TAX DEPOSITION QUESTIONS: 9. AMBIGUITY OF LAW

9. AMBIGUITY OF LAW

Introduction

In the tax code, the IRS formally redefines the word "includes" to effectively mean "includes everything". This deliberate misuse of the word "includes" leads the masses to falsely believe the IRS has jurisdiction over things, places and People that it does not.

This deliberately induced confusion and ambiguity is an act of tyranny against the People and a usurpation of power not authorized the IRS under the Constitution. Without well defined words, the laws are meaningless, null, void, and unenforceable.

Findings and Conclusions

With the assistance of the following series of questions, we will show that the government has deliberately obfuscated and confused the laws on taxation to create "cognitive dissonance", uncertainty, confusion, and fear of citizens about the exact requirements of the laws on taxation and the precise jurisdiction of the U.S. government. This confusion has been exploited to violate the due process rights of the sovereign People and encourage lawless and abusive violations of due process protections guaranteed by the Fifth and Sixth Amendments to the U.S. Constitution. We will also show that:

- **Critical legal terms in the IRS code defy proper definition and interpretation because of the IRS's misuse of the word "includes".**
- **This deliberate misuse of the word "includes" leads the masses to falsely believe the IRS has jurisdiction over things, places and People it does not.**
- **This deliberately induced confusion and ambiguity is an act of tyranny against the People and a usurpation of power not authorized the IRS under the Constitution.**

Bottom Line: Without well defined words, a law is meaningless and unenforceable. This is a basic principle of due process.

Section Summary

Acrobat version of this section including questions and evidence (large: 3.83 Mbytes)

Further Study On Our Website:

- The Meaning of the Words "includes" and "including"
- Definition of the term "includes" in the Internal Revenue Code
- Great IRS Hoax book:
  - Section 3.11.1: "Words of Art": Lawyer Deception Using Definitions
  - Section 3.11.1.7: "Includes" and "Including" (26 U.S.C. §7701(c))
  - Section 5.6.14: Scams with the Word "includes"
  - Section 5.11: Why the "Void for Vagueness Doctrine" Should be Invoked By The Courts to Render the Internal Revenue Code Unconstitutional in Total
  - Section 6.4: Treasury/IRS Cover-Ups, Obfuscation and Scandals

- Section 6.6: Judicial Conspiracy to Protect the Income Tax
- Section 6.7: Legal Profession Scandals
- Chapter 6: History of Federal Government Income Tax Fraud, Racketeering, and Extortion in the U.S.A.

9.1. Admit that when Supreme Court Justices, Judges of the Courts of Appeals, and Presidents of the United States are unable to agree on what a law says, that law is ambiguous. (WTP #109)

- Click here to see Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855 (1983) (WTP Exhibit 058)

9.2. Admit that when a law is ambiguous, it is unconstitutional and cannot be enforced under the "void for vagueness doctrine" because it violates due process protections guaranteed by the Fifth and Sixth Amendments as described by the Supreme Court in the following decisions: (WTP #110)

Origin of the doctrine (see ***Lanzetta v. New Jersey***, 306 U.S. 451)

- Click here for Lanzetta v.New Jersey, 306 U.S. 451 (WTP Exhibit 059)

Development of the doctrine (see ***Screws v. United States***, 325 U.S. 91, ***Williams v. United States***, 341 U.S. 97, and ***Jordan v. De George***, 341 U.S. 223).

- Click here for Screws v. United States, 325 U.S. 91
- Click here for Williams v. United States, 341 U.S. 97
- Click here for Jordan v. De George, 341 U.S. 223

9.3. Admit that the "void for vagueness doctrine" of the Supreme Court was described in *U.S. v. DeCadena* as follows: (WTP #110a)

*"**The essential purpose** of the "void for vagueness doctrine" with respect to interpretation of a criminal statute, **is to warn individuals of the criminal consequences of their conduct**. ... Criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law."*

*[*U.S. v. De Cadena, *105 F.Supp. 202, 204 (1952), emphasis added]*

- Click here for U.S. v. De Cadena, *105 F.Supp. 202, 204 (1952)* (WTP Exhibit 059d)

9.4. Admit that the word "includes" is defined in 26 U.S.C. §7701(c) as follows: (WTP #418)

TITLE 26 > Subtitle F > CHAPTER 79 > Sec. 7701.

Sec. 7701. - Definitions

(c) Includes and including

The terms "includes" and "including" when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.

- Click here for 26 U.S.C. §7701 (WTP Exhibit 418)

9.5. Admit that the word "includes" is defined by the Treasury in the Federal Register as follows: (WTP #419)

> ***Treasury Decision 3980***, *Vol. 29, January-December, 1927, pgs. 64 and 65 defines the words includes and including as:*
>
> *"(1) To comprise, comprehend, or embrace…(2) To enclose within; contain; confine…**But granting that the word 'including' is a term of enlargement, it is clear that it only performs that office by introducing the specific elements constituting the enlargement. It thus, and thus only, enlarges the otherwise more limited, preceding general language**…The word 'including' is obviously used in the sense of its synonyms, comprising; comprehending; embracing."*

- Click here for Treasury Decision 3980

9.6.Admit that the definition of the word "includes" found in Black's Law Dictionary, Sixth Edition, page 763 is as follows: (WTP #420)

> *"**Include**. (Lat. Inclaudere, to shut in. keep within.) To confine within, hold as an inclosure. Take in, attain, shut up, contain, inclose, comprise, comprehend, embrace, involve. Term may, according to context, express an enlargement and have the meaning of and or in addition to, or merely specify a particular thing already included within general words theretofore used. "Including" within statute is interpreted as a word of enlargement or of illustrative application as well as a word of limitation. Premier Products Co. v. Cameron, 240 Or. 123, 400 P.2d 227, 228."*

- Click here for evidence (WTP Exhibit 420)

9.7. Admit that if the meaning of the word "includes" as used in the Internal Revenue Code is "and" or "in addition to" as described above, then the code cannot define or confine the precise meaning of the following words that use "include" in their definition: (WTP #421)

- "State" found in 26 U.S.C. §7701(a)(10) and 4 U.S.C. §110. Click here for evidence
- "United States" found in 26 U.S.C. §7701(a)(9). Click here for evidence
- "employee" found in 26 U.S.C. §3401(c) and 26 CFR §31.3401(c)-1 Employee.
  - Click here for 26 U.S.C. §3401(c)
  - Click here for 26 CFR. §31.3401(c)-1
- "person" found in 26 CFR 301.6671-1 (which governs who is liable for penalties under Internal Revenue Code). Click here for evidence (WTP Exhibit 421)

9.8. Admit that if the meaning of "includes" as used in the definitions above is "and" or "in addition to", then the code cannot define any of the words described, based on the definition of the word "definition" found in Black's Law Dictionary, Sixth Edition, page 423: (WTP #422)

> ***definition**: (Black's Law Dictionary, Sixth Edition, page 423) A description of a thing by its properties; an explanation of the meaning of a word or term.* **The process of stating the exact meaning of a word by means of other words**. *Such a description of the thing defined, including all*

essential elements and excluding all nonessential, as to distinguish it from all other things and classes."

- Click here for evidence (WTP Exhibit 422)

9.9. Admit that absent concrete definitions of the above critical words identified in question 9.7, the meaning of the words becomes ambiguous, unclear, and subjective. (WTP #423)

9.10. Admit that when the interpretation of a statute or regulation is unclear or ambiguous, then the by the rules of statutory construction, the doubt should be resolved in favor of the taxpayer as indicated in the cite from the Supreme Court below: (WTP #424)

"In view of other settled rules of statutory construction, which teach that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively; that, ***if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer****..." Hassett v. Welch., 303 US 303, pp. 314 - 315, 82 L Ed 858. (1938) (emphasis added)*

- Click here for Hassett v. Welch, 303 U.S. 303 (1938) (WTP Exhibit 424)

9.11. Admit that in the majority of cases, doubts about the interpretation of the tax code are *not* resolved in favor of the taxpayer by most federal court as required by the Supreme Court above. (WTP #424)

9.12. Admit that an ambiguous meaning for a word violates the requirement for due process of law by preventing a person of average intelligence from being able to clearly understand what the law requires and does not require of him, thus making it impossible at worst or very difficult at best to know if he is following the law. (WTP #425)

9.13. Admit that Black's Law Dictionary, Sixth Edition, page 500, under the definition of "due process of law" states the following: (WTP #426)

*"The concept of "****due process of law" as it is embodied in Fifth Amendment demands that a law shall not be unreasonable, arbitrary, or capricious*** *and that the means selected shall have a reasonable and substantial relation to the object being sought."*

- Click here for evidence (WTP Exhibit 426)

9.14. Admit that if the definition of the word "includes" means that it is used synonymously with the word "and" or "in addition to", then it violates the requirement for due process of law found in the Fifth Amendment. (WTP #428)

- Click here for Fifth Amendment Annotated

9.15. Admit that the violation of due process of law created by the abuse of the word "includes" found in the preceding question creates uncertainty, mistrust, and fear of citizens towards their government because of their inability to comprehend what the law requires them to do. (WTP #429)

9.16. Admit that the violation of due process caused by the abuse of the word "includes" (in this case, making it mean "and" or "in addition to) identified above could have the affect of extending the perceived jurisdiction and authority of the federal government to tax beyond its clear limits prescribed in the U.S. Constitution. (WTP #430)

9.17. Admit that an abuse of the word includes to mean "and" or "in addition to" indicated above could have the affect of increasing and possibly even maximizing income tax revenues to the U.S. government through the violation of due

process, confusion, and fear that it creates in the citizenry. (WTP #431)

9.18. Admit that fear and confusion on the part of the citizenry towards their government and violation of due process by the government are characterized by most rational individuals as evidence of tyranny and treason against citizens. (WTP #432)

9.19. Admit that the U.S. Constitution provides the following definition for "treason": (WTP #433)

> **U.S. Constitution, Article III, Section 3, Clause 1:**
> **"Treason against the United States shall consist only of levying war against them, or adhering to their enemies…"**

- Click here for U.S. Constitution, Article III (WTP Exhibit 433)

9.20. Admit that Black's Law Dictionary, Sixth Edition, page 1583, provides the following definition for "war": (WTP #434)

> *"Hostile contention by means of armed forces, carried on between nations, states, or rulers, or between citizens in the same nation or state."*

- Click here for evidence (WTP Exhibit 434)

9.21. Admit that agents of the IRS involved in seizures of property use guns and arms and against citizens, making the confrontation an armed confrontation. (WTP #435)

9.22. Admit that IRS seizures can and do occur without court orders, warrants, or due process required by the Fourth Amendment and at the point of a gun. (WTP #436)

- Click here for Fourth Amendment (WTP Exhibit 436)

9.23. Admit that property seizures as described above amount to an act of war of the government against the citizens. (WTP #437)

9.24. Admit that acts of war against citizens, when not based on law, are treasonable offenses punishable by execution. (WTP #438)

- Click here to see 18 U.S.C. Chapter 115: Treason, Sedition, and Subversive Activities

9.25. Admit that the bible says in 1 Tim. 6:10:

> *"The love of money is the root of all evil." 1 Tim. 6:10*

9.26. Admit that violation of due process produces *injustice* in society, which is why the founding fathers required us to have a Fifth Amendment. (WTP #439)

9.27. Admit that the purpose of the government is to write laws to *prevent*, rather than *promote*, injustice in society, and thereby protect the right to life, liberty, property, and pursuit of happiness of *all citizens equally*. (WTP #440)

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SECTION 9-AMBIGUITY OF LAW SUMMARY

Note: Some of these questions were not asked in the hearing due to time constraints.

Central to any system of bona fide due process and justice are laws where the meaning of words can be generally understood and agreed upon.

This series of questions revolves around the word “includes.”

This word is of particular importance because it is used in the IRS code in conjunction with lists of things that the tax applies to.

Unfortunately, the IRS has decided to establish their own interpretation of this word and therefore has jaundiced the interpretation of many critical portions of the IRS code.

Precise definitions of words such as “state”, “United States”, “employee” and “person” are required or else no substantive definition can be understood. Meaningful definitions require both the inclusion and exclusion of meanings to avoid confusion.

Confusion is precisely what the IRS wants.

The IRS generally contends that when the word “includes” is used to list or delineate things in the IRS code, these are merely examples of items in an endless group of things under their jurisdiction.

This aspect of statutory construction is not a minor issue in the law. Due process requires that laws and key legal terms be unambiguous and precise in their meaning. Laws that do not meet these standards cannot be legally enforced.

In fact, if the IRS’s position is taken literally, there are no limits to the government’s power because everything under the sun is “included”. Clearly this is not the case.

IRS uses these word games to trick and deceive the masses into believing – and acting upon – the false belief that the income tax system has jurisdiction over places, things and People it does not have power over.

These false perceptions are not without their ill and wide-ranging effects on our Republic. Because the People do not, and can not, know the precise meaning of words and phrases in the law, they fear the law. They come to fear the government.

The government acts with impunity and enforces the “law” with threats of violence, incarceration and property confiscation. Due Process is denied. Injustice prevails and the Government fails its first and primary duty: protect the rights of the People.

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DEFINITION OF THE WORD "includes" IN THE INTERNAL REVENUE CODE

19. 'Includes' and more on 'resident.'

I have used the term '**includes'** many times, and since it is impossible to interpret the USC correctly without a proper understanding of this term, I will give some detailed attention to it's definition and usage in legal writings. I will start by focusing on **'resident,'** as found in the laws of the 'STATE OF CALIFORNIA'…although I am confident that only insignificant details will vary from corporate 'State' to corporate 'State.'

For example, in my case, I am not now, and never have been, a **resident** of the corporate STATE OF CALIFORNIA, because this term of art refers to one who lives on any federal territory located within the borders of California, such as a military base.

The word **resident** is a term of art that has a special meaning in the STATE OF CALIFORNIA CODE (which is how it is often written). The **General Provisions** of this Code, Section 17014, defines 'resident,' in pertinent part, as:

1. Every individual who is **in this state** for other than a temporary or transitory purpose.
2. Every individual domiciled **in this state** who is outside the state for a temporary or transitory purpose. (Emphasis added.)

Unfortunately, the above definition of resident is deceptive, because it must be understood that the phrase '**in this state'** in (1) and (2), is another term of art, which has a special meaning that is precisely defined in the Code's **General Provisions**, Section 6017, and **Assessments** Section 11205**:**

> 'In this State' or 'in the State' means within the exterior limits of the State of California and **includes** [is limited to] all territory within these limits owned by or ceded to the United States of America. (Emphasis added.)

(As shown above, this use of 'United States *of America*' is a constitutionally unauthorized usage, sometimes employed by the corporate federal 'United States,' **misleadingly to designate itself, or one of its agencies.** It **must not** be confused with the original meaning of that phrase, as found in the Declaration of Independence, and Article I of the still valid Articles of Confederation: "The title of this confederacy shall be '**The United States of America**.'"—which is the name of **the delegating authority**, not that **agency** [the 'United States'] to which the U.S. Constitution later delegated specific limited powers within the states, at 1:8, or plenary powers within the federal zone, at 4:3:2.)

The above definition of 'in this state' still does not clarify the meaning of the term 'resident,' however, until the special meaning of yet another *painted word*, '**includes**,' is understood.

