither the corporation nor the plaintiffs purchased any shares.

3. The defendants moved for dismissal under N.Y. CIV. PRAC. § 3211(a)(7) (McKinney 1963) which provides for dismissal for failure to state a claim.

alleged wrong was not in relation to the conduct of the business of the corporation but was a private transaction in the sale of securities.[4] In reversing the lower court's decision, the Appellate Division stated that inside information was a corporate asset, and the use of this asset by a corporate director for his own personal advantage was a breach of fiduciary duty.[5] The New York Court of Appeals, *held*, affirmed. Under common law, corporate directors are accountable to the corporation for profits derived from their stock transactions while in the possession of material inside information, without proof of damage to the corporation. *Diamond v. Oreamuno*, 24 N.Y.2d 494, 248 N.E. 2d 910, 301 N.Y.S.2d 78 (1969).

Corporate directors, by virtue of their fiduciary duty to the corporation, cannot use their positions of trust for personal advantage.[6] When the breach of fiduciary duty results in an injury to the corporation, relief may be sought in either a direct suit by the corporation or a stockholder's derivative action.[7] Under the derivative suit, the vast majority of courts hold that the recovery should be of the full corporate loss and inure to the corporation.[8] With the exception of the Delaware Chancery Court in *Brophy v. Cities Service Co.*,[9] courts which have considered the question of profiting by the use of inside information in securities transactions have not deemed it to be an actionable breach of fiduciary duty to the corporation under

4. Brief for Appellant at 4, Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969). The opinion of Gold, J., is unreported.

5. Diamond v. Oreamuno, 29 App. Div. 2d 285, 287 N.Y.S.2d 300 (1st Dep't 1968). The original complaint was brought against a number of MAI's officers. The Appellate Division modified the lower court order, reinstating the claim against Oreamuno, chairman of the board, and Gonzales, the president. The lower court's decision was affirmed as to the other directors.

6. Litwin v. Allen, 25 N.Y.S.2d 667, 677-78 (Sup. Ct. 1940). *See* Pepper v. Litton, 308 U.S. 295 (1939). For a discussion of the fiduciary duties of the corporate director, *see* H. HENN, CORPORATIONS §§ 236-42 (1961).

7. Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947). The stockholder's derivative suit involves the assertion of a corporate cause of action by an individual shareholder. Some of the areas in which derivative suits have been allowed by New York courts include: mismanagement by directors, Litwin v. Allen, 25 N.Y.S.2d 667 (Sup. Ct. 1940); misappropriation of corporate assets, Heller v. Boylan, 29 N.Y.S.2d 653 (Sup. Ct.), *aff'd mem.*, 263 App. Div. 815, 32 N.Y.S. 2d 131 (1st Dep't. 1941); misappropriation of corporate opportunities, Singer v. Carlisle, 26 N.Y.S.2d 172 (Sup. Ct.), *aff'd mem.*, 261 App. Div. 897, 26 N.Y.S.2d 320 (1st Dep't 1940); sale of control, Perlman v. Feldmann, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955). In each of these cases, there was a specific showing of injury to the corporation.

8. Liken v. Shaffer, 64 F. Supp. 432 (N.D. Iowa 1946). Courts have permitted sharcholders to recover individually in derivative suits on a pro rata share of the corporate recovery. *See* Perlman v. Feldmann, 219 F.2d 173 (2d Cir. 1955).

9. 31 Del. Ch. 241, 70 A.2d 5 (1949).

common law.[10] Reasoning that the corporation has no interest in its outstanding shares, they conclude that there is no corporate injury in insider trading.[11] Only in the *Brophy* decision, which has never been followed, has a court allowed a stockholder who is a third party to the insider's stock transaction to maintain a derivative suit on the basis of a breach of fiduciary duty.[12] Furthermore, courts have not permitted a shareholder to maintain an individual cause of action merely upon the basis of depreciation of the value of his stock, when the insider did not actively defraud the stockholder.[13] Even where the stockholder did purchase shares from the insider, the majority of courts have not allowed an individual suit under common law since they reason that no fiduciary duty extends to the trading of shares which are the director's personal property.[14] At common law, the only remedy has lain in jurisdictions which impose a limited fiduciary duty to disclose inside information to the purchasing or selling shareholder when special circumstances so dictate,[15] or in jurisdictions which impose such a duty regardless of special facts.[16] These courts, however, allow relief only to

10. *See, e.g.*, Equity Corp. v. Milton, 221 A.2d 494 (Del. 1966); Kaminsky v. Kahn, 20 N.Y.2d 573, 232 N.E.2d 837, 285 N.Y.S.2d 833 (1967).

11. These courts held that a director or officer occupied a fiduciary relationship to the corporation's shareholders as a body with respect to corporate business and property. Since the shares were his private property, the director's dealings in his personal securities were not considered corporate transactions and thus involved no fiduciary duties. *See* H. HENN, *supra* note 6, at § 240. Prior to the instant case, New York courts followed this reasoning. *See* Hauben v. Morris, 255 App. Div. 35, 5 N.Y.S.2d 721 (1st Dep't 1938), *aff'd*, 281 N.Y. 652, 22 N.E.2d 482 (1939); Stanton v. Schenck, 142 Misc. 406, 252 N.Y.S. 172 (Sup. Ct. 1931).

12. *See* H. MANNE, INSIDER TRADING AND THE STOCK MARKET 24 (1966). In the *Brophy* case, the defendant was an employee rather than a director or officer. The court held that when an employee acquires confidential information in the course of his employment, he occupies a position of trust towards that information analogous to that of a fiduciary. *See also* Mosser v. Darrow, 341 U.S. 267 (1951).

13. Henry v. General Motors Corp., 236 F. Supp. 854 (N.D.N.Y.), *aff'd*, 339 F.2d 887 (2d Cir. 1964). The practical aspects of allowing an individual's suit on the basis of depreciation of stock resulting from the activities of an insider has militated against its use. Since all stockholders have suffered the same wrong, allowing such suits would result in multitudinous litigation. *See* Niles v. New York Cent. & H.R.R., 176 N.Y. 119, 68 N.E. 142 (1903).

14. *See, e.g.*, Chatz v. Midco Oil Corp., 152 F.2d 153, 155 (7th Cir. 1945). This view states that the fiduciary duty extends only to corporate affairs and not to personal stock. Thus the director or officer is not dealing with the corpus of his trust when he trades his own securities.

15. This view, called the "special facts" rule, was first enunicated in Strong v. Repide, 213 U.S. 419 (1909). Among the special circumstances that will invoke the rule are lack of a readily ascertainable market value or the shareholders' lack of business experience. The New York courts have followed this rule. *E.g.*, Stanton v. Schenck, 142 Misc. 406, 252 N.Y.S. 172 (Sup. Ct. 1931).

16. *See, e.g.*, Jacobson v. Yaschik, 249 S.C. 577, 155 S.E.2d 601 (1967). This rule imposes a fiduciary duty to disclose all relevant information to the purchasing or selling shareholder regardless of special facts.

the purchaser, and not to the corporation. Federal securities law provides remedy for insider non-disclosure actions under sections 16(b)[17] and 10(b)[18] of the Securities Exchange Act of 1934 and under rule 10b-5 promulgated by the SEC.[19] Employment of federal remedies, however, is limited and has left questions as to their exact scope and applicability. Section 16(b), which allows corporate recovery in a derivative suit against corporate directors, officers and beneficial owners of ten percent of the corporation's shares, is available only where the insider has made short-swing profits within the six-month limitation period provided by the statute.[20] Other inherent limitations, including the two-year statute of limitations and the requirement that the stock involved be a registered security, severely restrict the effective use of 16(b).[21] To fill this gap, federal courts have fashioned section 10(b) and rule 10b-5 into an effective bar against the speculative abuse of confidential information in those areas not covered by 16(b). The remedy under these two provisions is flexible, applying to any person utilizing the inside information in the trading of any security, equity or debt,[22] with the private action taking the form of either a direct or

17. 15 U.S.C. § 78p(b) (1964).

18. *Id.* § 78j(b) (1964).

19. 17 C.F.R. § 240.10b-5 (1968).

20. The section states: "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or by any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months . . . ." Other provisions in the section include corporate recovery under a derivative suit and a specific grant of exemptive power to the SEC. 15 U.S.C. § 78p(b) (1964).

21. *See* Lowenfels, *Section 16(b): A New Trend in Regulating Insider Trading*, 54 CORNELL L. REV. 45, 62 (1968). In addition to these limitations, the trend of recent opinions indicates that the courts are attempting to soften the harsh application of section 16(b) by using a more subjective standard in calling for a close look at the factual situation to determine whether the violation was the type of activity that the act was meant to prohibit. Since the section itself does not require scienter, the courts previously applied only a mechanical test, with the major factual determination being whether the purchase and sale were within the six-month period. *See, e.g.*, Petteys v. Butler, 367 F.2d 528 (8th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967); Blau v. Lamb, 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967). Both of these cases adopted a subjective approach.

22. "It shall be unlawful for any person, directly or indirectly . . . (a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (1968). The rule is all-inclusive and covers any security by its own terms. However, there is no violation of the section unless either interstate commerce, the mails, or a national exchange is used in the transaction. *See* A. BROMBERG, SECURITIES LAW: FRAUD—SEC RULE 10b-5 §§ 2.3, 11.2 (1969).

a derivative suit.[23] Courts have consistently sustained derivative actions based on section 10(b) and rule 10b-5, but only where the corporation as a whole was injured as a purchaser or seller.[24] Although a few courts have criticized the purchaser-seller requirement and have hinted at its erosion,[25] recent cases still have held that profits from insider activity will not inure to the corporation in a derivative suit unless damage to the corporation is proven.[26]

In the present case, the court relied on the principles of agency and trust law to reach its decision. Stating that the corporate director is a fiduciary of the corporation, the court held that the exploitation of inside information by the director for his own personal advantage in his stock transactions violated this fiduciary duty.[27] The court stated that the critical question was to determine who had the higher claim to the profits derived from the use of inside information, the corporation or the director. Since a showing of damages is not necessary to a cause of action based on breach of fiduciary duty, and since the profits derived by the director resulted from a breach of this duty, the court held that a sufficient cause of action had been stated

23. The rule itself does not grant a remedy by its language. The federal courts have consistently held that private persons have standing to sue to redress violations of rights granted by section 10(b) and rule 10b-5. *E.g.*, Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961); Speed v. Transamerica Corp., 235 F.2d 369 (3d Cir. 1956). All federal courts have now sustained a private right of action in this area. Ruder, *Texas Gulf Sulphur—The Second Round: Privity and State of Mind in Rule 10b-5 Purchase and Sale Cases*, 63 NW. U.L. REV. 423, 431 n. 46 (1968).

24. *See, e.g.*, Ruckle v. Roto Am. Corp., 339 F.2d 24 (2d Cir. 1964); McClure v. Borne Chem. Co., 292 F.2d 824 (3d Cir. 1961). Other cases have tried further to restrict rule 10b-5 by creating deception and causation requirements. *See* Barnett v. Anaconda Co., 238 F. Supp. 766 (S.D.N.Y. 1964); O'Neill v. Maytag, 230 F. Supp. 235 (S.D.N.Y. 1964).

25. A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967) (dictum); Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967). *See* Lowenfels, *supra* note 21. Mr. Lowenfels contends that relief under rule 10b-5 should not be subject to rigid prerequisites, but should give remedy to those shareholders whose shares have been diluted in value by the insider's actions.

26. Schoenbaum v. Firstbrook, 268 F. Supp. 385 (S.D.N.Y. 1967), *aff'd*, 405 F.2d 200 (2d Cir. 1968); Cohen v. Colvin, 266 F. Supp. 677 (S.D.N.Y. 1967). There is some authority that indicates that the injury requirement might be dropped, but to date, no court has allowed a derivative action for damages under section 10(b) or rule 10b-5 where there has been no showing of injury to the corporation from the insider trading with a non-stockholder. *Cf.* Ruckle v. Roto Am. Corp., 339 F.2d 24 (1964). Even the recent case of SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), which was the first decision to hold that insiders must return profits gained by the use of inside information in a national exchange transaction, did not direct who was to receive these profits.

27. The court stated: "[A] corporate fidiciary, who is entrusted with potentially valuable information, may not appropriate that asset for his own use even though, in so doing, he causes no injury to the corporation." 248 N.E.2d at 912, 301 N.Y.S.2d at 81.

to enable the corporation to recover the director's profits in a derivative suit.[28] Indicating that its decision was within the spirit of section 16(b), 10(b) and rule 10b-5, the court found that the insider's activity in the instant case constituted the same sort of "abuse of a fiduciary relationship" as is condemned by federal law.[29] Finding that the federal remedies were extremely limited and not exclusive in this factual situation, the court reasoned that it was imperative to create an effective common law remedy by giving recovery to the corporation in a derivative suit.

The instant decision provides an effective check on securities trading by corporate insiders in an area where present state law has been clearly inadequate.[30] Even in jurisdictions which have allowed the purchaser a remedy in this situation, the operations of the national stock exchanges have limited its effectiveness. In the typical transaction, the purchaser deals with his broker rather than directly with the corporate insider. Furthermore the buyer usually orders his broker to buy at the current price or to complete the transaction if the market price is not above his "limit." Since the insider's offer to sell would normally be close to the market price, it is difficult to discover any injury.[31] Due to the anonymity that characterizes such stock transactions, the defrauded purchaser rarely knows he has dealt with an insider and hence cannot seek to remedy the unjust transaction.[32] Section 16(b) of the Securities Exchange Act was designed to provide such a remedy for registered securities, but it has only provided partial relief because of its six-month limitation. Section 10(b) and rule 10b-5 do not allow the corporation to recover in a derivative suit absent a showing of damages to the corporation. Thus, the plaintiff is limited in this situation to relief founded on fiduciary principles, a remedy provided by the Court of Appeals in a manner closely resembling 16(b) in policy and procedure. Both the present decision and 16(b) proceed

28. The court did, however, parenthetically infer some damage by stating that such actions by directors tarnish the corporation's image. Although somewhat vague on this point, the court did not state that an inference of damage was necessary to the maintinence of the suit. *Id.*

29. The court also stated that the provisions of section 16(b) demonstrated that a derivative action is an effective method for dealing with such abuses.

30. *See* text accompanying notes 9-16 *supra.*

31. *See* Comment, *Insider Trading Without Disclosure—Theory of Liability*, 28 OHIO ST. L.J. 472, 475 (1967).

32. Also, "[i]f there is no knowledge that an insider is buying, private recovery on the basis of after-acquired knowledge would amount to a windfall, since the insider's activity would not preclude the investor's loss." Note, *A Suggested Locus of Recovery in National Exchange Violations of Rule 10b-5*, 54 CORNELL L. REV. 306, 308 (1969).

on the theory that the corporation should be allowed to recover for profits derived by insiders through the exploitation of their fiduciary relationship.[33] The instant decision reached this result by deeming the utilization of corporate information for personal gain to be a violation of the insider's fiduciary duty and by removing the procedural block of the injury requirement. It provides both a practical safeguard against fiduciary violations and a corporate recovery for the benefits derived from the exploited information. This decision supplements the remedy of 16(b) by extending beyond six months the check on the misuse of corporate information.[34]

Moreover, the court's decision implies a broader mandate which would have the effect of prohibiting all insider trading under common law fiduciary principles. From the outset, the court indicated that its major concern was to check insider trading rather than to compensate a corporation which was not ostensibly harmed. In relegating the plaintiff's recovery to secondary importance, it recognized that the primary function of an action for breach of fiduciary duty is to remove from a fiduciary all inducement to utilize his position of trust for his personal benefit.[35] Although the present decision went further than *Brophy* in not requiring the additional element of potential harm to the corporation, future cases under the *Diamond* precedent may strip any insider of his profits by adopting *Brophy's* reasoning that any employee who acquires confidential information occupies a position of trust to the corporation. Furthermore, there are strong public policy arguments which would support the extension of this holding against an abuse of such a position of trust by a mere employee. For example, uninformed investors are equally disadvantaged vis-a-vis non-fiduciaries or lower-echelon agents trading on inside information as they would be by

33. The instant court recognized this in a quote from Adler v. Klawans, 267 F.2d 840, 844 (2d Cir. 1959): "The undoubted congressional intent in the enactment of section 16(b) was to discourage what was reasonably thought to be a widespread abuse of a fiduciary relationship—specifically to discourage if not prevent three classes of persons from making private and gainful use of information acquired by them by virtue of their official relationship to a corporation." 248 N.E.2d at 913, 301 N.Y.S.2d at 83.

34. The court's decision also is consistent with federal policy. According to a Senate Report, there "was a flagrant betrayal of their fiduciary duties by directors . . . who used the confidential information . . . to aid them in their market activities." S. REP. NO. 1455, 73d Cong., 2d Sess., 55 (1934). These congressional hearings led to the enactment of the Securities Exchange Act of 1934 and demonstrate the policy underlying its passage.

35. The court quoted the *Brophy* decision, stating that: "[P]ublic policy will not permit an employee occupying a position of trust and confidenee toward his employer to abuse that relation to his own profit, regardless of whether his employer suffers a loss." 248 N.E.2d at 914, 301 N.Y.S.2d at 83.

corporate directors. This abuse, which cannot be effectively checked by the purchaser because of the anonymity of the exchange, could be arrested by the derivative suit employed in *Diamond*. A similar result has been achieved in the suit under 10(b) and 10b-5 in *Texas Gulf Sulphur* which extended insider liability to cover employees who held material inside information. Here again, the result would be consistent with federal securities law.

Another interesting possibility under the *Diamond* doctrine arises because the gist of the wrong is misuse of the confidential information rather than the possible damage done to the corporation. If the fiduciary made full disclosure to the purchaser prior to his sale of stock, but before full public disclosure of that same information, he could be subjected to liability by the stockholders in a derivative suit, even though there would be no liability to the purchaser.[36] This result would occur because the sale before public release still would involve the fiduciary breach prohibited by *Diamond*—the utilization of inside information for personal advantage.[37] It is submitted that this result is necessary in order that all investors trading on an impersonal exchange have relatively equal access to material information. The use of inside information permits the insider to trade on a much more realistic set of probabilities and insulates him from the normal operations of supply and demand that characterize stock transactions. The mere fact that the insider has revealed his information to a single purchaser should not exonerate him, for there is still an abuse of the securities system

36. Under the present decision, there also exists the possibility of double liability being incurred by the insider. Presumably, the purchaser of the insider's stock, as well as the corporation, would be successful in an action against the insider either under federal securities law or in those state courts that hold an insider liable for trading without disclosure. The court, although not specifically dealing with this question, suggested that the insider interplead any and all possible claimants to the profits. The court's solution hardly seems viable in light of the possible multiplicity of anonymous transactions that could occur in the purchase of his stock. Finding all possible claimants to the profits would be virtually impossible. Two solutions to this problem have been suggested: (1) Hold the insider liable to both the corporation and the individual purchaser since he should not escape one liability merely because he has managed to incur another. *See* Note, *The Prospect for Rule X-10b-5: An Emerging Remedy for Defrauded Investors*, 59 YALE L.J. 1120, 1140-42 (1950); (2) Stay the corporate action to await the outcome of the suit by the purchaser in his individual right. If the individual prevails, that recovery would be used to diminish the damages recoverable by the corporation. *See* R. STEVENS, CORPORATIONS 701-02 (2d ed. 1949).

37. It is interesting to note that if the court had based its decision on the conversion of corporate assets, as was partially done at the Appellate Division, the impact of the case would have been even broader, for recovery would not be limited to an action against the insider. Under this approach, the court conceivably could impose liability on tippees for conversion of a corporate asset.

in permitting the insider to take advantage of the undisclosed information at the expense of a public which has no access to it. The court in the present case recognized the considerable difference between a corporate director who is subject to the same risks in stock transactions as the ordinary investor and those directors who utilize their position of trust to gain special advantage. The court did not prohibit all trading by corporate insiders. Instead, it prohibited trading that would result in profits obtained solely from access to information not available to all investors. The decision implies that corporate directors who wish to trade in their corporation's securities must either divulge by public release all inside information which might affect the price of the securities or abstain from trading altogether. Since the underlying purpose of both state and federal securities law in this area is to establish market integrity, this result is commendable as a step towards equality among purchasers in their stock transactions.

National Banks—Investment Companies—National Banks May Establish Collective Investment Funds

Petitioner, First National City Bank of New York (Bank), established a collective investment fund (Fund) designed to be the functional equivalent of an open-end investment company[1] and to compete with mutual funds by offering investment advisory service to the small investor.[2] The Fund was approved by the Comptroller of the Currency as a fiduciary activity authorized for national banks by section 92a of the Federal Reserve Act[3] and was registered with the

1. While the Fund operates in the same fashion as an open-end mutual fund, there are several differences. Shares in mutual funds may be marketed through the regular channels of public distribution, but units of participation in the Fund may be offered and publicized only through the Bank's trust department. 12 C.F.R. §§ 9.18(b)(5)(iii), (iv) (1969). The major attraction of the Fund is that the fee for management is ½% per annum while most mutual funds have additional "load" charges ranging generally from 7% to 8½%. 12 C.F.R. § 9.18(b)(12) (1969). Finally, unlike mutual funds, the Fund is subject to the supervision of the Comptroller as well as the SEC. This includes review of the Fund's investments to see that they are in accordance with sound fiduciary principles. 12 U.S.C. § 481 (1964); 12 C.F.R. § 9.11(d) (1969).

2. The minimum investment allowed by the Fund is $10,000, and surveys have indicated that individual sales of $10,000 or more have accounted for about half of the mutual fund industry's total dollar sales. *See generally Hearings on S. 2704 Before a Subcomm. of the House Comm. on Banking and Currency*, 89th Cong., 2d Sess. 138 (1966).