While it would be easy to assume that the above definition means "all land within the borders of California, **and does not exclude** federal territory therein," the proper interpretation is fundamentally and crucially different! What is really meant, is that land '**in this State'** refers **only** to "territory within these limits owned by or ceded to the United States of America" (i.e., **an agency** of the corporate federal U.S. Government).

I believe that it is beyond contention that the use of 'includes' is meant to mislead and deceive. The law writers prove themselves to be able to be completely unambiguous when a forthright statement is called for—as 26 USC 6103(b)(5) or 4612(a)(4), quoted in section 6, above. However, the correct interpretation of this term, as used **in all corporate State and federal codes and regulations,** has been made quite clear, if one probes deep enough.

For instance, if one goes back to the January 1, 1961 revision of Title 26 Code of Federal Regulations, at Section 170.59, it states:

> 'Includes' and 'including' shall not be deemed to exclude things other than those enumerated [i.e., by the example given… by the class example] **which are in the same general class**." (Emphasis added.)

The example represents the class…and that class only! Which is to say, if Puerto Rico is given as a class example, this would indicate that no union state, being party to the Constitution, could be referred to, since Puerto Rico is not yet, at least, a union state.

As the Supreme Court has put forth several times, the statutes must be assumed to be written exactingly, and, therefore, taken to mean precisely what they say. (This will be painfully obvious, when we read Public Law 86-624, below.) So, no meaning can be imputed into their words, other than specifically what is written. Therefore, what is excluded must be interpreted to mean that it was intended to be excluded.

This revision of 1961, is where this essential qualification of "includes" was introduced, although this concept has been accepted in law for millennia. For example, in the maxims**:** the *Ejusdem generis* rule (of the same kind, class, or nature), as well as *Noscitur a sociis* (it is known by its associates) and *Inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another).

It is interesting, although not unexpected or important, that it was watered down in the most recent revisions, for the older version still has legal force and effect. Now, the code tries to disguise things by saying, in 26 USC § 7701(c) **Includes and Including**:

> The terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things **otherwise within the meaning of the term defined**."

This, of course, is a desperate effort—which, for the most part has succeeded!—to obfuscate the earlier phrasing: "which are in the same general class." But, for anyone with half a mind, it is seen to be just the same old smoke and mirrors.

A Supreme Court ruling supports this:

> The ordinary significance of the terms, as defined by the dictionaries, both Webster and the Standard, is 'to confine within; to hold; to contain; to shut up; embrace; and involve.' Include or the participial form thereof, is defined 'to comprise within'; 'to hold'; 'to contain'; 'to shut up'; and synonyms are 'contain'; 'enclose'; 'comprehend'; 'embrace.' (*Montello Salt Co. v. Utah*, 221 U.S. 452 (1911), at 455-456).

Even more interesting, considering its source, is **Treasury Definition** 3980, Vol. 29, January-December, 1927, pages 64 and 65, where the terms 'includes' and 'including' are defined as follows:

> (1) To comprise, comprehend, or embrace…(2) To enclose within; contain; confine…But granting that the word 'including' is a term of enlargement, it is clear that it only performs that office ***by introducing the specific elements constituting the enlargement.*** It thus, and thus only, enlarges the otherwise more limited, preceding general language…The word 'including' is obviously used in the sense of its synonyms, **comprising**; comprehending; embracing. (Emphasis added.)

In the Montello case, above, the U.S. Supreme Court, puts its cachet to this view:

> The Supreme Court of the State…also considered that the word 'including' was used as a word of enlargement, the learned court being of the opinion that such was its ordinary sense. With this we cannot concur. It is its exceptional sense, as the dictionaries and cases indicate.

Some 80 court cases have chosen the restrictive meaning of 'includes,' etc., such as this one last example:

> Includes is a word of limitation. Where a general term in Statute is followed by the word 'including' the primary import of specific words following quoted words is to indicate restriction rather than enlargement. (*Powers ex rel Dovon v. Charron R.I.*, 135 A. 2nd 829)

To elucidate more clearly the 1961 definition, above**:** 'includes' and 'including' shall not be deemed to include things not enumerated, **unless they are in the same general class.** For instance, 'State,' in 26 USC 7701(10)**:** "The term 'State' shall be construed to include the District of Columbia…" Here, "the District of Columbia," without any doubt, is not "in the same general class," category, or genus as Missouri or California—it is a federal "State." The District of Columbia has a totally different jurisdictional set up than a union state. It is under the absolute jurisdiction of the 'U.S.,' and the states are not. Only in the federal zone does the U.S. have *jura summi imperii*, right of supreme dominion, complete sovereignty.

And, two sections from the Conclusion of my paper:

1. The Alaska and Hawaii Omnibus Acts, mandate that the IRC stop referring to Alaska and Hawaii as being 'States,' upon their being made states of the union. Therefore, 26 CFR 31.3121(e)-1 **State, United States, and citizen** [revised April 1, 1999] now reads: "(a) When used in the regulations in this subpart, the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Territories of Alaska and Hawaii **before their admission as States**…" They were previously, then, **federal States**, which is what the IRC said it applied to. *Quod erat demonstrandum*. (QED, 'which was to be demonstrated.')

13. In section 7 of this paper I quote an alcohol and tobacco tax act, of 1868, which reads: "…and the word **'State' to mean and include a Territory and District of Columbia**." So, here we have the federal States referred to openly and unmistakably. Furthermore, '**mean' and 'include' are equated**, which **makes 'include' restrictive**. This is bolstered in 12 USC 202 **Definitions** where it says: "the term 'State' means any State, [comma, that means, here, 'which comprises the following'] Territory, or possession of [i.e., belonging to] the [District] United States…" 'State,' here, unquestionably has to indicate a federal State, because of the other sample examples, which are totally distinct from a union state and, therefore, cannot be in the same list with it. QED.

THE GREAT IRS HOAX: WHY WE DON'T OWE INCOME TAX

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"Who is John Galt?"

Welcome to our free download page. The *Great IRS Hoax: Why We Don't Owe Income Tax* is a an ***amazing*** documentary that exposes the lie that the IRS and our tyrannical government "servants" have foisted upon us all these years:

> *"That we are liable for IRC Subtitle A income tax as American Nationals living in the 50 states of the Union with earnings from within the 50 states of the Union that does not originate from the government."*

Through a detailed and very thorough analysis of both enacted law and IRS behavior unrefuted by any of the 100,000 people who have downloaded the book, including present and former (after they learn the truth!) employees of the Treasury and IRS, it reveals why Subtitle A of the Internal Revenue Code is private law/special law that one only becomes subject to by engaging in an excise taxable activity such as a "trade or business", which is a type of federal employment and agency that puts people under federal jurisdiction who would not otherwise be subject. It proves using the government's own laws and publications and court rulings that for everyone in states of the Union who has not availed themselves of this excise taxable privilege of federal employment/agency, Subtitle A of the I.R.C. is not "law" and does not require the average American domiciled in states of the Union to pay a "tax" to the federal government. The book also explains how Social Security is the de facto mechanism by which "taxpayers" are recruited, and that the program is illegally administered in order to illegally expand federal jurisdiction into the states using private law. This book does not challenge or criticize the constitutionality of any part of the Internal Revenue Code nor any state revenue code, but simply proves that these codes are being misrepresented and illegally enforced by the IRS and state revenue agencies against persons who are not their proper subject. This book might just as well be called *The Emperor Who Had No Clothes* because of the massive and blatant fraud that it exposes on the part of our public servants.

"But Dad, the emperor is naked!"

Five years of continuous research by the author(s) and their readers went into writing this very significant and incredible book. This book is *very different* from most other tax books because:

1. The book is written in part by our tens of thousands of readers and growing...***THAT'S YOU***! We invite and frequently receive good new ideas and materials from legal researchers and ordinary people like YOU, and when we get them, we add them to the book after we research and verify them for ourselves to ensure their accuracy. Please keep your excellent ideas coming, because this is a team effort, guys!
2. *We use words right out of the government's own mouth, in most cases, as evidence of most assertions we make*. If the government calls the research and processes found in this book frivolous, they would have to call the Supreme Court, the Statutes at Large, the Treasury Regulations (26 C.F.R.) and the U.S. Code frivolous, because everything derives from these sources.
3. Ever since the first version was published back in Nov. 2000, we have invited, and even *begged*, the government continually and repeatedly, both on our website and in our book and in correspondence with the IRS and the Senate Finance Committee (click here to read our letter to Senator Grassley under "Political Activism"), and in the We The People Truth in Taxation Hearings to provide a signed affidavit on government stationary along with supporting evidence that disproves *anything* in this book . We have even promised to post the government's rebuttal on our web site *unedited* because we are more interested in the truth than in our own agenda. Yet, some ***criminal public servants*** have consistently and steadfastly refused their legal duty under the First Amendment Petition Clause to answer our concerns and questions, thereby hiding from the truth and obstructing justice in violation of 18 U.S.C. Chapter 73. By their failure to answer they have defaulted and admitted to the complete truthfulness of this book pursuant to Federal Rule of Civil Procedure 8(d). If the "court of public opinion" really were a court, and if the public really were *fully educated* about the law as it is the purpose of this book to bring about, the IRS and our federal government would have been convicted long ago of the following crimes by their own treasonous words and actions thoroughly documented in this book (click here for more details):

    - Establishment of the U.S. government as a "religion" in violation of First Amendment (see section 4.3.2 of this book and our article entitled: Our Government has Become Idolatry and a False Religion)
    - Obstruction of justice under 18 U.S.C. Chapter 73
    - Conspiracy against rights under 18 U.S.C. §241
    - Extortion under 18 U.S.C. §872 .
    - Wrongful actions of Revenue Officers under 26 U.S.C. §7214
    - Engaging in monetary transactions derived from unlawful activity under 18 U.S.C. §1957
    - Mailing threatening communications under 18 U.S.C. §876
    - False writings and fraud under 18 U.S.C. §1018
    - Taking of property without due process of law under 26 CFR §601.106(f)(1)
    - Fraud under 18 U.S.C. §1341
    - Continuing financial crimes enterprise (RICO) under 18 U.S.C. §225
    - Conflict of interest of federal judges under 28 U.S.C. §455
    - Treason under Article III, Section 3, Clause 1 of the U.S. Constitution
    - Breach of fiduciary duty in violation of 26 CFR 2635.101, Executive order order 12731, and Public Law 96-303
    - Peonage and obstructing enforcement under Thirteenth Amendment, 18 U.S.C. §1581 and 42 U.S.C. §1994
    - Bank robbery under 18 U.S.C. §2113 (in the case of fraudulent notice of levies)

4. We keep the level of the writing to where a person of average intelligence and no legal background can understand and substantiate the claims we are making for himself.
5. We show you how and where to go to substantiate every claim we make and we encourage you to check the facts for yourself so you will believe what we say is absolutely accurate and truthful.
6. All inferences made are backed up by extensive legal research and justification, and therefore tend to be more convincing and authoritative and understandable than most other tax books. We assume up front that you will

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7. Absolutely everything in the book is consistent with itself and we try very hard not to put the reader into a state of "cognitive dissonance", which is a favorite obfuscation technique of our public dis-servants and legal profession. No part of this book conflicts with any other part and there is complete "cognitive unity". Every point made supports and enhances every other point. If the book is truthful, then this must be the case. A true statement cannot conflict with itself or it simply can't be truthful.
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4	Know Your Citizenship Status and Rights!	376	4,424		
5	The Evidence: Why We Aren't Liable to File Returns or Pay Income Tax	539	5,467		
6	History of Federal Government Income Tax Fraud, Racketeering, and Extortion in the U.S.A.	179	1,864		
7	Case Studies	45	420		
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The *Great IRS Hoax* book draws on works from several prominent sources and authors, such as:

1. The U.S. Constitution.
2. The Family Constitution
3. Amendments to the U.S. Constitution.
4. The Declaration of Independence.
5. The United States Code (U.S.C.), Title 26 (Internal Revenue Code), both the current version and amended past versions.
6. U.S. Supreme Court Cases.
7. U.S. Tax Court findings.
8. The Code of Federal Regulations (CFR), Title 26, both the current version and amended past versions.
9. IRS Forms and Publications (directly from the IRS Website at http://www.irs.gov).
10. U.S. Treasury Department Decisions.
11. Federal District Court cases.
12. Federal Appellate (circuit) court cases.
13. Several websites.
14. A book entitled *Losing Your Illusions* by Gordon Phillips of Private Arena (http://privatearena.com/).

15. A book entitled *IRS Humbug*, by Frank Kowalik.
16. A book entitled *Federal Mafia*, by Irwin Schiff (http://paynoincometax.com).
17. A book entitled *Constitutional Income*, by Phil Hart (http://constitutionalincome.com/).
18. Case studies of IRS enforcement tactics (http://www.neo-tech.com/irs-class-action/).
19. Case studies of various tax protester groups.
20. The IRS' own publications about Tax Protesters.
21. A book entitled *Why No One is Required to File Tax Returns* by William Conklin (http://www.anti-irs.com)
22. Writings of Thomas Jefferson, the author of the Declaration of Independence.
23. Department of Justice, Tax Division, Criminal Tax Manual
24. Several other books mentioned on our Recommended Reading page.