3. This statute gave the Comptroller the power to authorize national banks "to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunaties, or in any other fiduciary capacity in which State banks,

Securities and Exchange Commission (SEC) as an open-end investment company under the Investment Company Act of 1940.[4] The Bank applied to the SEC to have the Fund exempted from those provisions of section 10 of the Investment Company Act of 1940 which require a majority of the five-member committee supervising the Fund to be unaffiliated with the Bank.[5] Contending that too much bank control would jeopardize the position of the investors,[6] the National Association of Securities Dealers[7] (NASD) intervened before the SEC to oppose the exemption. The SEC allowed the exemption on the basis that the Fund would still be subject to all the safeguards necessary for the protection of its investors. The NASD then petitioned the Court of Appeals for the District of Columbia that the SEC order granting the exemption be set aside.[8] In a separate attack upon the Fund,

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trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located." 12 U.S.C. § 92a (1964). Pursuant to this authorization, the Comptroller issued the following regulation authorizing national banks to create collective investment funds: "Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively . . . [i]n a common trust fund, maintained by the bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as managing agent under a managing agency agreement expressly providing that such monies are received by the bank in trust . . . ." 12 C.F.R. § 9.18(a)(3) (1969).

4. 15 U.S.C. §§ 80a, 80b (1964), *as amended*, 15 U.S.C. §§ 80a, 80b (Supp. II, 1965-66).

5. The Bank sought exemption from the provisions of § 10 controlling the composition of the board of directors of a registered investment company. 15 U.S.C. §§ 80a-10(b)(3), -10(c), -10(d)(2) (1964). On March 9, 1966, the Commission denied the Bank's request for relief under § 10(d)(2), whereby only one member of the board need be unaffiliated as regards investment banks; however, the Commission did grant relief under §§ 10(b)(3) and 10(c), permitting 60% of the board to be affiliated with the Bank. SEC Investment Company Act Release No. 4538 (March 9, 1966).

6. The NASD relied on section 6(c) of the Investment Company Act authorizing the SEC to grant exemptions from the Act or any rule or regulation adopted under it "if and to the extent that such exemption is neeessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions . . ." of the Act. 15 U.S.C. § 80a-6(c) (1964).

7. The NASD represents about 3,700 registered brokers or securities dealers. Most of its members sell shares in mutual funds to investors and are compensated by sales commissions from the "load" charged by the funds. NASD members stand to lose commissions because of competition from the Fund.

8. The petition for review of the SEC's order was previously dismissed by the Court of Appeals for the District of Columbia on the ground that the NASD lacked standing as a party aggrieved under section 80a-42(a) of the Investment Company Act of 1940. NASD v. SEC, No. 20164 (D.C. Cir. Nov. 21, 1967). A petition for rehearing en banc was granted and the division opinion vacated on January 1, 1968. The en banc order was subsequently vacated on April 12, 1968, to permit the assigned division to reconsider the matter. The case is before the court again to be considered without reargument.

respondent, Investment Company Institute (ICI),[9] brought suit in federal district court seeking a declaratory judgment invalidating so much of the Comptroller's Regulation 9[10] as permits the Bank to operate the Fund on the ground that the Fund was not a fiduciary activity allowable under state law, but was a principal-agent arrangement designed to circumvent the restrictions on the power of national banks to deal in securities imposed by section 16 of the Glass-Steagall Act.[11] The Comptroller and the Bank answered that the Fund was a valid fiduciary activity and did not violate the Glass-Steagall Act. The district court held for the ICI. On appeal to the Court of Appeals for the District of Columbia,[12] *held*, reversed. When a national bank creates a collective investment fund in a state where state banks may provide similar services, the fund is an allowable fiduciary activity and may be exempted from the requirement that a majority of the supervisory committee be unaffiliated with the bank. *NASD v. SEC*, 1969 CCH FED. SEC. L. REP. ¶ 92,438 (D.C. Cir. June 21, 1969).

The Bank created its Fund on a foundation of statutory and regulatory authorization. Originally there was no express statutory authority for national banks to deal in securities; consequently, banks were impliedly prohibited from doing so.[13] Because the banks had devised a method for circumventing this prohibition,[14] Congress in 1927 passed the McFadden Act granting national banks the authority to engage in the business of underwriting and dealing in investment securities.[15] Then, as a result of the financial panic of 1929, Congress

9. The ICI is an unincorporated national association, having as its members 177 open-end management investment companies, 88 investment advisers, and 78 principal underwriters. The open-end management investment companies which are members of the ICI have assets of $36 billion, representing about 94% of the assets of all such companies in the United States.

10. 12 C.F.R. § 9.18 (1969).

11. This section places the following limitation upon banks dealing in securities: "The business of dealing in securities and stock by the [national banking] association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock . . . ." 12 U.S.C. § 24 (seventh) (Supp. III, 1965-67).

12. The Comptroller and the Bank then individually appealed to the court of appeals where their cases were consolidated for decision with the petition for review filed by NASD.

13. *E.g.*, First Nat'l Bank v. National Exchange Bank, 92 U.S. 122 (1875); Fleckner v. Bank of the United States, 21 U.S. (8 Wheat.) 338 (1823).

14. Because of this implied limitation, national banks established security affiliates, organized under state law, and used these to realize profit from underwriting and dealing in stocks and other securities.

15. "*Provided*, That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness

passed the Glass-Steagall Act and the Securities Act of 1933 aimed at divorcing investment banking from commercial banking. The Glass-Steagall Act was designed to protect bank depositors from the insolvency which resulted from the widespread investment of bank assets in speculative securities. This Act curtailed the power of national banks to engage in securities transactions by prohibiting the affiliation of banks with securities dealers, by forbidding interlocking directorates between investment companies and banks, and by limiting the bank's activities to the purchase and sale of securities on customer order.[16] The Securities Act of 1933 was designed to protect the investors by requiring securities dealers to provide potential customers with a prospectus describing the management of their account, its policies and objectives, and the right of participants therein; in addition, the Act required the account to be registered with the SEC.[17] Later, in an effort to protect shareholders of mutual funds against dishonest and unethical practices on the part of those selling securities, Congress passed the Investment Company Act of 1940. This Act provided for the registration of investment companies, the election of investment advisors and directors by the participants, the approval of auditors by the participants, the issuance of semi-annual reports to shareholders, and the dominance of the board of directors by members not affiliated with investment bankers.[18] The Act also authorized the SEC to grant exemptions from the requirements of the Act, provided the exemptions are "necessary or appropriate in the public interest and consistent with the protection of investors."[19] The regulatory body, the Federal Reserve Board of Governors (Board), did not authorize national banks to act as managing agents for collective investment funds until the middle 1930's when it issued Regulation F. This regulation was subsequently revised to limit the creation of collective investment funds to those accounts held for a "bona fide fiduciary purpose."[20] The Board consistently took the view that a common trust fund should not be permitted for the sole purpose of providing the investor with the bank's investment management services.[21] In 1962, however, when regulation

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of any person, copartnership, association, or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities . . . ." Act of Feb. 25, 1927, Pub. L. No. 639, ch. 191, § 2(b), 44 Stat. 1226.

16. 12 U.S.C. §§ 24(seventh), 78, 377, 378 (1964).

17. 15 U.S.C. §§ 77a-bbbb (1964).

18. 15 U.S.C. §§ 80a-8, -15(a)(3), -16(a), -31(a)(2), -29(d), -10 (1964).

19. 15 U.S.C. § 80a-6(c) (1964).

20. FRB Reg. F, 12 C.F.R. § 206.10(c) (1939).

21. *See* 42 FED. RES. BULL. 228 (1956); 41 FED. RES. BULL. 142 (1955); 26 FED. RES. BULL. 390 (1940).

of the fiduciary activities of national banks was transferred from the Board to the Comptroller,[22] the Comptroller was specifically granted the power to permit national banks to engage in any fiduciary activity permitted to state banks under state law.[23] Consequently, in April, 1963, the Comptroller, under the power granted him to regulate the fiduciary activities of national banks, issued revised Regulation 9,[24] deleting the "bona fide fiduciary purpose"[25] requirement and authorizing national banks to pool managing agency accounts.[26]

The court[27] reasoned that although the Fund was not a traditional trust arrangement, it was a true fiduciary activity within the purview of section 92a of the Federal Reserve Act.[28] Since New York law permits state banks to establish commingled managing agency accounts,[29] the court held that the Comptroller did not exceed his statutory power[30] when he issued revised Regulation 9[31] and approved the Fund established pursuant thereto. In support of its decision, the court pointed out that the regulatory power of the Comptroller, together with the restrictions of the Securities Act of 1933, would insure the proper supervision of this broad fiduciary activity. Noting the differences between the purposes of the Securities Act of 1933 and the Glass-Steagall Act,[32] the court concluded that the words "security"

22. 12 U.S.C. § 92a (1964).

23. Relevant to the impact of the Comptroller's statutory power is the fact that even though New York banking law does not specifically authorize the commingling of funds held by a managing agent, the New York State Banking Department has given formal approval, under the authority of the state banking laws, to commingled managing accounts of two New York banks. N.Y. BANKING LAW § 100 (McKinney 1950), *as amended*, (Supp. 1968-69). Also relevant to the Comptroller's authority, is an earlier decision that an agent who manages and commingles funds held for a principal under a contractual agreement is still a trustee and the relationship is a fiduciary arrangement. Brown v. Christman, 126 F.2d 625 (D.C. Cir. 1942).

24. 12 C.F.R. § 9.18 (1969).

25. 2 Fed. Reg. 2976 (1937).

26. "Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively . . . in a common trust fund, maintained by the bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as managing agent under a managing agency agreement expressly providing that such monies are received by the bank in trust . . . ." 12 C.F.R. § 9.18(a)(3) (1969).

27. Chief Judge Bazelon and Judge Burger filed concurring opinions stating the reasoning of the court. Since Judge Bazelon dealt in detail with the validity of the Fund, his reasoning is hereinafter set forth as that of the court. In its per curiam opinion, the court expressed some reservations about the standing of the parties to initiate this action, but it resolved the question in favor of NASD and ICI so that the case could be decided on its merits.

28. 12 U.S.C. § 92a (1964).

29. N.Y. BANKING LAW § 100 (McKinney 1950), *as amended*, (Supp. 1968-69).

30. 12 U.S.C. § 92a (1964).

31. 12 C.F.R. § 9.18 (1969).

32. Note, *Commingled Trust Funds and Variable Annuities: Uniform Federal Regulation of Investment Funds Operated by Banks and Insurance Companies*, 82 HARV. L. REV. 435 (1968).

and "underwriter" as they appear in the Securities Act have a much more expansive meaning than the same words used in the Glass-Steagall provision forbidding national banks to "underwrite any issue of securities or stock . . . ."[33] Therefore, it reasoned that banks may establish collective investment funds which are registered as securities under the Securities Act of 1933 and at the same time are considered to be fiduciary arrangements not in violation of the Glass-Steagall prohibition. The court also found that since the Fund is a fiduciary activity whereby the Bank buys and sells securities for the account of customers, the Fund is but one aspect of the single entity, the Bank, and therefore is not in violation of the Glass-Steagall restrictions against interlocking directorates and affiliations between personnel of commercial banks and security dealers.[34] The court concluded that since the Fund is a fiduciary arrangement with inherent prohibitions against wilfull mismanagement[35] and is subject to the dual supervision of the Comptroller and SEC,[36] the SEC exemption allowing a majority of the directors of the Fund to be affiliates of the Bank is allowable as consistent with the purpose of the Investment Company Act; that is, to protect the investors against the dangers of bank dominated security affiliates.