Below is a complete outline of the content of this very extensive work:

3.12.6 26 CFR Sec. 1.861-8T(d)(2)(ii)(A): Exempt income
3.12.7 26 CFR Sec. 1.861-8T(d)(2)(iii): Income Not Exempt from Taxation
3.12.8 26 CFR Sec. 1.861-8(f)1: Determination of Taxable Income
3.12.9 26 CFR Sec. 1.863-1: Determination of Taxable Income
3.12.10 26 CFR Sec. 31: Employment Taxes and Collection of Income Taxes at the Source
3.12.11 26 CFR Sec. 31.3401(c)-1: Employee

3.13 Treasury Decisions and Orders

3.13.1 Treasury Delegation of Authority Order 150-37: Always Question Authority!
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3.14.2 1883: Butchers' Union Co. v. Crescent City Co. (111 U.S. 746)
3.14.3 1894: Caha v. United States (152 U.S. 211)
3.14.4 1895: Pollack v. Farmer's Loan and Trust Company (157 U.S. 429, 158 U.S. 601)
3.14.5 1900: Knowlton v. Moore (178 U.S. 41)
3.14.6 1901: Downes v. Bidwell (182 U.S. 244)
3.14.7 1906: Hale v. Henkel (201 U.S> 43)
3.14.8 1911: Flint v. Stone Tracy Co. (*220 U.S. 107)*
3.14.9 1914: Weeks v. U.S. (*232 U.S. 383)*
3.14.10 1916: Brushaber vs. Union Pacific Railroad (*240 U.S. 1)*
3.14.11 1916: Stanton v. Baltic Mining (240 U.S. 103)
3.14.12 1918: Peck v. Lowe (247 U.S. 165)
3.14.13 1920: Evens v. Gore (253 U.S. 245)
3.14.14 1920: Eisner v. Macomber (252 U.S. 189)
3.14.15 1922: Bailey v. Drexel Furniture Co. (259 U.S. 20)
3.14.16 1924: Cook v. Tait (265 U.S. 47)
3.14.17 1930: Lucas v. Earl (281 U.S. 111)
3.14.18 1935: Railroad Retirement Board v. Alton Railroad Company (295 U.S. 330)
3.14.19 1938: Hassett v. Welch (303 U.S. 303)
3.14.20 1945: Hooven & Allison Co. v. Evatt (324 U.S. 652)
3.14.21 1959: Flora v. U.S. (362 U.S. 145)
3.14.22 1960: U.S. v. Mersky (361 U.S. 431)
3.14.23 1961: James v. United States (366 US 213, p. 213, 6L Ed 2d 246)
3.14.24 1970: Brady v. U.S. (379 U.S. 742)
3.14.25 1974: California Bankers Association v. Shultz (416 U.S. 25)
3.14.26 1975: Garner v. U.S. (424 U.S. 648)
3.14.27 1976: Fisher v. United States (425 U.S. 391)
3.14.28 1978: Central Illinois Public Service Co. v. United States (435 U.S. 21)
3.14.29 1985: U.S. v. Doe (465 U.S. 605)
3.14.30 1991: Cheek v. United States (498 U.S. 192)
3.14.31 1992: United States v. Burke (504 U.S. 229, 119 L Ed 2d 34, 112 S Ct. 1867)
3.14.32 1995: U.S. v. Lopez (000 U.S. U10287)

3.15 Federal District and Circuit Court Cases

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3.15.2 Jack Cole Co. vs. Alfred McFarland, Sup. Ct. Tenn 337 S.W. 2d 453
3.15.3 1916: Edwards v. Keith 231 F 110, 113
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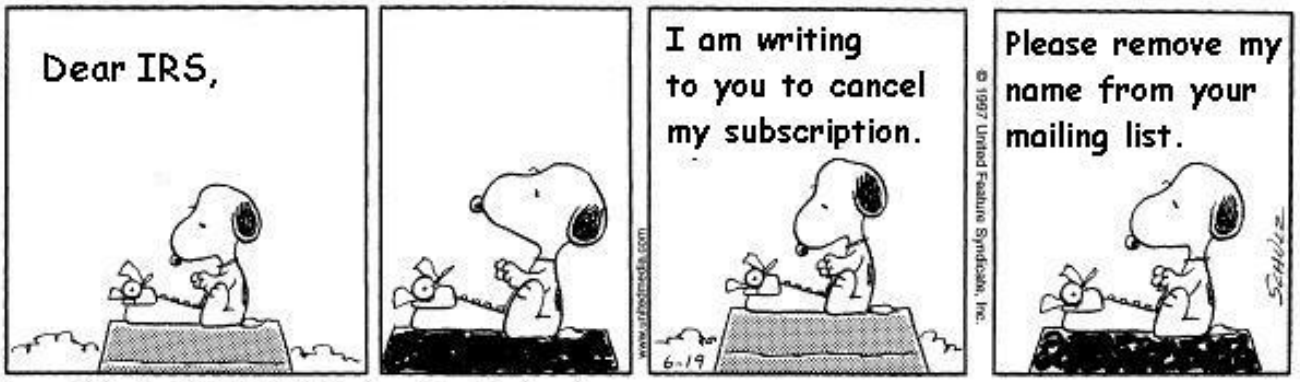

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Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855 (1983)

Supreme Court of the United States

William KOLENDER, et al., Petitioner,
v.
Edward LAWSON.

No. 81-1320.

Decided May 2, 1983.

Individual who had been arrested and convicted for violating a California statute requiring persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a police officer, brought suit for declaratory and injunctive relief challenging the statute's constitutionality. The District Court held the statute unconstitutional and enjoined its enforcement. The United States Court of Appeals for the Ninth Circuit, 658 F.2d 1362, affirmed and California officials appealed. The Supreme Court, Justice O'Connor, held that the statute was unconstitutionally vague by failing to clarify what was contemplated by the requirement that a suspect provide a "credible and reliable" identification.

Affirmed.

Syllabus (FN*)

A California statute requires persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer. The California Court of Appeal has construed the statute to require a person to provide such identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a stop under the standards of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. The California court has defined "credible and reliable" identification as "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." Appellee, who had been arrested and convicted under the statute, brought an action in Federal District Court challenging the statute's constitutionality. The District Court held the statute unconstitutional and enjoined its enforcement, and the Court of Appeals affirmed.

Held: The statute, as drafted and as construed by the state court, is unconstitutionally

vague on its face within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. Pp. 1857-1860.

658 F.2d 1362 (9th Cir. 1981), affirmed and remanded.

Justice O'CONNOR delivered the opinion of the Court.

This appeal presents a facial challenge to a criminal statute that requires persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968). (FN1) We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the Due Process clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. Accordingly, we affirm the judgment of the court below.

I

Appellee Edward Lawson was detained or arrested on approximately 15 occasions between March 1975 and January 1977 pursuant to Cal.Penal Code § 647(e). (FN2) Lawson was prosecuted only twice, and was convicted once. The second charge was dismissed.

Lawson then brought a civil action in the District Court for the Southern District of California seeking a declaratory judgment that § 647(e) is unconstitutional, a mandatory injunction seeking to restrain enforcement of the statute, and compensatory and punitive damages against the various officers who detained him. The District Court found that § 647 (e) was overbroad because "a person who is stopped on less than probable cause cannot be punished for failing to identify himself." Juris. Statement, at A-78. The District Court enjoined enforcement of the statute, but held that Lawson could not recover damages because the officers involved acted in the good faith belief that each detention or arrest was lawful.

Appellant H.A. Porazzo, Deputy Chief Commander of the California Highway Patrol, appealed the District Court decision to the Court of Appeals for the Ninth Circuit. Lawson

cross-appealed, arguing that he was entitled to a jury trial on the issue of damages against the officers. The Court of Appeals affirmed the District Court determination as to the unconstitutionality of § 647(e). The appellate court determined that the statute was unconstitutional in that it violates the Fourth Amendment's proscription against unreasonable searches and seizures, it contains a vague enforcement standard that is susceptible to arbitrary enforcement, and it fails to give fair and adequate notice of the type of conduct prohibited. Finally, the Court of Appeals reversed the District Court as to its holding that Lawson was not entitled to a jury trial to determine the good faith of the officers in his damages action against them, and remanded the case to the District Court for trial.

The officers appealed to this Court from that portion of the judgment of the Court of Appeals which declared § 647(e) unconstitutional and which enjoined its enforcement. We noted probable jurisdiction pursuant to 28 U.S.C. § 1254(2). 455 U.S. 999, 102 S.Ct. 1629, 71 L.Ed.2d 865 (1982).

II

In the courts below, Lawson mounted an attack on the facial validity of § 647(e). (FN3) "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). As construed by the California Court of Appeal, (FN4) § 647(e) requires that an individual provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a Terry detention. (FN5) People v. Solomon, 33 Cal.App.3d 429, 108 Cal.Rptr. 867 (1973). "Credible and reliable" identification is defined by the state Court of Appeal as identification "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." Id., at 438, 108 Cal.Rptr. 867. In addition, a suspect may be required to "account for his presence ... to the extent that it assists in producing credible and reliable identification ...." Ibid. Under the terms of the statute, failure of the individual to provide "credible and reliable" identification permits the arrest. (FN6)

III

Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. See generally M. Bassiouni, Substantive Criminal Law 53 (1978).

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Village of Hoffman Estates v. Flipside, 455 U.S. 489, 102 S.Ct. 1186, 71 L. Ed.2d 362 (1982); Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement." Smith, supra, 415 U. S. at 574, 94 S.Ct., at 1247-1248. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id., at 575, 94 S.Ct., at 1248. (FN7)

Section 647(e), as presently drafted and construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets "only at the whim of any police officer" who happens to stop that individual under § 647(e). Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90, 86 S.Ct. 211, 213, 15 L.Ed.2d 176 (1965). Our concern here is based upon the "potential for arbitrarily suppressing First Amendment liberties ...." Id., at 91, 86 S.Ct., at 213. In addition, § 647(e) implicates consideration of the constitutional right to freedom of movement. See Kent v. Dulles, 357 U.S. 116, 126, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204 (1958); Aptheker v. Secretary of State, 378 U.S. 500, 505-506, 84 S.Ct. 1659, 1663-1664, 12 L.Ed.2d 992 (1964). (FN8)

Section 647(e) is not simply a "stop-and-identify" statute. Rather, the statute requires that the individual provide a "credible and reliable" identification that carries a "reasonable assurance" of its authenticity, and that provides "means for later getting in touch with the person who has identified himself." Solomon, supra, 33 Cal.App.3d 438, 108 Cal.Rptr. 867. In addition, the suspect may also have to account for his presence "to the extent it assists in producing credible and reliable identification." Ibid.

At oral argument, the appellants confirmed that a suspect violates § 647(e) unless "the

officer [is] satisfied that the identification is reliable." Tr. of Oral Arg. 6. In giving examples of how suspects would satisfy the requirement, appellants explained that a jogger, who was not carrying identification, could, depending on the particular officer, be required to answer a series of questions concerning the route that he followed to arrive at the place where the officers detained him, (FN9) or could satisfy the identification requirement simply by reciting his name and address. See id., at 6-10.

It is clear that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "entrust[s] lawmaking 'to the moment-to-moment judgment of the policeman on his beat.' " Smith, supra, 415 U.S., at 575, 94 S.Ct., at 1248 (quoting Gregory v. City of Chicago, 394 U.S. 111, 120, 89 S.Ct. 946, 951, 22 L.Ed.2d 134 (1969) (Black, J., concurring)). Section 647(e) "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,' " Papachristou, supra, 405 U. S., at 170, 92 S.Ct., at 847-848 (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98, 60 S. Ct. 736, 741-742, 84 L.Ed. 1093 (1940)), and "confers on police a virtually unrestrained power to arrest and charge persons with a violation." Lewis v. City of New Orleans, 415 U. S. 130, 135, 94 S.Ct. 970, 973, 39 L.Ed.2d 214 (1974) (POWELL, J., concurring). In providing that a detention under § 647(e) may occur only where there is the level of suspicion sufficient to justify a Terry stop, the State ensures the existence of "neutral limitations on the conduct of individual officers." Brown v. Texas, 443 U.S. 47, 51, 99 S. Ct. 2637, 2640, 61 L.Ed.2d 357 (1979). Although the initial detention is justified, the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement.

Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity. See Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). Section 647(e), as presently construed, requires that "suspicious" persons satisfy some undefined identification requirement, or face criminal punishment. Although due process does not require "impossible standards" of clarity, see United States v. Petrillo, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1541-1542, 91 L.Ed. 1877 (1947), this is not a case where further precision in the statutory language is either impossible or impractical.

IV

We conclude § 647(e) is unconstitutionally vague on its face because it encourages

arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute. (FN10) Accordingly, the judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BRENNAN, concurring.

I join the Court's opinion; it demonstrates convincingly that the California statute at issue in this case, Cal.Penal Code § 647(e), as interpreted by California courts, is unconstitutionally vague. Even if the defect identified by the Court were cured, however, I would hold that this statute violates the Fourth Amendment. (FN1) Merely to facilitate the general law enforcement objectives of investigating and preventing unspecified crimes, States may not authorize the arrest and criminal prosecution of an individual for failing to produce identification or further information on demand by a police officer.

It has long been settled that the Fourth Amendment prohibits the seizure and detention or search of an individual's person unless there is probable cause to believe that he has committed a crime, except under certain conditions strictly defined by the legitimate requirements of law enforcement and by the limited extent of the resulting intrusion on individual liberty and privacy. See Davis v. Mississippi, 394 U.S. 721, 726-727, 89 S.Ct. 1394, 1397-1398, 22 L.Ed.2d 676 (1969). The scope of that exception to the probable cause requirement for seizures of the person has been defined by a series of cases, beginning with Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), holding that a police officer with reasonable suspicion of criminal activity, based on articulable facts, may detain a suspect briefly for purposes of limited questioning and, in so doing, may conduct a brief "frisk" of the suspect to protect himself from concealed weapons. See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873, 880-884, 95 S.Ct. 2574, 2579-2580, 2581-2582, 45 L.Ed.2d 607 (1975); Adams v. Williams, 407 U.S. 143, 145-146, 92 S.Ct. 1921, 1922-1923, 32 L.Ed.2d 612 (1972). Where probable cause is lacking, we have expressly declined to allow significantly more intrusive detentions or searches on the Terry rationale, despite the assertion of compelling law enforcement interests. "For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." Dunaway v. New York, 442 U.S. 200, 214, 99 S.Ct. 2248, 2257, 60 L. Ed.2d 824 (1979). (FN2)

Terry and the cases following it give full recognition to law enforcement officers' need for an "intermediate" response, short of arrest, to suspicious circumstances; the power to

effect a brief detention for the purpose of questioning is a powerful tool for the investigation and prevention of crimes. Any person may, of course, direct a question to another person in passing. The Terry doctrine permits police officers to do far more: If they have the requisite reasonable suspicion, they may use a number of devices with substantial coercive impact on the person to whom they direct their attention, including an official "show of authority," the use of physical force to restrain him, and a search of the person for weapons. Terry v. Ohio, 392 U.S., at 19, n. 16, 88 S.Ct., at 1879, n. 16; see Florida v. Royer, --- U.S. ----, ----, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983) (opinion of WHITE, J.); United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1979) (opinion of Stewart, J.). During such an encounter, few people will ever feel free not to cooperate fully with the police by answering their questions. Cf. 3 W. LaFave, Search and Seizure § 9.2, at 53-55 (1978). Our case reports are replete with examples of suspects' cooperation during Terry encounters, even when the suspects have a great deal to lose by cooperating. See, e.g., Sibron v. New York, 392 U.S., at 45, 88 S.Ct., at 1893-1894; Florida v. Royer, supra, 460 U.S., at ----, 103 S.Ct., at 1326.

The price of that effectiveness, however, is intrusion on individual interests protected by the Fourth Amendment. We have held that the intrusiveness of even these brief stops for purposes of questioning is sufficient to render them "seizures" under the Fourth Amendment. See Terry v. Ohio, 392 U.S., at 16, 88 S.Ct., at 1877. For precisely that reason, the scope of seizures of the person on less than probable cause that Terry permits is strictly circumscribed, to limit the degree of intrusion they cause. Terry encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him.

> "[T]he person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." Id., at 34, 88 S.Ct., at 1886 (WHITE, J., concurring).

Failure to observe these limitations converts a Terry encounter into the sort of detention that can be justified only by probable cause to believe that a crime has been committed. See Florida v. Royer, 460 U.S., at ----, 103 S.Ct., at 1325 (opinion of WHITE, J.); id., at ----, 103 S.Ct., at 1330 (opinion of BRENNAN, J.); Dunaway v. New York, 442 U.S., at 216, 99 S.Ct., at 2258.

The power to arrest--or otherwise to prolong a seizure until a suspect had responded to the satisfaction of the police officers--would undoubtedly elicit cooperation from a high

percentage of even those very few individuals not sufficiently coerced by a show of authority, brief physical detention, and a frisk. We have never claimed that expansion of the power of police officers to act on reasonable suspicion alone, or even less, would further no law enforcement interests. See, e.g., Brown v. Texas, 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979). But the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion. See Dunaway v. New York, supra; United States v. Brignoni-Ponce, 422 U.S., at 878, 95 S.Ct., at 2578-2579. Detention beyond the limits of Terry without probable cause would improve the effectiveness of legitimate police investigations by only a small margin, but it would expose individual members of the public to exponential increases in both the intrusiveness of the encounter and the risk that police officers would abuse their discretion for improper ends. Furthermore, regular expansion of Terry encounters into more intrusive detentions, without a clear connection to any specific underlying crimes, is likely to exacerbate ongoing tensions, where they exist, between the police and the public. See Report of the National Advisory Commission on Civil Disorders 157-168 (1968).

In sum, under the Fourth Amendment, police officers with reasonable suspicion that an individual has committed or is about to commit a crime may detain that individual, using some force if necessary, for the purpose of asking investigative questions. (FN3) They may ask their questions in a way calculated to obtain an answer. But they may not compel an answer, and they must allow the person to leave after a reasonably brief period of time unless the information they have acquired during the encounter has given them probable cause sufficient to justify an arrest. (FN4)

California cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a Terry encounter, any more than it could abridge the protections of the Fifth and Sixth Amendments by making it a crime to refuse to answer police questions once a suspect has been taken into custody. To begin, the statute at issue in this case could not be constitutional unless the intrusions on Fourth Amendment rights it occasions were necessary to advance some specific, legitimate state interest not already taken into account by the constitutional analysis described above. Yet appellants do not claim that § 647(e) advances any interest other than general facilitation of police investigation and preservation of public order--factors addressed at length in Terry, Davis, and Dunaway. Nor do appellants show that the power to arrest and to impose a criminal sanction, in addition to the power to detain and to pose questions under the aegis of state authority, is so necessary in pursuit of the State's legitimate interests as to justify the substantial additional intrusion on individuals' rights. Compare Brief for Appellants 18-19 (asserting that § 647(e) is justified by state interest in "detecting and preventing crime" and

"protecting the citizenry from criminal acts"), and People v. Solomon, 33 Cal.App.3d 429, 436-437, 108 Cal.Rptr. 867, 872 (1973) (§ 647(e) justified by "the public need involved,"i. e., "protection of society against crime"), with United States v. Brignoni-Ponce, 422 U.S., at 884, 95 S.Ct., at 2581-2582 (federal interest in immigration control permits stops at the border itself without reasonable suspicion), and California v. Byers, 402 U.S. 424, 456-458, 91 S.Ct. 1535, 1552-1553, 29 L.Ed.2d 9 (1971) (Harlan, J., concurring in the judgment) (state interest in regulating automobiles justifies making it a crime to refuse to stop after an automobile accident and report it). Thus, because the State's interests extend only so far as to justify the limited searches and seizures defined by Terry, the balance of interests described in that case and its progeny must control.

Second, it goes without saying that arrest and the threat of a criminal sanction have a substantial impact on interests protected by the Fourth Amendment, far more severe than we have ever permitted on less than probable cause. Furthermore, the likelihood that innocent persons accosted by law enforcement officers under authority of § 647(e) will have no realistic means to protect their rights compounds the severity of the intrusions on individual liberty that this statute will occasion. The arrests it authorizes make a mockery of the right enforced in Brown v. Texas, supra, in which we held squarely that a State may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion. (FN5) If § 647(e) remains in force, the validity of such arrests will be open to challenge only after the fact, in individual prosecutions for failure to produce identification. Such case-by-case scrutiny cannot vindicate the Fourth Amendment rights of persons like appellee, many of whom will not even be prosecuted after they are arrested, see ante, at 1857. A pedestrian approached by police officers has no way of knowing whether the officers have "reasonable suspicion"--without which they may not demand identification even under § 647(e), id., at 1857, and n. 5--because that condition depends solely on the objective facts known to the officers and evaluated in light of their experience, see Terry v. Ohio, 392 U.S., at 30, 88 S.Ct., at 1884; United States v. Brignoni-Ponce, 422 U.S., at 884-885, 95 S.Ct., at 2581-2582. The pedestrian will know that to assert his rights may subject him to arrest and all that goes with it: new acquaintances among jailers, lawyers, prisoners, and bail-bondsmen, first-hand knowledge of local jail conditions, a "search incident to arrest," and the expense of defending against a possible prosecution. (FN6) The only response to be expected is compliance with the officers' requests, whether or not they are based on reasonable suspicion, and without regard to the possibility of later vindication in court. Mere reasonable suspicion does not justify subjecting the innocent to such a dilemma. (FN7)

By defining as a crime the failure to respond to requests for personal information during a Terry encounter, and by permitting arrests upon commission of that crime, California attempts in this statute to compel what may not be compelled under the Constitution. Even

if § 647(e) were not unconstitutionally vague, the Fourth Amendment would prohibit its enforcement.

Justice WHITE, with whom Justice REHNQUIST joins, dissenting.

The usual rule is that the alleged vagueness of a criminal statute must be judged in light of the conduct that is charged to be violative of the statute. See, e.g., United States v. Mazurie, 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975); United States v. Powell, 423 U.S. 87, 92-93, 96 S.Ct. 316, 319-320, 46 L.Ed.2d 228 (1975). If the actor is given sufficient notice that his conduct is within the proscription of the statute, his conviction is not vulnerable on vagueness grounds, even if as applied to other conduct, the law would be unconstitutionally vague. None of our cases "suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 2561-2562, 41 L.Ed.2d 439 (1974). The correlative rule is that a criminal statute is not unconstitutionally vague on its face unless it is "impermissibly vague in all of its applications." Hoffman Estates v. Flipside, 455 U.S. 489, 497, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982).

These general rules are equally applicable to cases where First Amendment or other "fundamental" interests are involved. The Court has held that in such circumstances "more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression," Parker v. Levy, supra, 417 U.S., at 756, 94 S.Ct., at 2561; a "greater degree of specificity" is demanded than in other contexts. Smith v. Goguen, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974). But the difference in such cases "relates to how strict a test of vagueness shall be applied in judging a particular criminal statute." Parker v. Levy, supra, 417 U.S., at 756, 94 S.Ct., at 2562. It does not permit the challenger of the statute to confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own. See ibid. Of course, if his own actions are themselves protected by the First Amendment or other constitutional provision, or if the statute does not fairly warn that it is proscribed, he may not be convicted. But it would be unavailing for him to claim that although he knew his own conduct was unprotected and was plainly enough forbidden by the statute, others may be in doubt as to whether their acts are banned by the law.

The upshot of our cases, therefore, is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications. If any fool would know that a

particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face and should not be vulnerable to a facial attack in a declaratory judgment action such as is involved in this case. Under our cases, this would be true, even though as applied to other conduct the provision would fail to give the constitutionally required notice of illegality.

Of course, the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment; and, as I have indicated, I also agree that in First Amendment cases the vagueness analysis may be more demanding. But to imply, as the majority does, ante, at 1859, n. 8, that the overbreadth doctrine requires facial invalidation of a statute which is not vague as applied to a defendant's conduct but which is vague as applied to other acts is to confound vagueness and overbreadth, contrary to Parker v. Levy, supra.

The Court says that its decision "rests on our concern for arbitrary law enforcement, and not on the concern for lack of actual notice." Ante, at 1859. But if there is a range of conduct that is clearly within the reach of the statute, law enforcement personnel, as well as putative arrestees, are clearly on notice that arrests for such conduct are authorized by the law. There would be nothing arbitrary or discretionary about such arrests. If the officer arrests for an act that both he and the law breaker know is clearly barred by the statute, it seems to me an untenable exercise of judicial review to invalidate a state conviction because in some other circumstance the officer may arbitrarily misapply the statute. That the law might not give sufficient guidance to arresting officers with respect to other conduct should be dealt with in those situations. See e.g., Hoffman Estates, 455 U.S., at 504, 102 S.Ct., at 1196. It is no basis for fashioning a further brand of "overbreadth" and invalidating the statute on its face, thus forbidding its application to identifiable conduct that is within the state's power to sanction.

I would agree with the majority in this case if it made at least some sense to conclude that the requirement to provide "credible and reliable identification" after a valid stop on reasonable suspicion of criminal conduct is "impermissibly vague in all of its applications." Hoffman Estates v. Flipside, supra, at 495, 102 S.Ct., at 1191. (FN*) But the statute is not vulnerable on this ground; and the majority, it seems to me, fails to demonstrate that it is. Suppose, for example, an officer requests identification information from a suspect during a valid Terry stop and the suspect answers: "Who I am is just none of your business." Surely the suspect would know from the statute that a refusal to provide any information at all would constitute a violation. It would be absurd to suggest that in such a situation only the unfettered discretion of a police officer, who has legally stopped a person on reasonable suspicion, would serve to determine whether a violation of

the statute has occurred.

> "It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [a failure to provide credible and reliable identification] and that would be covered by the statute.... In these instances there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed [to have failed to meet the statute's requirements] by the State, but unpredictability in those situations does not change the certainty in others."

Smith v. Goguen, 415 U.S. 566, 584, 94 S.Ct. 1242, 1253, 39 L.Ed.2d 605 (1974) (WHITE, J., concurring in judgment). See id., at 590, 94 S.Ct., at 1255 (BLACKMUN, J. with whom THE CHIEF JUSTICE joins, agreeing with Justice WHITE on the vagueness issue). Thus, even if as the majority cryptically asserts, the statute here implicates First Amendment interests, it is not vague on its face, however more strictly the vagueness doctrine should be applied. The judgment below should therefore not be affirmed but reversed and appellee Lawson remitted to challenging the statute as it has been or will be applied to him.

The majority finds that the statute "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' information." Ante, at 1859. At the same time, the majority concedes that "credible and reliable" has been defined by the state court to mean identification that carries reasonable assurance that the identification is authentic and that provides means for later getting in touch with the person. The narrowing construction given this statute by the state court cannot be likened to the "standardless" statutes involved in the cases cited by the majority. For example, Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), involved a statute that made it a crime to be a "vagrant." The statute provided:

> "Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, ... common drunkards, common night walkers, ... lewd, wanton and lascivious persons, ... common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, ... shall be deemed vagrants." 405 U.S., at 156, n. 1, 92 S.Ct., at 840, n. 1.

In Lewis v. City of New Orleans, 415 U.S. 130, 132, 94 S.Ct. 970, 972, 39 L.Ed.2d 214 (1974), the statute at issue made it a crime "for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." The present statute, as construed by the state courts, does not fall in the same category.

The statutes in Lewis v. City of New Orleans and Smith v. Goguen, supra, as well as other cases cited by the majority clearly involved threatened infringements of First Amendment freedoms. A stricter test of vagueness was therefore warranted. Here, the majority makes a vague reference to potential suppression of First Amendment liberties, but the precise nature of the liberties threatened are never mentioned. Shuttlesworth v. City of Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965), is cited, but that case dealt with an ordinance making it a crime to "stand or loiter upon any street or sidewalk ... after having been requested by an police officer to move on," id., at 90, 86 S.Ct., at 213, and the First Amendment concerns implicated by the statute were adequately explained by the Court's reference to Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938), and Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), which dealt with the First Amendment right to distribute leaflets on city streets and sidewalks. There are no such concerns in the present case.

Of course, if the statute on its face violates the Fourth or Fifth Amendment--and I express no views about that question--the Court would be justified in striking it down. But the majority apparently cannot bring itself to take this course. It resorts instead to the vagueness doctrine to invalidate a statute that is clear in many of its applications but which is somehow distasteful to the majority. As here construed and applied, the doctrine serves as an open-ended authority to oversee the states' legislative choices in the criminal-law area and in this case leaves the state in a quandary as to how to draft a statute that will pass constitutional muster.

I would reverse the judgment of the Court of Appeals.

(FN*) The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

(FN1.) Cal.Penal Code § 647(e) provides:

> "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: .... (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

(FN2.) The District Court failed to find facts concerning the particular occasions on which Lawson was detained or arrested under § 647(e). However, the trial transcript contains numerous descriptions of the stops given both by Lawson and by the police officers who

detained him. For example, one police officer testified that he stopped Lawson while walking on an otherwise vacant street because it was late at night, the area was isolated, and the area was located close to a high crime area. Tr. 266-267. Another officer testified that he detained Lawson, who was walking at a late hour in a business area where some businesses were still open, and asked for identification because burglaries had been committed by unknown persons in the general area. Tr. 207. The appellee states that he has never been stopped by police for any reason apart from his detentions under § 647(e).

(FN3.) The appellants have apparently never challenged the propriety of declaratory and injunctive relief in this case. See Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L. Ed.2d 505 (1974). Nor have appellants ever challenged Lawson's standing to seek such relief. We note that Lawson has been stopped on approximately 15 occasions pursuant to § 647(e), and that these 15 stops occurred in a period of less than two years. Thus, there is a "credible threat" that Lawson might be detained again under § 647(e). See Ellis v. Dyson, 421 U.S. 426, 434, 95 S.Ct. 1691, 1696, 44 L.Ed.2d 214 (1975).

(FN4.) In Wainwright v. Stone, 414 U.S. 21, 22-23, 94 S.Ct. 190, 192, 38 L.Ed.2d 179 (1973), we held that "[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.' Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 273 [60 S.Ct. 523, 525, 84 L.Ed. 744] (1940)." The Court of Appeals for the Ninth Circuit noted in its decision that the state intermediate appellate court has construed the statute in People v. Solomon, 33 Cal.App.3d 429, 108 Cal.Rptr. 867 (1973), that the state supreme court has refused review, and that Solomon has been the law of California for nine years. In these circumstances, we agree with the Ninth Circuit that the Solomon opinion is authoritative for purposes of defining the meaning of § 647(e). See 658 F.2d 1362, 1364-1365 n. 3 (1981).

(FN5.) The Solomon court apparently read Terry to hold that the test for a Terry detention was whether the officer had information that would lead a reasonable man to believe that the intrusion was appropriate. The Ninth Circuit noted that according to Terry, the applicable test under the Fourth Amendment requires that the police officer making a detention "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S., at 21, 88 S.Ct., at 1880. The Ninth Circuit then held that although what Solomon articulated as the Terry standard differed from what Terry actually held, "[w]e believe that the Solomon court meant to incorporate in principle the standards enunciated in Terry." 658 F.2d 1366, n. 8. We agree with that interpretation of Solomon. Of course, if the Solomon court misread Terry and interpreted § 647(e) to permit investigative detentions in situations where the officers lack a reasonable suspicion of criminal activity based on objective facts,

Fourth Amendment concerns would be implicated. See Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637, 61 L.Ed.2d 357 (1979).

In addition, the Solomon court appeared to believe that both the Terry detention and frisk were proper under the standard for Terry detentions, and since the frisk was more intrusive than the request for identification, the request for identification must be proper under Terry. See 33 Cal.App.3d, at 435, 108 Cal.Rptr., at 867. The Ninth Circuit observed that the Solomon analysis was "slightly askew." 658 F.2d, at 1366, n. 9. The court reasoned that under Terry, the frisk, as opposed to the detention, is proper only if the detaining officer reasonably believes that the suspect may be armed and dangerous, in addition to having an articulable suspicion that criminal activity is afoot.

(FN6.) In People v. Caylor, 6 Cal.App.3d 51, 56, 85 Cal.Rptr. 497 (1970), the court suggested that the State must prove that a suspect detained under § 647(e) was loitering or wandering for "evil purposes." However, in Solomon, which the court below and the parties concede is "authoritative" in the absence of a California Supreme Court decision on the issue, there is no discussion of any requirement that the State prove "evil purposes."