The instant decision is a landmark in the development of the expanding scope of national banking powers. The immediate effect of the court's holding is to permit national banks to compete on a large scale in the collective investment fund market. Although numerous problems must be solved before collective funds of national banks can realize their competitive potential,[37] the impact of the present decision

33. 12 U.S.C. § 24 (seventh) (Supp. III, 1965-67).

34. 12 U.S.C. §§ 24, 78, 377-78 (1964).

35. The court held that since the Bank has created the Fund to compete with mutual funds it will neither retain income-producing assets in the form of excessive cash deposits nor use them to offset its loans. Also, since the Fund must of necessity deal primarily in stock, there is no real basis for concern that the Bank will use the Fund to further its limited banking business. Lastly, since the Bank must obtain favorable prices in order to compete with other collective investment funds, there is no danger of its allotting brokerage to existing or potential Bank customers.

36. The Comptroller is charged with regulation of the fiduciary activities of national banks. 12 U.S.C. § 92a (1964). The Fund, as a registered open-end investment company with the units of participation therein registered as securities, is subject to the supervision of the SEC.

37. There are two major problems facing the Fund: investment level and public solicitation. The Bank has concluded that in order to operate its Fund profitably, it must establish a minimum investment level of $10,000. While a figure this low will allow the Bank to compete for a great number of mutual fund customers, it is evident that if the limit were lowered the competition would be increased. The biggest problem facing the Bank, however, is public solicitation. While mutual funds are allowed to publicly solicit for purchasers of their interests, the Bank is limited to advertising the Fund through the means of a financial report available upon request. *See*

is evidenced by the forecast that the opening of the mutual funds area to the banking industry will divert two billion dollars to banks over the next five to ten years.[38] Nevertheless, the correctness of this decision is doubtful. While the reasoning of the court is superficially persuasive, the decision permits national banks to engage in an activity which has never been expressly considered by Congress. As a matter of fact, the court opens to national banks a fruitful area of investment closed to them since the enactment of post-Depression legislation. Since Congress acted in the wake of the financial panic of 1929 to close the doors allowing national banks to underwrite investment securities, it is doubtful that the judicial branch is the proper forum to reopen those doors. By a very literal reading of the statutory provisions involved, the court reached a logical result, but one probably never intended by the legislative branch. This mechanistic approach never really deals with the basic policy issue: did Congress intend to authorize national banks to operate open-end mutual funds. Since the potential development of banks into large institutional investors will have a profound effect upon the nation's economy, the entrance of banks into the mutual fund market should be a matter of express legislative study and consent—not a matter of statutory construction. The instant decision will now force Congress to act promptly to accept or reject this judicial formulation of national banking policy.

Public Welfare—Section 402(a)(23) of Social Security Act Neither Prohibits State Reductions of ADC Grants Nor Compels Affirmative Increases

Two Negro women brought a class action[1] against various members of the Louisiana Board of Public Welfare,[2] seeking to enjoin the defendants from enforcing a proposed ten percent reduction in Aid

Comment, *Of Banks and Mutual Funds: The Collective Investment Trust*, 20 SW. L.J. 334, 349 (1966).

38. *Hearings on H.R. 8499, 9410 Before the Commerce and Finance Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. 26 (1964).

1. The suit was brought on behalf of the plaintiffs, their children, and all other persons receiving aid under the Louisiana ADC program. Lampton v. Bonin, 299 F. Supp. 336, 338 (E.D. La. April 15, 1969).

2. The defendants included Garlin L. Bonin as Commissioner of the Louisiana Board of Public Welfare, Camille Adams as Chairman of the Board, John J. McKeithen as Governor of the state and ex-officio member of the Board, and 8 other members of the Board. *Id.*

to Dependent Children (ADC) grants. Plaintiffs also sought declaratory relief, contending[3] that section 402(a)(23) of the Social Security Act[4] prohibited the proposed ADC reduction and required states to take affirmative steps to increase current payment levels commensurate with rises in the cost of living. The Board of Public Welfare defended the reduction proposal as a necessary concomitant to a recent Supreme Court decision[5] which had spawned a sudden increase in eligible ADC recipients.[6] Defendants further contended that such a reduction would be entirely consistent with section 402(a) (23), which they insisted imposed no inhibitions on state manipulations of ADC payments prior to July 1, 1969.[7] In a three-judge decision, the United States District Court for the Eastern District of Louisiana upheld the defendants' position,[8] retaining jurisdiction over the question of whether section 402(a)(23) required an affirmative increase in ADC appropriations by July 1, 1969.[9] In a subsequent decision, *held*, judgment for the defendants.[10] Section 402(a)(23) of the Social Security

3. The plaintiffs originally submitted additional arguments; First, the Proposed ADC reduction, unaccompanied by corresponding reductions in other categories of public assistance, denied them equal protection of the law; second, the proposed reduction was violative of section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1964). The latter argument was based on the fact that 80% of Louisiana ADC recipients were Negroes.

4. 42 U.S.C. § 602(a)(23) (Supp. 1968): "A State plan for aid and services to needy families with children must . . . provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to the families will have been proportionately adjusted."

5. King v. Smith, 392 U.S. 309 (1968). This decision had the effect of compelling Louisiana to make ADC payments to families previously ineligible to receive aid under the "man in the house" policy. Prior to *King v. Smith*, payments had been withheld from families in which the parent and a member of the opposite sex were not married, but either lived together as man and wife and maintained a common household or had continuous intimate relations while living in separate households. *See* 22 VAND. L. REV. 219 (1968).

6. Because of *King v. Smith*, it has been estimated that 200,000 to 400,000 persons in the District of Columbia and 18 states should have cause for ADC reinstatement. N.Y. Times, May 19, 1968, at 32, col. 1. *See* 22 VAND. L. REV. 219, 222 (1968).

7. The defendants asserted that section 402(a)(23) required only that ADC need standards and maximums be adjusted to compensate for rising living costs by July 1, 1969. Since the statutory language did not expressly refer to increasing payments, the defendants maintained that such a requirement should not be read into the provision.

8. Lampton v. Bonin, 299 F. Supp. 336 (E.D. La. 1969). This initial decision was rendered on April 15, 1969.

9. The court retained jurisdiction because it concluded that the issue concerning the increase requirement was not ripe for adjudication. Although the Louisiana legislature had not enacted a new appropriations bill, the court noted that additional funds to ADC might be included in the pending appropriations bill. Lampton v. Bonin, 299 F. Supp. 336, 346 (E.D. La. 1969).

10. By July 1, the Louisiana legislature had met and adjourned without increasing the level of payments of families with dependent children. Although the Department raised its standard of

Act neither prohibits state reductions in ADC payments, nor requires affirmative increases in grant levels. *Lampton v. Bonin*, 38 U.S.L.W. 2084 (E.D. La. July 16, 1969), *deciding final issue of* 299 F. Supp. 336 (1969).

During the depression, Congress enacted the Social Security Act of 1935, which established the ADC program to aid needy children.[11] Although the ADC program is financed largely by the federal government, it is administered by the states, whose welfare plans must conform to the Social Security Act and be approved by the Secretary of HEW. Prior to January, 1968, state administrators had enjoyed approximately 35 years of complete freedom in determining their ADC need standards and corresponding payment levels.[12] Recognizing the chronic inadequacy of ADC payments, Congress abruptly curtailed this freedom by enacting section 402(a)(23) of the Social Security Act. This provision expressly commanded that by July 1, 1969, states adjust their ADC need standards and grant maximums to reflect changes in the cost of living.[13] While section 402(a)(23) has been subjected to conflicting interpretations, legislative history reveals that Congress was seeking not only to provide for pre-July 1 elevation of standards and maximums, but also to compel simultaneous increases in payments.[14]

need to reflect a 20% rise in living costs, it reduced the actual ADC payments. Lampton v. Bonin, 38 U.S.L.W. 2084 (E.D. La. July 16, 1969). The second decision was rendered on July 16, 1969.

11. *See* 76 YALE L.J. 1234 (1966-67).

12. 299 F. Supp. 336, 352 (1969).

13. *See* note 4 *supra*.

14. Section 402(a)(23) was introduced before the Senate Committee on Finance as a proposed amendment by HEW to H.R. 12080, 90th Cong., 1st Sess. (1967). In its original form, the amendment called for the states to update their need standards to reflect current prices and to meet need in full as they determined it. *Hearings on H.R. 12080 Before the Senate Comm. on Finance*, 90th Cong., 1st Sess., pt. 1, at 635 (1967) [hereinafter cited as *1967 Hearings*]. This amendment, along with similar proposals for the adult categories of assistance, was designed to meet the problem of inadequate assistance payments by compelling increases in the current level of payments. Testifying in support of the proposed amendments, the Secretary of HEW John W. Gardner and Under-Secretary Wilbur J. Cohen documented the inadequacy of assistance payments, especially in the ADC program. *1967 Hearings*, pt. 1, at 216, 255-59. Though the original proposals were extensively modified, the provisions adopted by the Senate, which were contained in the Senate Report under the heading "Increasing Income of Recipients of Public Assistance," were undoubtedly intended to ameliorate the same problem of low level assistance grants by requiring states to increase payments. S. REP. No. 744, 90th Cong., 1st Sess. (1967). The Senate passed these provisions and sent the bill to a Senate-House Conference Committee where the mandatory increases for adult assistance programs were abolished. No similar change was made in the ADC provision, which remained mandatory upon the states. The annual cost of living adjustment was deleted and replaced by a single adjustment before July 1, 1969. CONF. REP. No. 1030, 90th Cong., 1st Sess. (1967). The evolution of section 402(a)(23) from its inception

One year after section 402(a)(23) was enacted, HEW promulgated a regulation[15] to guide the states in their compliance with this provision. Contrary to apparent congressional intent, the regulation permitted the states arbitrarily to reduce ADC grants any time prior to July 1, 1969, and did not provide for eventual payment increases. Recently, district courts in New York[16] and Texas[17] have held that the HEW regulation erroneously construes section 402(a)(23) and thereby defeats the fundamental legislative objective underlying the provision. Both courts recognized in section 402(a)(23) an unequivocal congressional purpose to bolster ADC payment levels and hence prohibit grant reductions subsequent to the enactment of the provision.

In the instant case, the court initially concluded that section 402(a)(23) of the Social Security Act imposed absolutely no inhibitions on state manipulation of ADC payments prior to July 1, 1969. In reaching this conclusion, considerable reliance was placed on HEW's interpretation[18] of the provision embodied in its newly-issued regulation.[19] Therefore, Louisiana's proposed ten percent grant reduction was held not to violate section 402(a)(23).[20] In its subsequent decision,[21] the court was called upon to define the precise requirements of section 402(a)(23). Attempting to delineate these requirements and

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before the Senate Committee on Finance until its enactment by Congress manifests clearly that it was designed to compel the states to raise ADC payments.

15. HEW Reg. § 233.20(a)(2)(ii), 34 Fed. Reg. 1394 (1969): "In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established . . . . *In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions* in accordance with subparagraph 3(viii) of this paragraph . . . ." (emphasis added).