(FN7.) Our concern for minimal guidelines finds its roots as far back as our decision in United States v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563 (1875):

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

(FN8.) In his dissent, Justice WHITE claims that "[t]he upshot of our cases ... is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." Post, at 1865. The description of our holdings is inaccurate in several respects. First, it neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." Hoffman Estates v. Flipside, 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). Second, where a statute imposes criminal penalties, the standard of certainty is higher. See Winters v. New York, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948). This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. See e.g., Colautti v. Franklin, 439 U.S. 379, 394-401, 99 S.Ct. 675, 685-688, 58 L.Ed.2d 596 (1979); Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). The dissent concedes that "the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First

Amendment ...." Post, at 1866. However, in the dissent's view, one may not "confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own." Id. But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines. Seee.g., Keyishian v. Board of Regents, 385 U.S. 589, 609, 87 S.Ct. 675, 687, 17 L.Ed.2d 629 (1967); NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). See also Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 Pa.L.Rev. 67, 110-113 (1960).

No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context. The dissent relies heavily on Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), but in that case, we deliberately applied a less stringent vagueness analysis "[b]ecause of the factors differentiating military society from civilian society." Id., at 756, 94 S.Ct., at 2562. Hoffman Estates, supra, also relied upon by the dissent, does not support its position. In addition to reaffirming the validity of facial challenges in situations where free speech or free association are affected, see 455 U.S., at 494, 495, 498-499, 102 S.Ct., at 1191, 1193-1194, the Court emphasized that the ordinance in Hoffman Estates "simply regulates business behavior" and that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow." Id., at 499, 498, 102 S.Ct., at 1193 (footnote omitted).

(FN9.) To the extent that § 647(e) criminalizes a suspect's failure to answer such questions put to him by police officers, Fifth Amendment concerns are implicated. It is a "settled principle that while police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." Davis v. Mississippi, 394 U.S. 721, 727, n. 6, 89 S.Ct. 1394, 1397, n. 6, 22 L.Ed.2d 676 (1969).

(FN10.) Because we affirm the judgment of the court below on this ground, we find it unnecessary to decide the other questions raised by the parties because our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so. See Burton v. United States, 196 U.S. 283, 295, 25 S.Ct. 243, 245, 49 L.Ed. 482 (1905); Liverpool, N.Y. & P.S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885). See also Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-347, 56 S.Ct. 466, 482-483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). The remaining issues raised by the parties include whether § 647(e) implicates Fourth Amendment concerns, whether the individual has a legitimate expectation of privacy in his identity when he is detained lawfully under Terry, whether the requirement that an individual identify himself during a Terry stop violates the Fifth Amendment protection against compelled testimony, and whether inclusion of the Terry standard as part of a criminal statute creates other vagueness problems. The appellee also argues that § 647(e) permits arrests on less than probable cause. See Michigan v.

DeFillippo, 443 U.S. 31, 36, 99 S.Ct. 2627, 2631, 61 L.Ed.2d 343 (1979).

(FN1.) We have not in recent years found a state statute invalid directly under the Fourth Amendment, but we have long recognized that the government may not "authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." Sibron v. New York, 392 U.S. 40, 61, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968). In Sibron, and in numerous other cases, the Fourth Amendment issue arose in the context of a motion by the defendant in a criminal prosecution to suppress evidence against him obtained as the result of a police search or seizure of his person or property. The question thus has always been whether particular conduct by the police violated the Fourth Amendment, and we have not had to reach the question whether state law purporting to authorize such conduct also offended the Constitution. In this case, however, appellee Edward Lawson has been repeatedly arrested under authority of the California statute, and he has shown that he will likely be subjected to further seizures by the police in the future if the statute remains in force. See Los Angeles v. Lyons, --- U.S. ----, ----, 103 S.Ct. 1660, 1669, 75 L.Ed.2d 675 (1983); Gomez v. Layton, 129 U.S.App.D. C. 289, 394 F.2d 764 (1968). It goes without saying that the Fourth Amendment safeguards the rights of those who are not prosecuted for crimes as well as the rights of those who are.

(FN2.) A brief detention is usually sufficient as a practical matter to accomplish all legitimate law enforcement objectives with respect to individuals whom the police do not have probable cause to arrest. For longer detentions, even though they fall short of a full arrest, we have demanded not only a high standard of law enforcement necessity, but also objective indications that an individual would not consider the detention significantly intrusive. Compare Dunaway v. New York, 442 U.S. 200, 212-216, 99 S.Ct. 2248, 2256-2258, 60 L.Ed.2d 824 (1979) (seizure of suspect without probable cause and custodial interrogation in police station violates Fourth Amendment), and Davis v. Mississippi, 394 U.S. 721, 727-728, 89 S.Ct. 1394, 1397-1398, 22 L.Ed.2d 676 (1969) (suspect may not be summarily detained and taken to police station for fingerprinting but may be ordered to appear at a specific time), with Michigan v. Summers, 452 U.S. 692, 701-705, 101 S.Ct. 2587, 2593-2595, 69 L.Ed.2d 340 (1981) (suspect may be detained in his own home without probable cause for time necessary to search the premises pursuant to a valid warrant supported by probable cause). See also Florida v. Royer, --- U.S. ----, ----, 103 S. Ct. 1319, 1325, 75 L.Ed.2d 225 (1983) (opinion of WHITE, J.) ("least intrusive means" requirement for searches not supported by probable cause).

(FN3.) Police officers may have a similar power with respect to persons whom they reasonably believe to be material witnesses to a specific crime. See, e.g., Model Code of Pre-Arraignment Procedure § 110.2(1)(b) (Proposed Official Draft 1975).

(FN4.) Of course, some reactions by individuals to a properly limited Terry encounter, e. g., violence toward a police officer, in and of themselves furnish valid grounds for arrest. Other reactions, such as flight, may often provide the necessary information, in addition to that the officers already possess, to constitute probable cause. In some circumstances it is even conceivable that the mere fact that a suspect refuses to answer questions once detained, viewed in the context of the facts that gave rise to reasonable suspicion in the first place, would be enough to provide probable cause. A court confronted with such a claim, however, would have to evaluate it carefully to make certain that the person arrested was not being penalized for the exercise of his right to refuse to answer.

(FN5.) In Brown we had no need to consider whether the State can make it a crime to refuse to provide identification on demand during a seizure permitted by Terry, when the police have reasonable suspicion but not probable cause. See 443 U.S., at 53, n. 3, 99 S. Ct., at 2641, n. 3.

(FN6.) Even after arrest, however, he may not be forced to answer questions against his will, and--in contrast to what appears to be normal procedure during Terry encounters--he will be so informed. See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In fact, if he indicates a desire to remain silent, the police should cease questioning him altogether. Id., at 473-474, 86 S.Ct., at 1627-1628.

(FN7.) When law enforcement officers have probable cause to believe that a person has committed a crime, the balance of interests between the State and the individual shifts significantly, so that the individual may be forced to tolerate restrictions on liberty and invasions of privacy that possibly will never be redressed, even if charges are dismissed or the individual is acquitted. Such individuals may be arrested, and they may not resist. But probable cause, and nothing less, represents the point at which the interests of law enforcement justify subjecting an individual to any significant intrusion beyond that sanctioned in Terry, including either arrest or the need to answer questions that the individual does not want to answer in order to avoid arrest or end a detention.

(FN*) The majority attempts to underplay the conflict between its decision today and the decision last term in Hoffman Estates v. Flipside, supra, by suggesting that we applied a "less strict vagueness test" because economic regulations were at issue. The Court there also found that the ordinances challenged might be characterized as quasi-criminal or criminal in nature and held that because at least some of respondent's conduct clearly was covered by the ordinance, the facial challenge was unavailing even under the "relatively strict test" applicable to criminal laws. 455 U.S., at 499-500, 102 S.Ct., at 1193-1194.

U.S. Constitution: Fifth Amendment

Fifth Amendment - Rights of Persons

Amendment Text | Annotations

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, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

More...

process of law; nor shall private property be taken for public use, without just compensation.

Annotations

- **Indictment by Grand Jury**
- **Double Jeopardy**
- **Development and Scope**
- **Reprosecution Following Mistrial**
- **Reprosecution Following Acquittal**
  - Acquittal by Jury
  - Acquittal by the Trial Judge
  - Trial Court Rulings Terminating Trial Before Verdict
- **Reprosecution Following Conviction**
  - Reprosecution After Reversal on Defendant's Appeal
  - Sentence Increases
- **"For the Same Offence"**
  - Legislative Discretion as to Multiple Sentences
  - Successive Prosecutions for "The Same Offense"
  - The "Same Transaction" Problem
- **Self-Incrimination**
- **Development and Scope**
- **The Power to Compel Testimony and Disclosure**
  - Immunity
  - Required Records Doctrine
  - Reporting and Disclosure

Criminal Law Cases

Constitution

Supreme Court

'); } //

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U.S. Constitution: Sixth Amendment

Sixth Amendment - Rights of Accused in Criminal Prosecutions

Amendment Text | Annotations

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Annotations

- **Criminal Prosecutions**
- **Coverage**
  - Offenses Against the United States
- **Right to a Speedy and Public Trial**
- **Speedy Trial**
  - Source and Rationale
  - Application and Scope
  - When the Right Is Denied
- **Public Trial**
- **Right to Trial by Impartial Jury**
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- **Impartial Jury**
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- **Notice of Accusation**
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- **Compulsory Process**
- **Assistance of Counsel**
- **Development of an Absolute Right to Counsel at Trial**
    - Powell v. Alabama
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    - Betts v. Brady and Progeny
    - Gideon v. Wainwright
    - Protection of the Right to Retained Counsel
    - Effective Assistance of Counsel
    - Self-Representation
- **Right to Assistance of Counsel in Nontrial Situations**
    - Judicial Proceedings Before Trial
    - Custodial Interrogation
    - Lineups and Other Identification Situations
    - Post-Conviction Proceedings

- Noncriminal and Investigatory Proceedings

'); } //

U.S. Supreme Court

LANZETTA v. STATE OF NEW JERSEY, 306 U.S. 451 (1939)

306 U.S. 451

LANZETTA et al.
v.
STATE of NEW JERSEY.
No. 308.

Argued Jan. 9, 1939.
Decided March 27, 1939.

Messrs. Samuel Kagle and Harry A. Mackey, both of Philadelphia, Pa., for appellants.

Messrs. Robert Peacock, of Mount Holly, N.J., and French B. Loveland, of Ocean City, N.J., for appellee. [306 U.S. 451, 452]

Mr. Justice BUTLER delivered the opinion of the Court.

By this appeal we are called on to decide whether, by reason of vagueness and uncertainty, a recent enactment of New Jersey, 4, R.S.N.J. 1937, 2:136-4, c. 155, Laws 1934, is repugnant to the due process clause of the Fourteenth Amendment, U.S.C.A.Const. It is as follows: 'Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster ...'.1 Every violation is punishable by fine not exceeding $10,000 or imprisonment not exceeding 20 years, or both. 5, R.S.N.J.1937, 2:136-5.

In the court of quarter sessions of Cape May County, appellants were accused of violating the quoted

clause. The indictment charges that on four days, June 12, 16, 19, and 24, 1936 'they, and each of them, not being engaged in any lawful occupation; they, and all of them, known to be members of a gang, consisting of two or more persons, and they, and each of them, having been convicted of a crime in the State of Pennsylvania, are hereby declared to be gangsters.' There was a trial, verdict of guilty, and judgment of conviction on which each was sentenced to be imprisoned in the state prison for not more than ten years and not less than five years, at hard labor. On the authority of its recent decision in State v. Bell, 188 A. 737, 15 N.J.Misc. 109, the Supreme Court entered judgment affirming the conviction. State v. Pius, 118 N.J.L. 212, 192 A. 89. The Court of Errors and Appeals affirmed, 120 N.J.L. 189, 198 A. 837, on the authority of its deci- [306 U.S. 451, 453] sion, State v. Gaynor, 119 N.J.L. 582, 197 A. 360, affirming State v. Bell.

If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. United States v. Reese, 92 U.S. 214 , 221; Czarra v. Board of Medical Supervisors, 25 App.D.C. 443, 453. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U.S. 359, 368 , 51 S.Ct. 532, 535, 73 A.L. R. 1484; Lovell v. Griffin, 303 U.S. 444 , 58 S.Ct. 666. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. 2 The applicable rule is stated in Connally v. General Const. Co., 269 U.S. 385, 391 , 46 S.Ct. 126, 127: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'

The phrase 'consisting of two or more persons' is all that purports to define 'gang'. The meanings of that [306 U.S. 451, 454] word indicated in dictionaries and in historical and sociological writings are numerous and varied. 3 Nor is the [306 U.S. 451, 455] meaning derivable from the common law,4 for neither in that field nor anywhere in the language of the law is there definition of the word. Our attention has not been called to, and we are unable to find, any other statute attempting to make it criminal to be a member of a 'gang.' 5

In State v. Gaynor, supra, the Court of Errors and Appeals dealt with the word. It said: 'Public policy ordains that a combination designed to wage war upon society shall be dispersed and its members rendered incapable of harm. This is the objective of section 4 ... and it is therefore a valid exercise of the legislative power. ... The evident aim of this provision was to render penal the association of criminals for the pursuit of criminal enterprises; that is the gist of the legislative expression. It cannot be gainsaid that such was within the competency of the Legislature; the mere statement of the purpose carries justification of the act. ... If society cannot impose such taint of illegality upon the confederation of convicted criminals, who have no lawful occupation, under circumstances denoting ... the pursuit of criminal objectives, it is helpless against one of the most menacing forms of evil activity. ... The primary function of government ... is to render security to its subjects. [306 U.S. 451, 456] And any mischief menacing that security demands a remedy commensurate with the evil.' (119 N.J.L. 582, 197 A. 361.)

Then undertaking to find the meaning of 'gang' as used in the challenged enactment, the opinion states: 'In the construction of the provision, the word is to be given a meaning consistent with the general object of the statute. In its original sense it signifies action-'to go'; in its modern usage, without qualification, it denotes-in common intent and understanding-criminal action. It is defined as 'a

company of persons acting together for some purpose, usually criminal,' while the term 'gangster' is defined as 'a member of a gang of roughs, hireling criminals, thieves, or the like.' Webster's New International Dictionary, 2d Ed. And the Oxford English Dictionary likewise defines the word 'gang' as 'any company of persons who go about together or act in concert (in modern use mainly for criminal purposes).' Such is plainly the legislative sense of the term.'

If worded in accordance with the court's explication, the challenged provision would read as follows: 'Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons (meaning a company of persons acting together for some purpose, usually criminal, or a company of persons who go about together or who act in concert, mainly for criminal purposes), who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or in any other State, is declared to be a gangster (meaning a member of a gang of roughs, hireling criminals, thieves, or the like).'

Appellants were convicted before the opinion in State v. Gaynor. It would be hard to hold that, in advance of judicial utterance upon the subject, they were bound to understand the challenged provision according to the language later used by the court. Indeed the state Supreme [306 U.S. 451, 457] Court (State v. Bell, supra) went on supposed analogy between 'gang' and offenses denounced by the Disorderly Persons Act, Comp.Stat.Supp.1930, 59-1 R.S.N.J.1937, 2:202-1, upheld by the Court of Errors and Appeals in Levine v. State, 110 N.J.L. 467, 470, 166 A. 300. But the court in that case found the meaning of 'common burglar' there involved to be derivable from the common law.