16. Rosado v. Wyman, 37 U.S.L.W. 2698 (E.D.N.Y. May 15, 1969).

17. Jefferson v. Hackney, N.D. Tex. 1969, *cited in* Lampton v. Bonin, 38 U.S.L.W. 2084, 2085 (E.D. La. July 16, 1969).

18. The court justified its reliance on HEW's opinion by citing Udall v. Tallman, 380 U.S. 1 (1965), which held that "When faced with a problem of statutory construction, great deference [will be placed on] the interpretation given the statute by the officers or ageney charged with its administration." 299 F. Supp. 336, 341 (1969).

16.

19. *See* note 15 *supra.*

20. In its first decision, the court held that section 402(a)(23) did not abridge the plaintiffs' rights to equal protection of the law or violate section 601 of the Civil Rights Act of 1964. The equal protection holding was based on the court's determination that each public assistance program stands on its own and is subject to independent state administration without regard for the policies of the other programs. As to the civil rights question, the court reasoned that while 80% of Louisiana's ADC recipients were Negroes, a majority of blind and disabled welfare recipients were also Negroes. In addition, there was no showing that the proposed ADC cut was motivated by racial prejudice.

21. *See* text accompanying note 9 *supra.*

at the same time clarify its original position, the court reasoned that a clear distinction should be made between "adjusting" the standard of need and "meeting" the adjusted standard. In applying a literal interpretation to the statutory language, the court ultimately concluded that section 402(a)(23) required states to raise ADC standards and maximums by July 1, 1969, but imposed no affirmative compulsion to increase payments by a proportionate amount.[22]

If the court had initially given proper consideration to the legislative history and intended practical effect of section 402(a)(23),[23] it would inevitably have concluded that Louisiana's proposed ADC reduction could not withstand the strictures of that provision. The court based its decision upon the mistaken premise that section 402(a)(23) did not require an increase in payments prior to July 1, 1969, and thus could not impinge upon a state's freedom to reduce grants before that date.[24] The court's interpretation of the provision, however, is not in accord with the most reasonable meaning of the language embodied therein.[25] Since the practical construction of the

22. Recognizing the economic detriment to ADC recipients inherent in its interpretation of section 402(a)(23), the court suggested 3 possible motives that could have prompted Congress to pass the provision: first, to increase the standard of need and make persons with marginal incomes eligible for ADC payments; secondly, to eliminate the use of arbitrary dollar maximums; and lastly, to emphasize the disparity between need and payments. Judge Cassibry, however, in his dissenting opinion to the second decision, vividly demonstrated the inadequacy of each suggested motive. Interpreting section 402(a)(23) to require state increases in ADC payments by July 1, 1969, he concluded that the Louisiana reduction was invalid. Lampton v. Bonin, 38 U.S. L.W. 2084, dissenting opinion at 2-6 (Civil No. 68-2092) (E.D. La. July 16, 1969).

23. *See* note 14 *supra*. Obviously, the intended effect of section 402(a)(23) was to require states to increase their current ADC payments as well as need standards and maximums. Otherwise Congress would not have provided 18 months for compliance with the provision. A revision of current standards and maximums would have required only a spontaneous administrative adjustment of figures. Raising ADC payments would presumably necessitate an assemblage of the state legislature. Since July 1, 1969, was the earliest date by which all state legislatures could convene in regular session, Congress established this date as a deadline for raising payments.

24. This fallacy in the court's reasoning is fully discussed in Judge Cassibry's dissenting opinions to both decisions. Lampton v. Bonin, 299 F. Supp. 336, 346 (E.D. La. 1969); 38 U.S.L.W. 2084, dissenting opinion (Civil No. 68-2092) (E.D. La. July 16, 1969).

25. Judge Cassibry provided a complete analysis of the meaning most reasonably imported by section 402(a)(23): "ADC payments in all states are predicated upon the need standard; if this standard is increased as section 402(a)(23) requires, the budgetary deficit must also increase accordingly. In those states paying the budgetary deficit in full, as well as in those states that pay only a percentage of the budgetary deficit (or standard of need), section 402(a)(23) necessarily requires increased ADC grants corresponding to the increase in the standard of need, for a percentage maximum (100% or less) kept constant automatically translates increased need into increased payment. Similarly, in those states imposing an arbitrary dollar maximum on the size of the assistance grant, section 402(a)(23), by requiring that the maximums imposed be adjusted

words harmonizes with the legislative history,[26] the recent case law,[27] and the purpose logically attributable to Congress,[28] section 402(a)(23) unquestionably commands the states to increase ADC payments no later than July 1, 1969, and prohibits any reduction in payments before that date. The construction of section 402(a)(23) offered by the court stresses the precise words of the statute to the exclusion of clear congressional purpose. This interpretation permits the states to wholly emasculate the potentially beneficial effects of the provision by sanctioning deep cuts far below the level of actual need. In short, this restrictive construction ignores the urgent necessity for increased ADC payments[29] and renders section 402(a)(23) virtually meaningless.[30] The net result of Louisiana's raising its standard of need without concomitant elevation of payments will be to increase the number of persons eligible for benefits at the expense of those already on relief.[31] It is inconceivable that Congress intended to allocate this additional cost of the ADC program to the most poverty-stricken members of society. In addition to subverting legislative intent, the instant decision might have a significant undermining effect on the nation's already inadequate ADC program. The present program is under severe attack from all quarters of the country,[32] with lack of funds representing the most acute problem.[33] Moreover, this fund shortage is destined to

in accordance with the change in the cost of living, insures increased grants for all recipients. Regardless of which system of computing ADC payments the state follows, section 402(a)(23) is therefore designed to effectuate increased ADC recipient grants. The language of the statute could not be any clearer." 299 F. Supp. 336, 350 (1969).

26. *See* note 14 *supra*.

27. Jefferson v. Hackney, N.D. Tex. 1969, *cited in* Lampton v. Bonin, 38 U.S.L.W. 2084 (E.D. La. July 16, 1969); Rosado v. Wyman, 37 U.S.L.W. 2699 (E.D.N.Y. May 15, 1969).

28. It is fundamental that the court must apply "reason and common understanding to reach the results intended by the legislature." Rathbun v. United States, 355 U.S. 107 (1957).

29. The majority of the court indicated regret over the harshness of the decision it felt compelled to render. Lampton v. Bonin, 38 U.S.L.W. 2084, opinion at 10 (Civil No. 68-2092 (E.D. La. July 16, 1969).

30. As was indicated in Rosado v. Wyman, 37 U.S.L.W. 2699 (E.D.N.Y. May 15, 1969), the majority's view in *Lampton* provides for "a mere administrative adjustment without effecting any substantive change."

31. *Id.*

32. When President Johnson signed the 1968 Social Security Act amendments, he stated: "The welfare system today pleases no one. It is criticized by liberals and conservatives, by the poor and the wealthy, by social workers and politicians, by whites and by Negroes in every area of the nation." HEW, WELFARE IN REVIEW 20 (May-June 1968).

33. The current crisis stems in part from the fact that Congress has consistently appropriated a larger proportion of aid to the aged, even though, among the ranks of the poor, the young far outnumber the old. There are approximately 15 million poor under age 18 in contrast to 1.5 million poor over age 65. B. WEISBROD, THE ECONOMICS OF POVERTY 11 (1965). In 1965, aid to dependent children accounted for 32.6% of public assistance expenditures, whereas

become much more critical if the number of eligible recipients continues to increase at the present appalling rate.[34] By allowing a state to reduce ADC grants in circumvention of an unequivocal federal mandate, the instant decision can serve only to intensify ADC's current economic plight. Furthermore, if widely followed, this decision will move the nation another step away from uniform application of public assistance and will cultivate the present inequities deriving from diversity among the states.

Taxation—Deductions—Wife's Traveling Expenses Deductible When Her Presence Serves Her Husband's Business Purpose

Roy O. Disney, President and Chairman of the Board of Walt Disney Productions,[1] made several business trips[2] to manage the company and to promote its "family-oriented" image.[3] In conformity with company policy, he took his wife on these trips and was reimbursed for her travel expenses.[4] His wife spent a considerable amount of time arranging for and hosting social functions, making good-will visits, attending press conferences, and attending various

38.6% went to the aged. In the South, the respective figures were 18.2% and 65.1%. SOUTHERN REGIONAL COUNCIL, PUBLIC ASSISTANCE IN THE SOUTH 11 (1966).

34. For example, in 1967 the number of those added to ADC rolls increased three times as fast as in most previous years. N.Y. Times, Feb. 20, 1968, at 38, col. 7. Further impetus was added to the increase-rate in 1968 by the decision in King v. Smith, 392 U.S. 309 (1968). *See* notes 5-6 *supra*.

1. The company specializes in "family-type" entertainment. It produces family-oriented motion pictures for theaters and television, operates Disneyland Park, publishes books and magazines, merchandizes items modeled after Disney created characters, and distributes films to schools and other markets. Business is conducted world-wide, with representatives, subsidiaries, and licensees in 58 foreign countries. United States v. Disney, 413 F.2d 783, 784 (9th Cir. 1969).

2. In January, 1962, Mr. Disney and his wife spent three weeks in New York, Paris, and London while he met with company sales representatives and held screenings of the company's products for exhibitors. Later in 1962 they made a three month world tour on company business. In 1963, the Disneys went to Europe on a business trip, and in August of that year made a business trip to Colorado, Wisconsin, and New York. *Id.* at 784-85.

3. As chief executive officer of the company, Mr. Disney held meetings with the company's sales force, held screenings of the company's products for exhibitors, and attended trade conventions and conferences. He was expected to cultivate cordial relationships with the executives with whom the company dealt, to enhance the morale and enthusiasm of company representatives, and to promote the public image of the company as one engaged in family-type entertainment. *Id.* at 787.

4. The company had a long-standing policy that executives would take their wives on trips when their presence would enhance the company's image or otherwise promote the company's interest. Consistent with this policy, the company paid for the wives' expenses on such trips. *Id.* at 785.

business-oriented events at which women were present.[5] Internal Revenue refused to allow the taxpayer to exclude the reimbursed amounts from gross income or to deduct them as ordinary and necessary business expenses.[6] In an action to recover income taxes paid, the district court held that the wife's reimbursed travel expenses should be excluded from gross income.[7] On appeal to the Court of Appeals for the Ninth Circuit, *held*, affirmed, on the ground that the amounts were deductible as business expenses.[8] Where the dominant purpose of the wife's presence in accompanying her husband on a business trip is to serve her husband's business purpose, and where she actually spends a substantial amount of time assisting him, the amount reimbursed for her travel expenses is deductible as an ordinary and necessary business expense. *United States v. Disney*, 413 F.2d 783 (9th Cir. 1969).