The descriptions and illustrations used by the court to indicate the meaning of 'gang' are not sufficient to constitute definition, inclusive or exclusive. The court's opinion was framed to apply the statute to the offenders and accusation in the case then under consideration; it does not purport to give any interpretation generally applicable. The state court did not find, and we cannot, that 'gang' has ever been limited in meaning to a group having purpose to commit any particular offense or class of crimes, or that it has not quite frequently been used in reference to groups of two or more persons not to be suspected of criminality or of anything that is unlawful. The dictionary definitions adopted by the state court extend to persons acting together for some purpose, 'usually criminal', or 'mainly for criminal purposes'. So defined, the purposes of those constituting some gangs may be commendable, as, for example, groups of workers engaged under leadership in any lawful undertaking. The statute does not declare every member to be a 'gangster' or punishable as such. Under it, no member is a gangster or offender unless convicted of being a disorderly person or of crime as specified. It cannot be said that the court intended to give 'gangster' a meaning broad enough to include anyone who had not been so convicted or to limit its meaning to the field covered by the words that it found in a dictionary, 'roughs, hireling criminals, thieves, or the like'. The latter interpretation would include some obviously not within the statute and would exclude some plainly covered by it. [306 U.S. 451, 458] The lack of certainty of the challenged provision is not limited to the word 'gang' or to its dependent 'gangster'. Without resolving the serious doubts arising from the generality of the language, we assume that the clause 'any person not engaged in any lawful occupation' is sufficient to identify a class to which must belong all capable of becoming gangsters within the terms of the provision. The enactment employs the expression, 'known to be a member'. It is ambiguous. There immediately arises the doubt whether actual or putative association is meant. If actual membership is required, that status must be established as a fact, and the word 'known' would be without significance. If reputed membership is enough, there is uncertainty whether that reputation must be general or extend only to some persons. And the statute fails to indicate what constitutes membership or how one may join a 'gang'.

The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to

the due process clause of the Fourteenth Amendment.

REVERSED.

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

Footnotes

[Footnote 1] The section continues: 'provided, however, that nothing in this section contained shall in any wise be construed to include any participant or sympathizer in any labor dispute.' The proviso is not here involved.

[Footnote 2] Champlin Ref. Co. v. Corporation Commission, 286 U.S. 210, 242 , 243 S., 52 S.Ct. 559, 567, 568, 86 A.L.R. 403; Cline v. Frink Dairy Co., 274 U.S. 445, 458 , 47 S.Ct. 681, 685; Connally v. General Const. Co., 269 U.S. 385 , 391-393, 46 S.Ct. 126, 127, 128; Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 239 , 45 S.Ct. 295, 297; United States v. Cohen Grocery Co., 255 U.S. 81 , 89-92, 41 S.Ct. 298, 300, 301, 14 A.L.R. 1045; Collins v. Kentucky, 234 U.S. 634, 638 , 34 S.Ct. 924, 925; International Harvester Co. v. Kentucky, 234 U.S. 216 , 221-223, 34 S.Ct. 853, 854, 855. Cf. People v. Belcastro, 356 Ill. 144, 190 N.E. 301, 92 A.L. R. 1223; People v. Licavoli, 264 Mich. 643, 250õn.W. 520.

[Footnote 3] American dictionaries define the word as follows:

Webster's New International Dictionary (2d Ed.): 'gang ... Act, manner or means of going; passage, course, or journey ... A set or full complement of any articles; an outfit. A number going in or forming a company; as, a gang of sailors; a gang of elk. Specif.: ... A group of persons associated under the same direction; as a gang of pavers; a gang of slaves. ... A company of persons acting together for some purpose; usually criminal, or at least not good or respectable; as, a political gang; a gang of roughs. ...'

Funk & Wagnalls New Standard Dictionary (1915): 'gang ... A company or band of persons, or sometimes of animals, going or acting together; a group or squad: sometimes implying cooperation for evil or disreputable purposes; as, a gang of laborers; a gang of burglars; he set the whole gang at work. ...'

Century Dictionary and Cyclopedia (1902): 'gang ... A number going or acting in company, whether of persons or of animals: as, a gang of drovers; a gang of elks. Specifically-(a) A number of persons associated for a particular purpose or on a particular occasion: used especially in a depreciatory or contemptuous sense or of disreputable persons: as, a gang of thieves; a chain-gang ... (b) A number of workmen or laborers of any kind engaged on any piece of work under supervision of one person; a squad; more particularly, a shift of men; a set of laborers working together during the same hours. ...'

Part of the text of the definitions given by the Oxford English Dictionary (1933) reads: 'gang ... A set of things or persons ... A company of workmen ... A company of slaves or prisoners ... Any band or company of persons who go about together or act in concert (chiefly in a bad or depreciatory sense, and in mod. usage mainly associated with criminal societies). ... To be of a gang: to belong to the same society, to have the same interests. ...'

Another English dictionary, Wyld's Universal Dictionary of the English Language, defines the word as follows: 'gang ... 1. A band, group, squad; (a) of labourers working together; (b) of slaves, prisoners & c. 2. (in bad sense) (a) A group of persons organized for evil or criminal purpose: a gang of burglars

&c; (b) (colloq., in disparagement) a body, party, group, of persons: 'I am sick of the whole gang of university wire- pullers. ..."

See: Asbury, Herbert, The Gangs of New York, 1927, Alfred A. Knopf. Thrasher, Frederic M., 'Gangs' in Encyclopedia of the Social Sciences, 1931, vol. 6, p. 564, and The Gang: A Study of 1313 Gangs in Chicago, 1927, University of Chicago Press.

[Footnote 4] See, e.g., Champlin Ref. Co. v. Corporation Commission, 286 U.S. 210, 242 , 243 S., 52 S.Ct. 559, 567, 568, 86 A.L.R. 403; Connally v. General Const. Co., 269 U.S. 385, 391 , 46 S.Ct. 126, 127; Nash v. United States, 229 U.S. 373 , 33 S.Ct. 780.

[Footnote 5] Cf. Kans.Laws 1935, c. 161. Ill.Laws 1933, p. 489, Ill.Rev.Stat. 1937, c. 38, 578, held unconstitutional in People v. Belcastro, 356 Ill. 144, 190 N.E. 301, 92 A.L.R. 1223. Mich.Comp.Laws (Mason's Supp.1935) 17115-167, held unconstitutional in People v. Licavoli, 264 Mich. 643, 250 N.W. 520.

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THOMSON FINDLAW

U.S. Supreme Court

SCREWS v. U.S., 325 U.S. 91 (1945)

325 U.S. 91

SCREWS et al.
v.
UNITED STATES.
No. 42.

Argued Oct. 20, 1944.
Decided May 7, 1945.

[325 U.S. 91, 92] Mr. James F. Kemp, of Atlanta, Ga., for petitioners.

Mr. Charles Fahy, Sol. Gen., of Washington, D.C., for respondent.

Mr. Justice DOUGLAS announced the judgment of the Court and delivered the following opinion, in which the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice REED, concur.

This case involves a shocking and revolting episode in law enforcement. Petitioner Screws was sheriff of Baker County, Georgia. He enlisted the assistance of petitioner Jones, a policeman, and petitioner Kelley, a special deputy, in arresting Robert Hall, a citizen of the United States and of Georgia. The arrest was made late at night at Hall's home on a warrant charging Hall with theft of a tire. Hall, a young negro about thirty years of age, was handcuffed and taken by car to the court house. As Hall alighted from the car at the court house square, the three petitioners began beating him with their fists and with a solid-bar blackjack about eight inches long and weighing two pounds. They claimed Hall had reached for a gun and had used insulting language as he alighted from the [325 U.S. 91, 93] car. But after Hall, still handcuffed, had been knocked to the ground they continued to beat him from fifteen to

thirty minutes until he was unconscious. Hall was then dragged feet first through the court house yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour and without regaining consciousness. There was evidence that Screws held a grudge against Hall and had threatened to 'get' him.

An indictment was returned against petitioners-one count charging a violation of 20 of the Criminal Code, 18 U.S.C. 52, 18 U.S.C.A. 52, and another charging a conspiracy to violate 20 contrary to 37 of the Criminal Code, 18 U.S.C. 88, 18 U.S.C.A. 88. Sec. 20 provides:

> 'Whoever, under color of any law, statute, ordinance, regulation, or custom, will-fully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both.'

The indictment charged that petitioners, acting under color of the laws of Georgia, 'willfully' caused Hall to be deprived of 'rights, privileges, or immunities secured or protected' to him by the Fourteenth Amendment-the right not to be deprived of life without due process of law; the right to be tried, upon the charge on which he was arrested, by due process of law and if found guilty to be punished in accordance with the laws of Georgia; that is to say that petitioners 'unlawfully and wrong- fully did assault, strike and beat the said Robert Hall about the head with human fists and a blackjack causing injuries' to Hall 'which were the proximate and immediate cause [325 U.S. 91, 94] of his death.' A like charge was made in the conspiracy count.

The case was tried to a jury. 1 The court charged the jury that due process of law gave one charged with a crime the right to be tried by a jury and sentenced by a court. On the question of intent it charged that ' ... if these defendants, without its being necessary to make the arrest effectual or necessary to their own personal protection, beat this man, assaulted him or killed him while he was under arrest, then they would be acting illegally under color of law, as stated by this statute, and would be depriving the prisoner of certain constitutional rights guaranteed to him by the Constitution of the United States and consented to by the State of Georgia.'

The jury returned a verdict of guilty and a fine and imprisonment on each count was imposed. The Circuit Court of Appeals affirmed the judgment of conviction, one judge dissenting. 5 Cir., 140 F.2d 662. The case is here on a petition for a writ of certiorari which we granted because of the importance in the administration of th criminal laws of the questions presented. 322 U.S. 718 , 64 S.Ct. 946

I. We are met at the outset with the claim that 20 is unconstitutional, in so far as it makes criminal acts in violation of the due process clause of the Fourteenth Amendment. The argument runs as follows: It is true that this Act as construed in United States v. Classic, 313 U.S. 299, 328 , 61 S.Ct. 1031, 1044, was upheld in its application to certain ballot box frauds committed by state officials. But in that case the constitutional rights protected were the rights to vote [325 U.S. 91, 95] specifically guaranteed by Art. I, 2 and 4 of the Constitution. Here there is no ascertainable standard of guilt. There have been conflicting views in the Court as to the proper construction of the due process clause. The majority have quite consistently construed it in broad general terms. Thus it was stated in Twining v. New Jersey, 211 U.S. 78, 101 , 29 S.Ct. 14, 20, that due process requires that 'no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government.' In Snyder v. Massachusetts, 291 U.S. 97, 105 , 54 S.Ct. 330, 332,

90 A.L.R. 575, it was said that due process prevents state action which 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' The same standard was expressed in Palko v. Connecticut, 302 U.S. 319, 325 , 58 S.Ct. 149, 152, in terms of a 'scheme of ordered liberty.' And the same idea was recently phrased as follows: 'The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.' Betts v. Brady, 316 U.S. 455, 462 , 62 S.Ct. 1252, 1256.

It is said that the Act must be read as if it contained those broad and fluid definitions of due process and that if it is so read it provides no ascertainable standard of guilt. It is pointed out that in United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 , 41 S.Ct. 298, 300, 14 A.L.R. 1045, an Act of Congress was struck down, the enforcement of which would have been 'the exact equivalent of an effort to carry out a statute [325 U.S. 91, 96] which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.' In that case the act declared criminal was the making of 'any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries.' 255 U.S. at page 86, 41 S.Ct. at page 299, 14 A.L.R. 1045. The Act contained no definition of an 'unjust or unreasonable rate' nor did it refer to any source where the measure of 'unjust or unreasonable' could be ascertained. In the instant case the decisions of the courts are, to be sure, a source of reference for ascertaining the specific content of the concept of due process. But even so the Act would incorporate by reference a large body of changing and uncertain law. That law is not always reducible to specific rules, is expressible only in general terms, and turns many times on the facts of a particular case. Accordingly, it is argued that such a body of legal principles lacks the basic specificity necessary for criminal statutes under our system of government. Congress did not define what it desired to punish but referred the citizen to a comprehensive law library in order to ascertain w at acts were prohibited. To enforce such a statute would be like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.' Suetonius, Lives of the Twelve Caesars, p. 278.

The serious character of that challenge to the constitutionality of the Act is emphasized if the customary standard of guilt for statutory crimes is taken. As we shall see specific intent is at times required. Holmes, The Common Law, p. 66 et seq. But the general rule was stated in Ellis v. United States, 206 U.S. 246, 257 , 27 S.Ct. 600, 602, 11 Ann.Cas. 589, as follows: 'If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent.' And see Horning v. District of [325 U.S. 91, 97] Columbia, 254 U.S. 135, 137 , 41 S.Ct. 53, 54; Nash v. United States, 229 U.S. 373, 377 , 33 S.Ct. 780, 781. Under that test a local law enforcement officer violates 20 and commits a federal offense for which he can be sent to the penitentiary if he does an act which some court later holds deprives a person of due process of law. And he is a criminal though his motive was pure and though his purpose was unrelated to the disregard of any constitutional guarantee. The treacherous ground on which state officials-police, prosecutors, legislators, and judges-would walk is indicated by the character and closeness of decisions of this Court interpreting the due process clause of the Fourteenth Amendment. A confession obtained by too long questioning (Ashcraft v. Tennessee, 322 U.S. 143 , 64 S.Ct. 921); the enforcement of an ordinance requiring a license for the distribution of religious literature (Murdock v. Pennsylvania, 319 U.S. 105 , 63 S.Ct. 870, 146 A.L.R. 81); the denial of the assistance of counsel in certain types of cases (Cf. Powell v. Alabama, 287 U.S. 45 , 53 S.Ct. 55, 84 A.L.R. 527, with Betts v. Brady, supra); the enforcement of certain types of anti-picketing statutes (Thornhill v. Alabama, 310 U.S. 88 , 60 S.Ct. 736); the enforcement of state price control laws (Olsen v. Nebraska, 313 U.S. 236 , 61 S.Ct. 862, 133 A. L.R. 1500); the requirement that public school

children salute the flag (West Virginia State Board of Education v. Barnette, 319 U.S. 624 , 63 S.Ct. 1178, 147 A.L.R. 674)-these are illustrative of the kind of state action2 which might or might not be caught in the broad reaches of 20 dependent on the prevailing view of the Court as constituted when the case arose. Those who enforced local law today might not know for many months (and meanwhile could not find out) whether what they did deprived some one of due process of law. The enforcement of a criminal statute so construed would indeed cast [325 U.S. 91, 98] law enforcement agencies loose at their own risk on a vast uncharted sea.

If such a construction is not necessary, it should be avoided. This Court has consistently favored that interpretation of legislation which supports its constitutionality. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 , 56 S.Ct. 466, 483; National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 , 57 S.Ct. 615, 621, 108 A.L.R. 1352; Anniston Mfg. Co. v. Davis, 301 U.S. 337, 351 , 352 S., 57 S.Ct. 816, 822, 823. That reason is impelling here so that if at all possible 20 may be allowed to serve its great purpose-the protection of the individual in his civil liberties.