The tax treatment of reimbursed expenses has created perplexing problems that have not yet been resolved.[9] Amounts paid by an employer as reimbursements ordinarily must be included in gross income from which the actual expenses incurred may be deducted;[10]

5. Mrs. Disney attended meetings of employees, exhibitors, distributors, business associates, the press, and the public. She did not perform any secretarial-type duties, nor did she attend daytime business meetings. She spent much of the day attending to her husband's laundry, taking telephone calls, and shopping. *Id.*

6. There was no dispute over the fact that the trips were business trips for Mr. Disney, or over the fact that the company could deduct as business expenses the amount paid for Mrs. Disney's travel expenses. The Disneys kept careful records of their expenses and accounted to the company for each trip. They made no claim to a refund for amounts spent on items classified by them as personal expenses. *Id.*

7. Disney v. United States, 267 F. Supp. 1 (C.D. Cal. 1967), *noted in* 20 ALA. L. REV. 169 (1967).

8. Although the court noted that the appeal raised the question of whether reimbursements are includible in the taxpayer's gross income, the court without explanation stated that it preferred to treat the deductibility question and affirm on that ground.

9. For a discussion of the problems in the treatment of reimbursed moving expenses, see J. CHOMMIE, THE LAW OF FEDERAL INCOME TAXATION § 24 (1968). Although there is already a code section requiring that reimbursements for basic moving expenses be included in gross income, INT. REV. CODE OF 1954, § 217, there has been a suggestion that new legislation is needed to resolve the problem of incidental reimbursed moving expenses. 21 U. MIAMI L. REV. 705, 711 (1967). For an attempt to unravel the "numerous and complex" tax problems that arise when an employer pays for a trip to a business convention, see Osborn, *What's the Tax Rule*, TRIAL, Apr.-May, 1968, at 59.

10. 1 J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION § 6.05, at 23 (rev. ed. W. Oliver 1962). At one time the treasury regulations required that reimbursements for travel expenses were to be included in gross income and the actual expenses incurred deducted. Treas. Reg. 118 § 39.23(a)-2(c), 1956 FEDERAL TAX REGULATIONS 557. Prior to the tax years in the instant case the regulation was changed and Treas. Reg. § 1.162-17(b)(1) (1958) provides: "The employee need not report on his tax return (either itemized or in total amount) expenses for travel, transportation, entertainment, and similar purposes paid or incurred by him solely for the benefit of his employer for which he is required to account and does account to his employer . . . for

however, courts have frequently allowed such reimbursements to be excluded from gross income when the amounts were not intended as compensation.[11] Courts have long held that the reimbursement of actual travel expenses incurred by an employee on behalf of his employer does not result in income to the employee.[12] The reimbursed expenses of an employee's wife may also be excluded from gross income when she accompanies her husband on a noncompensatory business trip and her presence serves the *employer's* business purpose.[13] In *Allen J. McDonell*,[14] an employee accompanied the winners of the company's sales contest and their wives to Hawaii. The company, considering the presence of the employee's wife essential to the enhancement of the company's image with the vacationing couples, paid her expenses for the trip. The court found that since the company had a business reason for the wife's presence, the trip did not constitute disguised remuneration, and therefore the expenses of the trip were not

which the employee is paid through advances, reimbursements, or otherwise, provided the total amount of such advances, reimbursements, and charges is equal to such expenses. In such a case the taxpayer need only state in his return that the total of amounts . . . received from the employer as advances or reimbursements did not exceed the ordinary and necessary business expenses paid or incurred by the employee." The regulations also cover the situation where the reimbursements are in excess of expenses, Treas. Reg. § 1.162-17(b)(2) (1958); where the expenses are in excess of the reimbursements, Treas. Reg. § 1.162-17(b)(3) (1958); and, where the employee is not required to account to his employer for his expenses, Treas. Reg. § 1.162-17(c) (1958). These regulations, dealing with what the employee must report on his own return, appear to be procedural and do not affect the substantive question of when reimbursements are in fact compensatory in nature. *See* Graves, *Reimbursed Expenses*, 105 J. ACCOUNTANCY 27 (June 1958).

11. *E.g.*, Homer H. Starr, 46 T.C. 743 (1966); *cf.* Alex Silverman, 28 T.C. 1061 (1957), *aff'd*, 253 F.2d 849 (8th Cir. 1958) (reimbursement included in income because wife's presence had no business purpose). Professor Chommie says that the theory underlying the exclusion of reimbursements for basic moving costs, an analogous situation, is that they constitute employer costs. J. CHOMMIE, *supra* note 9, at 49-50. Since all compensation for personal services, regardless of the form of payment, is included in gross income, INT. REV. CODE OF 1954, § 61(a)(1), it is arguable that amounts paid by an employer to his employees constitutes taxable income unless the employee can prove that the amounts were intended as gifts. According to the brief submitted on behalf of the Disneys, such an argument was made by the government in the instant case. Brief for Appellees at 14, United States v. Disney, 413 F.2d 783 (9th Cir. 1969). However, the fact that there is no donative intent in a reimbursement situation does not necessarily mean that amounts expended by an employer to send an employee on a business mission were intended as compensation to the employee. In any event, courts have not required a showing that a gift was intended in excluding reimbursements from gross income where the amounts were not intended as compensation. *See, e.g.*, Gotcher v. United States, 259 F. Supp. 340 (E.D. Tex. 1966).

12. J.S. Cullinan, 5 B.T.A. 996 (1927); Sanitary Farms Dairy, Inc., 25 T.C. 463 (1955) (an African safari, not taken for pleasure, but for the benefit of the corporation).

13. *See* Allenberg Cotton Co. v. United States, 61-1 U.S. Tax Cas. ¶ 9131 (W.D. Tenn. 1960); Gotcher v. United States, 259 F. Supp. 340 (E.D. Tex. 1966).

14. 26 CCH Tax Ct. Mem. 115 (1967).

includible in the employee's gross income.[15] The courts, however, have required inclusion of reimbursements for both the husband and the wife when the trip was primarily for pleasure and was considered a reward or compensation to the employee for his services.[16] If the reimbursements are reported in gross income, the question becomes whether the taxpayer may deduct the expenses incurred. By statute, the taxpayer's business expenses are deductible,[17] and it is well settled that if his wife accompanies him on a business trip her travel expenses are deductible if her presence serves a bona fide business purpose of her husband.[18] The deduction is usually allowed[19] when the wife's services replace the need for an employee to perform the same services;[20] but, the deduction is usually denied when the wife's activities are primarily of a social nature.[21] In *Warwick v. United States*,[22] however, an executive was allowed to deduct his wife's travel expenses upon showing that she made friends with customers, toured their factories, and made it possible for her husband to be entertained in the homes of customers.

15. *Id.* at 117.

16. Rudolph v. United States, 291 F.2d 841 (5th Cir. 1961), *petition for cert. dismissed*, 370 U.S. 269 (1962) (Justices Douglas and Black dissented on the ground that expenses paid by an employer for its employees and wives to attend a business convention should not be regarded as income to the employees.); Patterson v. Thomas, 289 F.2d 108 (5th Cir. 1961).

17. INT. REV. CODE OF 1954, § 162.

18. *See* Treas. Reg. § 1.162-2(c) (1958). "Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's performance on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses." *Id.*

19. "Each case will, naturally, turn on its own facts and there is no ready yard-stick rule of thumb for determining which traveling expenses are personal and which are incurred in the pursuit of a trade or business." 4A J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION § 25.99, at 362 (rev. ed. J. Riordan 1966).

20. *See, e.g.*, Poletti v. Commissioner, 330 F.2d 818 (8th Cir. 1964) (operator of an employment agency was allowed to deduct his wife's travel expenses when she accompanied him on a trip to California to assist in the opening of an agency and while there worked full time in the agency office); John C. Thomas, 8 P-H Tax Ct. Mem. ¶ 39,112, at 186 (B.T.A. 1939) (professional singer was allowed to deduct his wife's travel expenses because she performed valuable business connected services which occupied most of her working time). *See also* Rich, *A Wife's Tax Value: Tax Aspects of a Wife's Attending Conventions, Sales Meetings, Etc.*, N.Y.U. 22D INST. ON FED. TAX. 895, 896 (1964); Sax, *A Wife's Traveling Expenses*, 37 TAXES 595 (1959).

21. L.L. Moorman, 26 T.C. 666 (1956); William H. Johnson, 35 P-H Tax Ct. Mem. ¶ 66,164, at 964 (1966). Although the taxpayer in *Johnson* contended that his wife helped him promote his company's products and its image at a sales convention, the court denied the deduction because there was not enough evidence to show that the wife's presence was of substantial benefit to the conduct of her husband's business and there were no facts regarding the amount of time she spent in assisting him. *Id.*

22. 236 F. Supp. 761 (E.D. Va. 1964).

The deduction was allowed because the wife's presence on those trips helped her husband retain a special relationship between his company and its large European customers, was directly attributable and appropriate to his business, and assisted him in winning yearly bonuses.[23] The test for a bona fide business purpose is not the characterization of the wife's activities as social or business, but whether under the circumstances the wife's presence and activities perform a business function.

The instant court, recognizing that the first question raised by the appeal was whether the reimbursed travel expenses of the taxpayer's wife were includible in the taxpayer's gross income, stated that it preferred instead to consider the deductibility question.[24] The court began with the basic premise that in order for the wife's expenses to be deductible they must be ordinary and necessary in connection with her husband's business as distinguished from his employer's business.[25] The court considered the critical inquiries to be, first, whether the dominant purpose of the wife's presence was to serve her husband's business purpose in making the trip, and secondly, whether she actually spent a substantial amount of her time in helping him fulfill that purpose.[26] Agreeing with the trial court's finding that the taxpayer's business purposes were to promote the company's image, to enhance the morale of company representatives, and to cultivate close and cordial relations with business associates,[27] the court upheld the finding that Mrs. Disney's presence and assistance were necessary in order for her husband to fulfill his business purpose.[28] The court added that if Mr. Disney had occupied a less powerful position in the company, the necessity for taking his wife would have been dictated by employer insistence. Since a junior executive, performing the same duties on such trips, would have been warranted in concluding that disregard of the

23. *Id.* at 767.

24. 413 F.2d at 786.

25. *Id.* at 786-87.

26. *Id.* at 788.

27. *Id.* at 787.

28. Mrs. Disney apparently performed the services that the company expected of her on the trip. Although much of it was social in nature, that was precisely the business activity she was expected to engage in. The company felt her presence invited additional publicity from the women's pages and furthered the company's family-oriented image. Disney v. United States, 267 F. Supp. 1, 3 (C.D. Cal. 1967). The company also believed that her attendance at a screening could make "a material difference in the reception accorded a film and in the outcome of a distribution agreement." *Id.* Since part of Mr. Disney's business was to obtain favorable publicity and to promote the acceptance of the company's products, his wife's presence also served his business purpose. *See* cases cited notes 35-36 *infra* and accompanying text.

company policy might jeopardize his advancement, the court reasoned that Mr. Disney's conformance with the policy was justified and that he had adequately established that his wife's presence on the trip had a bona fide business purpose when tested by his own business purpose for making the trips.[29]

Although a decision for the taxpayer was proper, it is unfortunate that the court chose to base its result on the deductibility issue without first disposing of the includibility issue. Since the trial court expressly found that the reimbursed travel expenses were non-compensatory in nature,[30] the amounts should have been excluded from the taxpayer's gross income unless the court determined that the trial court clearly erred in its finding.[31] The court's avoidance of the includibility issue creates confusion as to the procedural treatment of reimbursed expenses[32] because it is unfair to require a taxpayer to establish his right to a deduction before the court has determined that the amounts would otherwise be taxable.[33] The court's emphasis on company policy as a factor in determining *deductibility* was misguided because the fact that a company has an established policy of reimbursing its executives for the expense of taking their wives on business trips is relevant to the *includibility* of the reimbursements in the employee's gross income. Such a policy strongly suggests that the reimbursements have an independent significance to the company and therefore are not intended to be compensation to the employee. Company policy should be given little, if any, weight on the question of deductibility since what the

29. 413 F.2d at 787-88.