Sec. 20 was enacted to enfor e the Fourteenth Amendment. 3 It derives4 from 2 of the Civil Rights Act of April 9, 1866, 14 Stat. 27.5 Senator Trumbull, chairman of the Senate Judiciary Committee which reported the bill, stated that its purpose was 'to protect all persons in the United States in their civil rights, and furnish the means of their vindication.' Cong. Globe, 39th Cong., 1st Sess., p. 211. In origin it was an antidiscrimination measure (as its language indicated), framed to protect negroes in their newly won rights. See Flack, The Adoption of the Fourteenth Amendment (1908), p. 21. It was [325 U.S. 91, 99] amended by 17 of the Act of May 31, 1870, 16 Stat. 144, 18 U.S.C.A. 52, 6 and made applicable to 'any inhabitant of any State or Territory.' 7 The prohibition against the 'deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States' was introduced by the revisers in 1874. R.S. 5510, 18 U.S. C.A. 52. Those words were taken over from 1 of the Act of April 20, 1871, 17 Stat. 13 (the so-called Ku-Klux Act) which provided civil suits for redress of such wrongs. 8 See Cong. Rec., [325 U.S. 91, 100] 43d Cong., 1st Sess., p. 828. The 1874 revision was applicable to any person who under color of law, etc., 'subjects, or causes to be subjected' any inhabitant to the deprivation of any rights, etc. The requirement for a 'willful' violation was introduced by the draftsmen of the Criminal Code of 1909. Act of March 4, 1909, 35 Stat. 1092. And we are told 'willfully' was added to 20 in order to make the section 'less severe'. 43 Cong. Rec ., 60th Cong., 2d Sess., p. 3599.

We hesitate to say that when Congress sought to enforce the Fourteenth Amendment9 in this fashion it did a vain thing. We hesitate to conclude that for 80 years this effort of Congress, renewed several times, to protect the important rights of the individual guaranteed by the Fourteenth Amendment has been an idle gesture. Yet if the Act falls by reason of vagueness so far as due process of law is concerned, there would seem to be a similar lack of specificity when the privileges and immunities clause (Madden v. Kentucky, 309 U.S. 83 , 60 S.Ct. 406, 125 A.L.R. 1383) and the equal protection clause (Smith v. Texas, 311 U.S. 128 , 61 S.Ct. 164; Hill v. Texas, 316 U.S. 400 , 62 S.Ct. 1159) of the Fourteenth Amendment are involved. Only if no construction can save the Act from this claim of unconstitutionality are we willing to reach that result. We do not reach it, for we are of the view that if 20 is confined more narrowly than the lower courts confined it, it can be preserved as one of the sanctions to the great rights which the Fourteenth Amendment was designed to secure. [325 U.S. 91, 101] II. We recently pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' Spies v. United States, 317 U.S. 492, 497 , 63 S.Ct. 364, 367. At times, as the Court held in United States v. Murdock, 290 U.S. 389, 394 , 54 S.Ct. 223, 225, the word denotes an act which is intentional rather than accidental. And see United States v. Illinois Cent. R. Co., 303 U.S. 239 , 58 S.Ct. 533. But 'when used in a criminal statute, it generally means an act done with a bad purpose.' United States v. Murdock, 290 U.S. at page 394, 54 S.Ct. at page 225. And see Felton v. United States, 96 U.S. 699 ; Potter v. United States, 155 U.S. 438 , 15 S.Ct. 144; Spurr v. United States, 174 U.S. 728 ,

19 S.Ct. 812; Hargrove v. United States, 5 Cir., 67 F. 820, 90 A.L.R. 1276. In that event something more is required than the doing of the act proscribed by the statute. Cf. United States v. Balint, 258 U.S. 250 , 42 S.Ct. 301. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr v. United States, supra, 174 U.S. at page 734, 19 S.Ct. at page 815; United States v. Murdock, supra, 290 U.S. at page 395, 54 S.Ct. at page 225. And that issue must be submitted to the jury under appropriate instructions. United States v. Ragen, 314 U.S. 513 524, 62 S.Ct. 374, 379.

An analysis of the cases in which 'willfully' has been held to connote more than an act which is voluntary or intentional would not prove helpful as each turns on its own peculiar facts. Those cases, however, make clear that if we construe 'willfully' in 20 as connoting a purpose to deprive a person of a specific constitutional right, we would introduce no innovation. The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. [325 U.S. 91, 102] See United States v. L. Cohen Grocery Co., supra. But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware. That was pointed out by Mr. Justice Brandeis speaking for the Court in Omaechevarria v. Idaho, 246 U.S. 343 , 38 S.Ct. 323. An Idaho statute made it a misdemeanor to graze sheep 'upon any range usually occupied by any cattle grower.' Rev. Codes Idaho 6872. The argument was that the statute was void for indefiniteness because it failed to provide for the ascertainment of boundaries of a 'range' or for determining what length of time was necessary to make a prior occupation a 'usual' one. The Court ruled that 'any danger to sheepmen which might otherwise arise from indefiniteness, is removed by section 6314 of Revised Codes, which provides that: 'In every crime or public offence there must exist a union, or joint operation, of act and intent, or criminal negligence." Id., 246 U.S. at page 348, 38 S.Ct. at page 325. A similar ruling was made in Hygrade Provision Co. v. Sherman, 266 U.S. 497 , 45 S.Ct. 141. The charge was that a criminal statute which regulated the sale of 'kosher' meat or products 'sanctioned by the orthodox Hebrew religious requirements', Penal Law N.Y. 435, subd. 4, was unconstitutional for want of any ascertainable standard of guilt. The Court speaking through Mr. Justice Sutherland stated, '... since the statutes require a specific intent to defraud in order to encounter their prohibitions, the hazard of prosecution which appellants fear loses whatever substantial foundation it might have in the absence of such a requirement.' 266 U.S. at pages 502, 503, 45 S.Ct. at page 143. In United States v. Ragen, supra, we took [325 U.S. 91, 103] that course in a prosecution for willful evasion of a federal income tax where it was alleged that the defendant had deducted more than 'reasonable' allowances for salaries. By construing the statute to require proof of bad faith we avoided the serious question which the rule of United States v. L. Cohen Grocery Co., supra, might have presented. We think a like course is appropriate here.

Moreover, the history of 20 affords some support for that narrower construction. As we have seen, the word 'willfully' was not added to the Act until 1909. Prior to that time it may be that Congress intended that he who deprived a person of any right protected by the Constitution should be liable without more. That was the pattern of criminal legislation which has been sustained without any charge or proof of scienter. Shevlin- Carpenter Co. v. Minnesota, 218 U.S. 57 , 30 S.Ct. 663; United States v. Balint, supra. And the present Act in its original form would have been susceptible of the same interpretation apart from the equal protection clause of the Fourteenth Amendment, where 'purposeful discriminatory' action must be shown. Snowden v. Hughes, 321 U.S. 1, 8 , 9 S., 64 S.Ct. 397, 401, 402. But as we have

seen, the word 'willfully' was added to make the section 'less severe'. We think the inference is permissible that its severity was to be lessened by making it applicable only where the requisite bad purpose was present, thus requiring specific intent not only where discrimination is claimed but in other situations as well. We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.

Once the section is given that construction, we think that the claim that the section lacks an ascertainable standard of guilt must fail. The constitutional requirement that a criminal statute be definite serves a high func- [325 U.S. 91, 104] tion. It gives a person acting with reference to the statute fair warning that his conduct is within its prohibition. This requirement is met when a statute prohibits only 'willful' acts in the sense we have explained. One who does act with such specific intent is aware that what he does is precisely that which the statute forbids. He is under no necessity of guessing whether the statute applies to him (see Connally v. General Construction Co., 269 U.S. 385 , 46 S.Ct. 126) for he either knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right. See Gorin v. United States, 312 U.S. 19, 27 , 28 S., 61 S.Ct. 429, 433, 434. Nor is such an act beyond the understanding and comprehension of juries summoned to pass on them. The Act would then not become a trap for law enforcement agencies acting in good faith. 'A mind intent upon willful evasion is inconsistent with surprised innocence.' United States v. Ragen, supra, 314 U.S. at page 524, 62 S.Ct. at page 379.

It is said, however, that this construction of the Act will not save it from the infirmity of vagueness since neither a law enforcement official nor a trial judge can know with sufficient definiteness the range of rights that are constitutional. But that criticism is wide of the mark. For the specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them. Take the case of a local officer who persists in enforcing a type of ordinance which the Court has held invalid as violative of the guarantees of free speech or freedom of worship. Or a local official continues to select juries in manner which flies in the teeth of decisions of the Court. If those acts are done willfully, how can the officer possibly claim that he had no fair warning that his acts were prohibited by the statute? He violates the statute not merely because he has a bad purpose but because he acts in defiance of announced rules of law. He who defies a [325 U.S. 91, 105] decision interpreting the Constitution knows precisely what he is doing. If sane, he hardly may be heard to say that he knew not what he did. Of course, willful conduct cannot make definite that which is undefined. But willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite. When they are convicted for so acting, they are not punished for violating an unknowable something.

The Act so construed has narrower range in all its applications than if it were interpreted in the manner urged by the government. But the only other alternative, if we are to avoid grave constitutional questions, is to construe it as applicable only to those acts which are clearly marked by the specific provisions of the Constitution as deprivations of constitutional rights, privileges, or immunities, and which are knowingly done within the rule of Ellis v. United States, supra. But as we have said that course would mean that all protection for violations of due process of law would drop out of the Act. We take the course which makes it possible to preserve the entire Act and save all parts of it from constitutional challenge. If Congress desires to give the Act wider scope, it may find ways of doing so. Moreover, here as in Apex Hosiery Co. v. Leader, 310 U.S. 469 , 60 S.Ct. 982, 128 A.L.R. 1044, we are dealing with a situation where the interpretation of the Act which we adopt does not preclude any state

from punishing any act made criminal by its own laws. Indeed, the narrow construction which we have adopted more nearly preserves the traditional balance between the States and the national government in law enforcement than that which is urged upon us. [325 U.S. 91, 106] United States v. Classic, supra, met the test we suggest. In that case we were dealing merely with the validity of an indictment, not with instructions to the jury. The indictment was sufficient since it charged a willful failure and refusal of the defendant-election officials to count the votes cast, by their alteration of the ballots and by their false certification of the number of votes cast for the respective candidates. 313 U.S. at pages 308, 309, 61 S.Ct. at pages 1034, 1035. The right so to vote is guaranteed by Art. I, 2 and 4 of the Constitution. Such a charge is adequate since he who alters ballots or without legal justification destroys them would be acting willfully in the sense in which 20 uses the term. The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of constitutional prohibitions or guarantees. Likewise, it is plain that basic to the concept of due process of law in a criminal case is a trial-a trial in a court of law, not a 'trial by ordeal.' Brown v. Mississippi, 297 U.S. 278, 285 , 56 S.Ct. 461, 465. It could hardly be doubted that they who 'under color of any law, statute, ordinance, regulation, or custom' act with that evil motive violate 20. Those who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him. And such a purpose need not be expressed; it may at times be reasonably inferred from all the circumstances attendant on the act. See Tot v. United States, 319 U.S. 463 , 63 S.Ct. 1241.

The difficulty here is that this question of intent was not submitted to the jury with the proper instructions. The court charged that petitioners acted illegally if they applied more force than was necessary to make the arrest effectual or to protect themselves from the prisoner's al- [325 U.S. 91, 107] leged assault. But in view of our construction of the word 'willfully' the jury should have been further instructed that it was not sufficient that petitioners had a generally bad purpose. To convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e.g. the right to be tried by a court rather than by ordeal. And in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstance-the malice of petitioners, the weapons used in the assault, its character and duration, the provocation if any, and the like.

It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. See Johnson v. United States, 318 U.S. 189, 200 , 63 S.Ct. 549, 555. But there are exceptions to that rule. United States v. Atkinson, 297 U.S. 157, 160 , 56 S.Ct. 391, 392; Clyatt v. United States, 197 U.S. 207, 221 , 222 S., 25 S.Ct. 429, 432, 433. And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed.

III. 1t is said, however, that petitioners did not act 'under color of any law' within the meaning of 20 of the Criminal Code. We disagree. We are of the view that petitioners acted under 'color' of law in making the arrest of Robert Hall and in assaulting him. They were officers of the law who made the arrest. By their own admissions they assaulted Hall in order to protect themselves and to keep their prisoner from escaping. It was their duty [325 U.S. 91, 108] under Georgia law to make the arrest effective. Hence, their conduct comes within the statute.

Some of the arguments which have been advanced in support of the contrary conclusion suggest that the question under 20 is whether Congress has made it a federal offense for a state officer to violate the law

of his State. But there is no warrant for treating the question in state law terms. The problem is not whether state law has been violated but whether an inhabitant of a State has been deprived of a federal right by one who acts under 'color of any law.' He who acts under 'color' of law may be a federal officer or a state officer. He may act under 'color' of federal law or of state law. The statute does not come into play merely because the federal law or the state law under which the officer purports to act is violated. It is applicable when and only when some one is deprived of a federal right by that action. The fact that it is also a violation of state law does not make it any the less a federal offense punishable as such. Nor does its punishment by federal authority encroach on state authority or relieve the state from its responsibility for punishing state offenses. 10

We agree that when this statute is applied to the action of state officials, it should be construed so as to respect the proper balance between the States and the federal government in law enforcement. Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the [325 U.S. 91, 109] Constitution or laws of the United States. Cf. Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, dealing with assaults by federal officials. The Fourteenth Amendment did not alter the basic relations between the States and the national government. United States v. Harris, 106 U.S. 629, 1 S.Ct. 601; In re Kemmler, 136 U.S. 436, 448, 10 S.Ct. 930, 934. Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States. Jerome v. United States, 318 U.S. 101, 105, 63 S.Ct. 483, 486. As stated in United States v. Cruikshank, 92 U.S. 542, 553, 554 S., 'It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.' And see United States v. Fox, 95 U.S. 670, 672. It is only state action of a 'particular character' that is prohibited by the Fourteenth Amendment and against which the Amendment authorizes Congress to afford relief. Civil Rights Cases, 109 U.S. 3, 11, 13 S., 3 S.Ct. 18, 21, 23. Thus Congress in 20 of the Criminal Code did not undertake to make all torts of state officials federal crimes. It brought within 20 only specified acts done 'under color' of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States.

This section was before us in United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, where we said: 'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.' In that case state election officials were charged with failure to count the votes as cast, alteration of the ballots, and false certification of the number of votes cast for the respective candidates. 313 U.S. at pages 308, 309, 61 S.Ct. at pages 1034, 1035. We stated that those acts of the defendants 'were committed in the course of [325 U.S. 91, 110] their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election.' Id., 313 U.S. at pages 325, 326, 61 S.Ct. at pages 1042, 1043. In the present case, as we have said, the defendants were officers of the law who had made an arrest and who by their own admissions and to certify the result of the election.' themselves and to keep the prisoner from escaping, i.e. to make the arrest effective. That was a duty they had under Georgia law. United States v. Classic is, therefore, indistinguishable from this case so far as 'under color of' state law is concerned. In each officers of the State were performing official duties; in each the power which they were authorized to exercise was misused. We cannot draw a distinction between them unless we are to say that 20 is not applicable to police officers. But the broad sweep of its language leaves no room for such an exception.