30. The trial court's finding included the following: "Mrs. Disney's presence on the round the world trip, the two trips to Europe and the domestic trip served to enhance the corporate image abroad, she assisted her husband in business activities, and her travel was for a bona fide business purpose. *The payment of Mrs. Disney's travel expenses by Walt Disney Productions was not intended to be compensatory in nature.* Reimbursement of Mrs. Disney's travel expenses was properly excluded from gross income of the taxpayer." (Emphasis added). Trial Court's Finding No. 21, *as quoted in* Brief for Appellees at 9, United States v. Disney, 413 F.2d 783 (9th Cir. 1969).

31. *See* FED. R. CIV. P. 23(b).

32. According to the approach taken by the court, a taxpayer should report reimbursements in gross income; while according to the express language of the appropriate treasury regulations it is not necessary to report such reimbursements as gross income. See note 10 *supra* and accompanying text.

33. A distinction should be drawn between an administrative determination to use the mechanics of including all reimbursements in gross income and then deducting actual expenses incurred, see note 10 *supra*, and a judicial determination that reimbursements which are compensatory in nature should be included in gross income and taxed unless they can be deducted as ordinary and necessary business expenses. *Cf.* Huffaker, *New T & E Regulations Raise Basic Questions Concerning Gross Income*, 18 J. TAXATION 90 (1963).

company considers ordinary and necessary to the conduct of its business should not control what is ordinary and necessary to the conduct of the business of its executives and employees.[34] However, in the instant case the scope of the taxpayer's business was practically identical with that of the company's business, therefore, Mrs. Disney's presence could be found to have a bona fide business purpose with respect to her husband's business and the company's business. The appellate court stressed the business purpose of the wife in connection with her husband's business in determining that the husband was entitled to a deduction,[35] while the trial court found that since Mrs. Disney's presence had a bona fide business purpose in connection with the company's business, the company did not intend the reimbursements to be additional compensation to her husband; therefore, the amounts were not includible in the taxpayer's gross income.[36] The proper approach would be to look first to the company's business purpose to determine whether the amounts were includible in the taxpayer's gross income. If the amounts are included, then determine whether they are deductible as ordinary and necessary expenses incurred in the conduct of the taxpayer's business. Despite shortcomings in the court's approach, the introduction of the "substantial time" guideline may prove helpful in future cases. Since the statute conditions deductibility on the expenses being ordinary and necessary to the taxpayer's business, guidelines should not look to the motive behind the trip but rather determine the business function served by the wife's presence on the trip. Probably the most helpful approach in determining the question of deductibility lies in a combination of the "substantial time" guideline used in *Disney* and the "directly attributable" and "appropriate" guidelines used in *Warwick*.[37] These guidelines reflect the statutory requirement by focusing on the business function of the wife's behavior rather than the motive for her presence, and provide relatively objective criteria for determining deductibility.

34. *See* Patterson v. Thomas, 289 F.2d 108 (5th Cir. 1961). *Compare* Allenberg Cotton Co. v. United States, 61-1 U.S. Tax Cas. ¶ 9131 (W.D. Tenn. 1960), *with* Joy L. Zubrod, Sr., CCH Tax Ct. Mem. 1967-204.

35. United States v. Disney, 413 F.2d 783, 787 (9th Cir. 1969).

36. Disney v. United States, 267 F. Supp. 1, 2-4 (C.D. Cal. 1967).

37. *See* text accompanying note 22 *supra*.

Taxation—Section 514 of the Soldiers' and Sailors' Civil Relief Act Does Not Prohibit State Sales and Use Taxes on Non-Resident Servicemen

The United States[1] instituted a civil suit against the Tax Commissioner of the State of Connecticut seeking a declaration that the imposition of sales and use taxes[2] on non-resident servicemen stationed in the state[3] in compliance with military orders violates

1. In the district court, the United States was joined as plaintiff by Lieutenant Schuman, a Navy officer and domiciliary of Nebraska. Although Lieutenant Schuman had incurred a use tax, his complaint was dismissed for lack of jurisdiction on the grounds that the requisite jurisdictional amount was not alleged and that the eleventh amendment forbids a suit in the federal courts by a private individual against a state. United States v. Sullivan, 270 F. Supp. 236, 246-47 (D. Conn. 1967).

2. CONN. GEN. STAT. REV. §§ 12-406 to 432a (1964), *as amended*, (Supp. 1967). The significance of this decision is evidenced by the fact that forty-five states have similar sales and use taxes. CCH STATE TAX GUIDE ¶ 60-000, at 6021 (2d ed. 1969). *See also* J. HELLERSTEIN, STATE AND LOCAL TAXATION, CASES AND MATERIALS 15 (3d ed. 1969); 3 REPORT OF THE SPECIAL SUBCOMM. OF THE COMM. ON THE JUDICIARY, STATE TAXATION OF INTERSTATE COMMERCE, H.R. REP. NO. 565, 89th Cong., 1st Sess. 607-20 (1965). Thirty-five states including Connecticut filed amicus curiae briefs in support of Connecticut's position. These states and their relevant statutes are as follows: ALA. CODE tit. 51, §§ 786(3), 788 (Supp. 1967); ARIZ. REV. STAT. ANN. §§ 42-1309, 42-1408 (1956) (the sales tax, section 42-1309, is a privilege tax levied on the retailer, not on the consumer); CAL. REV. & TAX. CODE §§ 6051, 6201 (Supp. 1968-69); COLO. REV. STAT. ANN. § 138-5 (1963) (combined sales and use tax); FLA. STAT. ANN. § 212.05 (Supp. 1969) (combined sales and use tax); GA. CODE ANN. § 92-3402a (Supp. 1968) (combined sales and use tax); ILL. ANN. STAT. ch. 120, §§ 439.3, 441 (Smith-Hurd Supp. 1969) (the sales tax, section 441, is a privilege tax on the retailer); KAN. STAT. ANN. §§ 79-3603, 79-3703 (Supp. 1968); KY. REV. STAT. ANN. §§ 139.200, 139.310 (1963); LA. REV. STAT. ANN. § 47:302 (1950) (combined sales and use tax); ME. REV. STAT. ANN. tit. 36, §§ 1811, 1861 (Supp. 1968-69); MD. ANN. CODE art. 81, §§ 325, 373 (1965), *as amended*, (Supp. 1968); MASS. ANN. LAWS ch. 64H, § 2, & ch. 641, § 2 (Supp. 1968); MICH. STAT. ANN. §§ 7.522, 7.555(3) (Supp. 1969); MINN. STAT. ANN. §§ 297A.02, 297A.14 (Supp. 1969); MO. ANN. STAT. §§ 144.020, 144.610 (Supp. 1968-69); NEB. REV. STAT. § 77-2703 (Supp. 1967) (combined sales and use tax); NEV. REV. STAT. §§ 372.105, 372.185 (1967); N.J. STAT. ANN. §§ 54:32B-3, 54:32B-6 (Supp. 1968-69); N.Y. TAX LAW §§ 1105, 1110 (1966); N.C. GEN. STAT. §§ 105-164.4, 105-164.6 (1965), *as amended*, (Supp. 1967); N.D. CENT. CODE §§ 57-39.2-02, 57-40.2-02 (Supp. 1969); OHIO REV. CODE §§ 5739.02, 5741.02 (Baldwin 1968); OKLA. STAT. ANN. tit. 68, §§ 1304, 1402 (1966); Oregon (no statute); PA. STAT. ANN. tit. 72, §§ 3403-201, 3403-204 (Supp. 1969); R.I. GEN. LAWS ANN. §§ 44-18-18, 44-18-20 (Supp. 1968); S.D. CODE §§ 10-45-2, 10-46-2 (1967); TENN. CODE ANN. §§ 67-3003, 67-3005 (Supp. 1968); TEX. TAX-GEN. ANN. arts. 20.02, 20.03 (Supp. 1968-69); UTAH CODE ANN. §§ 59-15-4, 59-16-3 (Supp. 1969); VA. CODE ANN. §§ 58-441.4, 58-441.5 (1969); WASH. REV. CODE ANN. §§ 82.08.020, 82.12.020 (Supp. 1968); WYO. STAT. ANN. §§ 39-291, 39-311 (Supp. 1969).

3. In addition to Lieutenant Schuman who paid a use tax on a used motorboat purchased from a non-retailer in Connecticut, the district court took notice of four other examples of the imposition of sales and use taxes on non-resident servicemen. Two of the examples involved the assessment of sales taxes on purchases of new cars in Connecticut, while a third example presented a situation identical to that of Lieutenant Schuman's. The fourth example dealt with the levy of

section 514 of the Soldiers' and Sailors' Civil Relief Act which prohibits all taxes "in respect of personal property."[4] The State of Connecticut contended that there is a distinction between the annually recurring personal property taxes contemplated by section 514 and the privilege taxes imposed by the state. The district court[5] accepted the position of the United States and held that the Connecticut sales and use taxes constituted taxation "in respect of personal property"[6] within the scope and intent of section 514. The Second Circuit affirmed,[7] and

a use tax with credit for sales taxes paid in Florida on the purchase of a new car. 270 F. Supp. at 241 n.2 (stipulation of facts, May 24, 1967, incorporated into the court's opinion).

4. Section 514 of the Soldiers' and Sailors' Civil Relief Act, as provided in section 17 of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942, and codified at 50 U.S.C. APP. § 574 (1964), provides: "(1) For the purposes of taxation in respect of any person, or of his (personal) property, income or gross income, by any State, Territory, possession or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost residence or domicile in any State, Territory, possession or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the (personal property,) income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from services within, such State, Territory, possession, political subdivision, or District, (and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district.) *Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders:* (*Provided*, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

"(2) When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: *Provided*, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid.")

The portion of the statute in parentheses was added in 1944, 58 Stat. 722; the portion in italics was added in 1962, 76 Stat. 768.

5. United States v. Sullivan, 270 F. Supp. 236 (D. Conn. 1967). The district court later amended its decision to permit Connecticut to continue to collect sales and use taxes from non-resident servicemen, provided that the amounts would be refunded if the judgment was ultimately sustained.

6. Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. APP. § 574 (1964).

7. United States v. Sullivan, 398 F.2d 672 (2d Cir. 1968).

on appeal to the Supreme Court, *held*, reversed. The provisions of section 514 of the Soldiers' and Sailors' Civil Relief Act do not proscribe the imposition of state sales and use taxes on non-resident servicemen stationed in the state pursuant to military or naval orders. *Sullivan v. United States*, 395 U.S. 169 (1969).

The constitutionality of federal legislation exempting servicemen from the burdens of taxation imposed by the state in which they are stationed pursuant to military orders is well established.[8] Thus, in 1940, Congress dealt specifically with the problem of state sales and use taxes as they relate to federal areas by enacting the Buck Act.[9] This Act gave the states the power to levy sales and use taxes in federal areas, except with respect to the sale or use of property sold by the United States or its instrumentalities through commissaries and ship's stores.[10] In that same year, Congress also passed the Soldiers' and Sailors' Civil Relief Act of 1940.[11] This Act contained no reference to sales and use taxes and pertained only to taxes on property or income.[12] Section 514 of the Act was added by the Soldiers' and Sailors' Civil Relief Act Amendments of 1942.[13] The purpose of this section was to prevent multiple state taxes on the property and income of non-resident servicemen.[14] Since it had been stated that section 514 did "not affect the right of a State to assess personal property taxes on property within its jurisdiction" with the consequent result of multiple taxation of personal property "during the same calendar year,"[15] subsequent amendments were enacted in 1944[16] to clarify the intent and purpose of section 514 in the area of personal property taxes.[17] The amendments provided that "personal property shall not be deemed to be located or

8. *See, e.g.*, Pittman v. Home Owners' Corp., 308 U.S. 21 (1939). The Court has not only upheld exemptions for servicemen, but also exemptions which reach beyond the activities of federal agencies and corporations to private parties who have contracted to carry on functions with the Federal Government. Carson v. Roane-Anderson Co., 342 U.S. 232 (1952).

9. Buck Act, 4 U.S.C. §§ 105-110 (1964).

10. *Id.* § 107.

11. Soldiers' and Sailors' Civil Relief Act, 54 Stat. 1178 (codified at 50 U.S.C. APP. §§ 501-590 (1964), *as amended*, (Supp. III 1968)).

12. 54 Stat. 1190.

13. Soldiers' and Sailors' Civil Relief Act Amendments of 1942, ch. 581, § 17, 56 Stat. 769 (codified at 50 U.S.C. APP. § 574 (1964)), *quoted in* note 4 *supra*.

14. S. REP. No. 1558, 77th Cong., 2d Sess. 11 (1942); H.R. REP. No. 2198, 77th Cong., 2d Sess. 6 (1942).

15. S. REP. No. 959, 78th Cong., 2d Sess. 1 (1944).

16. Act of July 3, 1944, Pub. L. No. 415, 58 Stat. 722, *amending* 50 U.S.C. APP. § 574 (1964).

17. S. REP. No. 959, 78th Cong., 2d Sess. 1 (1944).

present in or to have a situs for taxation" in the non-resident state.[18] Congress thereby reiterated its position that the 1942 amendments were designed to "relieve persons in the service from liability of double taxation by being moved from one state to another under orders."[19] In addition, Congress enacted subsection (2) which provided in part that section 514 included within its exemption "licenses, fees or excises imposed in respect to motor vehicles or the use thereof."[20] In 1953, the Supreme Court rejected an argument by the State of Colorado that a host state could levy an annual personal property tax if the home state did not and held that the right to tax servicemen was reserved to the domiciliary state regardless of whether it chose to exercise that right.[21] The Court concluded that Congress had not legislated solely against the possibility of multiple taxation, but had chosen the broader technique of awarding the sole right to tax to the domiciliary state. In 1965, the Supreme Court, interpreting subsection (2), held that a state could collect only those fees "essential to the functioning of the host State's [vehicle] licensing and registration laws" and that recurring taxes indistinguishable from annual ad valorem taxes could not be imposed regardless of how they were labeled.[22] Section 514 was again amended in 1962 to bring the statute to its present status.[23] The state statute involved in the instant decision[24] provides for the imposition of a three and one half percent sales tax on the gross receipts of personal property sales within the state.[25] The statute places liability for the tax on the retailer, but permits him to collect the tax from consumers.[26] In fact, the Supreme Court of Connecticut has held that the sales tax is a tax on the purchaser.[27] The use tax is imposed at a similar rate on the

18. 58 Stat. 722 (1944).

19. H.R. REP. No. 1514, 78th Cong., 2d Sess. 2 (1944).

20. Soldiers' and Sailors' Civil Relief Act Amendments of 1942, 50 U.S.C. APP. § 574(2) (1964).

21. Dameron v. Brodhead, 345 U.S. 322 (1953). This case involved a recurring personal property tax levied by Denver, Colorado, on a Louisiana domiciliary stationed in Colorado. In a 7-2 decision, the Court held that such a levy was prohibited by section 514.

22. California v. Buzard, 382 U.S. 386, 395 (1966).

23. Act of Oct. 9, 1962, Pub. L. No. 87-771, 76 Stat. 768. This amendment was precipitated by the case of United States v. Arlington County, 326 F.2d 929 (4th Cir. 1964). Virginia attempted to impose a personal property tax on the property of a non-resident serviceman who left his property in the state while on sea duty. The tax was disallowed.

24. CONN. GEN. STAT. REV. §§ 12-406 to 432a (1964), *as amended*, (Supp. 1967).

25. *Id.* § 12-408(1).

26. *Id.* § 12-408(2).

27. Avco Mfg. Corp. v. Connelly, 145 Conn. 161, 140 A.2d 479 (1958).

privilege of using, storing, or consuming property in Connecticut;[28] however, property subject to the sales tax is exempt from the use tax. The use tax is also imposed on the purchase of motor vehicles, boats, or airplanes from non-retailers. Finally, the use tax allows a credit for taxes paid in sister states. Although 45 states impose similar sales and use taxes,[29] no court had ruled on the status of such taxes under section 514 prior to the present case.[30]

In the instant decision, the Court noted that a tax on the transfer of property for consideration and a recurring personal property tax are dissimilar.[31] Since these taxes are dissimilar and since Congress was evidently aware of the existence of state sales and use taxes when it enacted section 514,[32] the Court concluded that Congress did not intend to include sales taxes within the protective scope of the "in respect of personal property" clause of section 514.[33] In regard to the use tax, the Court determined that although such a tax was not clearly excluded from the provisions of section 514, its imposition was not precluded by that section's history, purpose, or language. The Court indicated that the legislative history of the section is noticably free of references to sales and use taxes, even though Congress had dealt specifically with such taxes in the Buck Act. The Court further found that the purpose of section 514 was not contravened by sales and use taxes since these taxes are imposed only once. The Court also decided that the language of the section provides no indication that sales and use taxes are to be proscribed. The word "use" is employed only twice in the entire section—once in the 1944 amendment and again in the 1962 amendment.[34] The Court reasoned that since both amendments were deemed by Congress to be only clarifications of the original section,[35]

28. CONN. GEN. STAT. REV. § 12-411(1) (1964). "The use tax is not a tax on property but is described in the act as, and in fact is, in the nature of an excise tax upon the privilege of using, storing or consuming property." Connecticut Light & Power Co. v. Walsh, 134 Conn. 295, 307, 57 A.2d 128, 134 (1948).

29. *See* note 2 *supra.*

30. One writer, however, anticipated the applications of the sales tax to servicemen stationed in a state pursuant to military orders. Comment, *State Power to Tax the Service Member: An Examination of Section 514 of the Soldiers' and Sailors' Civil Relief Act*, 36 MIL. L. REV. 123, 142 (1967).

31. 395 U.S. at 175. *See, e.g.*, Bowman v. Continental Oil Co., 256 U.S. 642 (1921). *See generally* N. JACOBY, RETAIL SALES TAXATION 3-4 (1938).

32. Buck Act, 4 U.S.C. §§ 105-110 (1964) (originally enacted as 54 Stat. 1059 (1940)).

33. 395 U.S. at 175-76.

34. *See* note 4 *supra.*

35. S. REP. No. 959, 78th Cong., 2d Sess. 1 (1944); H.R. REP. No. 1514, 78th Cong., 2d Sess. 2 (1944); S. REP. No. 2182, 87th Cong., 2d Sess. 1 (1962); H.R. REP. No. 2126, 87th Cong., 2d Sess. 2 (1962).

the utilization of "use" in these amendments added nothing to the original purpose of the section. In conclusion, the Court held that the purpose of the section was not thwarted because the sales and use taxes were levied only once, credit was given for taxes paid in other states, and the burden on the non-resident serviceman was small.[36]

The construction of section 514 adopted by this court should be acclaimed by the states, especially those with large military populations.[37] Although prior decisions[38] and the holdings of the lower courts in the instant case liberally construed the Soldiers' and Sailors' Civil Relief Act generally and section 514 specifically, a similar decision in the present case would have involved a doubtful analysis of the statute and its legislative history and would have placed considerable administrative[39] and revenue burdens[40] on state governments. Sales and use taxes, which avoid multiple taxation through the tax credit provisions,[41] furnish an effective means for collecting revenue from servicemen to offset expenditures on services for this population segment. Where tax credit is not available, however, the purpose of section 514 would be clearly contravened, and such taxes would no doubt be contrary to federal law. Although the Court failed to enunciate the tax credit requirement, the probability of litigation on

36. The Court found that all necessities and many luxuries could be purchased tax free at commissaries. 395 U.S. at 179 (citing stipulation of facts incorporated into the district court's opinion, 270 F. Supp. at 241 n.2).

37. For example, California has 345,000 servicemen stationed in the state, 300,000 of which are non-residents. Brief for the States of California and Illinois as amici curiae at 2, Sullivan v. United States, 395 U.S. 169 (1969). Texas has a service population of 206,377. Brief for Texas as amicus curiae at 2, Sullivan v. United States, 395 U.S. 169 (1969).

38. The Court has stated that the Soldiers' and Sailors' Civil Relief Act should be read "with an eye friendly to those who dropped their affairs to answer their country's call." Le Maistre v. Leffers, 333 U.S. 1, 6 (1948).

39. Among the administrative burdens are: the necessity of inquiring of each purchaser concerning his service status; the difficult problem of checking on gross receipts received by retailers to assure proper reporting of taxable income; and the possibility that servicemen may use their exemption to purchase for non-servicemen. Brief for the State of California and Illinois as amici curiae, Sullivan v. United States, 395 U.S. 169 (1969); Brief for Texas as amicus curiae, Sullivan v. United States, 395 U.S. 169 (1969).

40. For example, California collects $3,000,000 yearly from non-resident servicemen in the form of state and local sales taxes. Brief for the States of California and Illinois as amici curiae at 2, Sullivan v. United States, 395 U.S. 169 (1969). Texas collects sales taxes on the purchases made with the $860,398,667 annual military payroll paid to servicemen stationed in the state. Brief for Texas as amicus curiae at 2, Sullivan v. United States, 395 U.S. 169 (1969). In fact, Connecticut derived 35.2% of its total revenue from its sales and use taxes. Brief for Appellants at 20 n.19, Sullivan v. United States, 395 U.S. 169 (1969).

41. Most states have provisions for tax credit for taxes paid in other states. *See* P-H STATE & LOCAL TAXES, ALL STATES TAX UNIT, ¶ 92,963, *as cited in* 395 U.S. at 180 n.36.

this point is slight since credit is unavailable in only five states.[42] Thus, the Court in this decision blends an excellent analysis of the statute and its legislative history with a balancing of the practicalities involved and reaches a legally sound and economically laudable result.

42. CCH STATE TAX GUIDE ¶ 60-000, at 6013 (2d ed. 1968).