It is said that we should abandon the holding of the Classic case. It is suggested that the present problem was not clearly in focus in that case and that its holding was ill-advised. A reading of the opinion makes plain that the question was squarely involved and squarely met. It followed the rule announced in Ex

parte Commonwealth of Virginia, 100 U.S. 339 , 346, that a state judge who in violation of state law discriminated against negroes in the selection of juries violated the Act of March 1, 1875, 18 Stat. 336. It is true that that statute did not contain the words under 'color' of law. But the Court in deciding what was state action within the meaning of the Fourteenth Amendment held that it was immaterial that the state officer exceeded the limits of his authority. '... as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.' 100 U.S. at page 347. And see Commonwealth of Virginia v. Rives, [325 U.S. 91, 111] 100 U.S. 313 , 321. The Classic case recognized, without dissent, that the cont ary view would defeat the great purpose which 20 was designed to serve. Reference is made to statements11 of Senator Trumbull in his discussion of 2 of the Civil Rights Act of 1866, 14 Stat. 27, and to statements of Senator Sherman concerning the 1870 Act12 as supporting the conclusion that 'under color of any law' was designed to include only action taken by officials pursuant to state law. But those statements in their context are inconclusive on the precise problem involved in the Classic case and in the present case. We are not dealing here with a case where an officer not authorized to act nevertheless takes action. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words 'under color of any law' were hardly apt words to express the idea.

Nor are the decisions under 33 of the Judicial Code, 28 U.S.C. 76, 28 U.S.C.A. 76, in point. That section gives the right of removal to a federal court of any criminal prosecution begun in a state court against a revenue officer of the United States 'on account of any act done under color of his office or of any such (revenue) law.' The cases under it recognize that it is an 'exceptional' procedure which wrests from state courts the power to try offenses against [325 U.S. 91, 112] their own laws. State of Maryland v. Soper (No. 1), 270 U.S. 9, 29 , 35 S., 46 S.Ct. 185, 189, 191; State of Colorado v. Symes, 286 U.S. 510, 518 , 52 S.Ct. 635, 637. Thus the requirements of the showing necessary for removal are strict. See State of Maryland v. Soper (No. 2), 270 U.S. 36, 42 , 46 S.Ct. 192, 193, saying that acts 'necessary to make the enforcement effective' are done under 'color' of law. Hence those cases do not supply an authoritative guide to the problems under 20 which seeks to afford protection against officers who possess authority to act and who exercise their powers in such a way as to deprive a person of rights secured to him by the Constitution or laws of the United States. It is one thing to deprive state courts of their authority to enforce their own laws. It is quite another to emasculate an Act of Congress designed to secure individuals their constitutional rights by finely spun distinctions concerning the precise scope of the authority of officers of the law. Cf. Yick Wo v. Hopkins, 118 U.S. 356 , 6 S.Ct. 1064.

But beyond that is the problem of stare decisis. The construction given 20 in the Classic case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have here a situation comparable to Mahnich v. Southern S.S. Co., 321 U.S. 96 , 64 S.Ct. 455, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The Classic case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the Classic case gave to the phrase 'under color of any law involved only a construction of the statute. hence if it states a rule un- [325 U.S. 91, 113] desirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we

revise the meaning of 20 to meet the exigencies of each case coming before us.

Since there must be a new trial, the judgment below is reversed.

REVERSED.

Mr. Justice RUTLEDGE, concurring in the result.

For the compelling reason stated at the end of this opinion I concur in reversing the judgment and remanding the cause for further proceedings. But for that reason, my views would require that my vote be cast to affirm the judgment, for the reasons stated by Mr. Justice MURPHY and others I feel forced, in the peculiar situation, to state.

The case comes here established in fact as a gross abuse of authority by state officers. Entrusted with the state's power and using it, without a warrant or with one of only doubtful legality1 they invaded a citizen's home, arrested him for alleged theft of a tire, forcibly took him in handcuffs to the courthouse yard, and there beat him to death. Previously they had threatened to kill him, fortified themselves at a near-by bar, and resisted the bartender's importunities not to carry out the arrest. Upon this and other evidence which overwhelmingly supports (140 F.2d at page 665) the verdict, together with instructions adequately [325 U.S. 91, 114] covering an officer's right to use force, the jury found the petitioners guilty.

I. The verdict has shaped their position here. Their contention hardly disputes the facts on which it rests. 2 They do not come therefore as faithful state officers, innocent of crime. Justification has been foreclosed. Accordingly, their argument now admits the offense, but insists it was against the state alone, not the nation. So they have made their case in this Court. 3

In effect, the position urges it is murder they have done,4 not deprivation of constitutional right. Strange as the argument is the reason. It comes to this, that abuse of state power creates immunity to federal power. Because what they did violated the state's laws, the nation cannot reach their conduct. 5 It may deprive the citizen of his liberty and his life. But whatever state officers may do in abuse of their official capacity can give this Government and its courts no concern. This, though the prime object of the Fourteenth Amendment and Section 20 was to secure these fundamental rights against wrongful denial by exercise of the power of the states.

The defense is not pretty. Nor is it valid. By a long course of decision from Ex parte Commonwealth of Virginia, 100 U.S. 339 , to United States v. Classic, 313 U.S. 299 , 61 S.Ct. 1031 it has been re- [325 U.S. 91, 115] jected. 6 The ground should not need ploughing again. It was cleared long ago and thoroughly. It has been kept clear, until the ancient doubt, laid in the beginning, was resurrected in the last stage of this case. The evidence has nullified any pretense that petitioners acted as individuals, about their personal though nefarious business. They used the power of official place in all that was done. The verdict has foreclosed semblance of any claim that only private matters, not touching official functions, were involved. Yet neither was the state's power, they say.

There is no third category. The Amendment and the legislation were not aimed at rightful state action. Abuse of state power was the target. Limits were put to state authority, and states were forbidden to pass them, by whatever agency. 7 It is too late now, if there were better reason than exists for doing so, to question that in these matters abuse binds the state and is its act, when done by [325 U.S. 91, 116] one to whom it has given power to make the abuse effective to achieve the forbidden ends. Vague ideas of dual federalism,8 of ultra vires doctrine imported from private agency,9 and of want of finality in official action, 10 do not nullify what four years of civil strife secured and eighty years have verified.

For it was abuse of basic civil and political rights, by states and their officials, that the Amendment and the enforcing legislation were adopted to uproot.

The danger was not merely legislative or judicial. Nor was it threatened only from the state's highest officials. It was abuse by whatever agency the state might invest with its power capable of inflicting the deprivation. In all its flux, time makes some things axiomatic. One has been that state officials who violate their oaths of office and flout [325 U.S. 91, 117] the fundamental law are answerable to it when their misconduct brings upon them the penalty it authorizes and Congress has provided.

There could be no clearer violation of the Amendment or the statute. No act could be more final or complete, to denude the victim of rights secured by the Amendment's very terms. Those rights so destroyed cannot be restored. Nor could the part played by the state's power in causing their destruction be lessened, though other organs were now to repudiate what was done. The state's law might thus be vindicated. If so, the vindication could only sustain, it could not detract from the federal power. Nor could it restore what the federal power shielded. Neither acquittal nor conviction, though affirmed by the state's highest court, could resurrect what the wrongful use of state power has annihilated. There was in this case abuse of state power, which for the Amendment's great purposes was state action, final in the last degree, depriving the victim of his liberty and his life without due process of law.

If the issues made by the parties themselves were allowed to govern, there would be no need to say more. At various stages petitioners have sought to show that they used no more force than was necessary, that there was no state action, and that the evidence was not sufficient to sustain the verdict and the judgment. These issues, in various formulations,11 have comprehended their case. All have been resolved against them without error. This should end the matter. [325 U.S. 91, 118] II. But other and most important issues have been injected and made decisive to reverse the judgment. Petitioners have not denied that they acted 'willfully' within the mean ng of Section 20 or that they intended to do the acts which took their victim's liberty and life. In the trial court they claimed justification. But they were unable to prove it. The verdict, on overwhelming evidence, has concluded against them their denial of bad purpose and reckless disregard of rights. This is necessarily implied in the finding that excessive force was used. No complaint was made of the charge in any of these respects and no request for additional charges concerning them was offered. Nor, in the application for certiorari or the briefs, have they raised questions of the requisite criminal intent or of unconstitutional vagueness in the statute's definition of the crime. However, these issues have been bought forward, so far as the record discloses, first by the dissenting opinion in the Court of Appeals, then by inquiry at the argument and in the disposition here.

The story would be too long, to trace in more than outline the history of Section 20 and companion provisions, in particular Section 19, 12 with which it must be considered on any suggestion of fatal ambiguity. But this history cannot be ignored, unless we would risk throwing overboard what the nation's greatest internal conflict created and eight [325 U.S. 91, 119] decades have confirmed, in protection of individual rights against impairment by the states.

Sections 19 and 20 are twin sections in all respects that concern any question of vagueness in defining the crimes. There are important differences. Section 19 strikes at conspiracies, Section 20 at substantive offenses. The former protects 'citizens,' that latter 'inhabitants.' There are, however, no differences in the basic rights guarded. Each protects in a different way the rights and privileges secured to individuals by the Constitution. If one falls for vagueness in pointing to these, the other also must fall for the same reason. If one stands, so must both. It is not one statute therefore which we sustain or nullify. It is two.

The sections have stood for nearly eighty years. Nor has this been without attack for ambiguity.

Together the two sections have repelled it. In 1915, one of this Court's greatest judges, speaking for it, summarily disposed of the suggestion that Section 19 is invalid: 'It is not open to question that this statute is constitutional. ... (It) dealt with Federal rights, and with all Federal rights, and protected them in the lump ....' United States v. Mosley, 238 U.S. 383, 386 , 387 S., 35 S.Ct. 904, 905. And in United States v. Classic, 313 U.S. 299 , 61 S.Ct. 1031, the Court with equal vigor reaffirmed the validity of both sections, against dissenting assault for fatal [325 U.S. 91, 120] ambiguity in relation to the constitutional rights then in question. . these more recent pronouncements but reaffirmed earlier and repeated ones. The history should not require retelling. But old and established freedoms vanish when history is forgotten.

Section 20 originated in the Civil Rights Act of 1866, 14 Stat. 27, Section 19 in the Enforcement Act of 1870, 16 Stat. 141, 6. Their great original purpose was to strike at discrimination, particularly against Negroes, the one securing civil, the other political rights. But they were not drawn so narrowly. From the beginning Section 19 protected all 'citizens,' Section 20 'inhabitants.'

At first Section 20 secured only rights enumerated in the Civil Rights Act. The first ten years brought it, through broadening changes, to substantially its present form. Only the word 'willfully' has been added since then, a change of no materiality, for the statute implied it beforehand. 13 35 Stat. 1092. The most important change of the first decade replaced the specific enumeration of the Civil Rights Act with the present broad language covering 'the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States.' R.S. 5510, 18 U.S.C.A. 52. This inclusive designation brought Section 20 into conformity with Section 19's original coverage of 'any right or privilege secured to him by the Constitution or laws of the United States.' Since then, under these generic designations, the two have been literally identical in the scope of the rights they secure. The slight difference in wording cannot be one of substance. 14 [325 U.S. 91, 121] Throughout a long and varied course of application the sections have remained unimpaired on the score of vagueness in the crimes they denounce. From 1874 to today they have repelled all attacks purposed to invalidate them. None has succeeded. If time and uniform decision can give stability to statutes, these have acquired it.

Section 20 has not been much used, in direct application, until recently. There were however a number of early decisions. 15 Of late the section has been applied more frequently, in considerable variety of situation, against varied and vigorous attack. 16 In United States v. Classic, 313 U.S. at page 321, 61 S.Ct. at page 1040, as has been stated, this Court gave it clearcut sanction. The opinion expressly repudiated any idea that the section, or Section 19, is vitiated by ambiguity. Moreover, this was done in terms which leave no room to say that the decision was not focused upon that question. 17 True, application to Fourteenth Amendment [325 U.S. 91, 122] rights was reserved because the question was raised for the first time in the Government's brief filed here. 313 U.S. at page 329, 61 S.Ct. at page 1044. But the statute was sustained in application to a vast range of rights secured by the Constitution, apart from the reserved segment, as the opinion's language and the single reservation itself attest. The ruling, thus broad, cannot have been inadvertent. For it was repeated concerning both sections, broadly, forcefully, and upon citation of long-established authority. And this was done in response to a vigorous dissent which made the most of the point of vagueness. 18 The point was flatly, and deliberately, rejected. The Court cannot have been blinded by other issues to the import of this one.

The Classic decision thus cannot be put aside in this case. Nor can it be demonstrated that the rights secured by the Fourteenth Amendment are more numerous or more dubious than the aggregate encompassed by other [325 U.S. 91, 123] constitutional provisions. Certainly 'the equal protection of the laws,' guaranteed by the Amendment, is not more vague and indefinite than many rights protected by other commands. 19 The same thing is true of 'the privileges or immunities of citizens of the United States.' The Fifth Amendment contains a due process clause as broad in its terms restricting national

power as the Fourteenth is of state power. 20 If Section 20 (with Section 19) is valid in general coverage of other constitutional rights, it cannot be void in the less sweeping application to Fourteenth Amendment rights. If it is valid to assure the rights 'plainly and directly' secured by other provisions, it is equal y valid to protect those 'plainly and directly' secured by the Fourteenth Amendment, including the expressly guaranteed rights not to be deprived of life, liberty or property without due process of law. If in fact there could be any difference among the various rights protected, in view of the history it would be that the section applies more clearly to Fourteenth Amendment rights than to others. Its phrases 'are all phrases of large generalities. But they are not generalities of unillumined vagueness; they are generalities circumscribed by history and appropriate to the largeness of the problems of government with which they were concerned.' Malinski v. People of State of New York, 324 U.S. 401 , 65 S.Ct. 781, 787, concurring opinion.

Historically, the section's function and purpose have been to secure rights given by the Amendment. From the Amendment's adoption until 1874, it was Fourteenth Amendment legislation. Surely when in that year the section was expanded to include other rights these were [325 U.S. 91, 124] not dropped out. By giving the citizen additional security in the exercise of his voting and other political rights, which was the section's effect, unless the Classic case falls, Congress did not take from him the protection it previously afforded (wholly apart from the prohibition of different penalties)21 against deprivation of such rights on account of race, color or previous condition of servitude, or repeal the prior safeguard of civil rights.

To strike from the statute the rights secured by the Fourteenth Amendment, but at the same time to leave within its coverage the vast area bounded by other constitutional provisions, would contradict both reason and history. No logic but one which nullifies the historic foundations of the Amendment and the section could support such an emasculation. There should be no judicial hack work cutting out some of the great rights the Amendment secures but leaving in others. There can be none excising all protected by the Amendment, but leaving [325 U.S. 91, 125] every other given by the Constitution intact under the statute's aegis.

All that has been said of Section 20 applies with equal force to Section 19. It had an earlier more litigious history, firmly establishing its validity. 22 It also has received recent ap- [325 U.S. 91, 126] plication,23 without question for ambiguity except in the Classic case, which nevertheless gave it equal sanction with its substantive counterpart.

Separately, and often together in application, Sections 19 and 20 have been woven into our fundamental and statutory law. They have place among our more permanent legal achievements. They have safeguarded many rights and privileges apart from political ones. Among those buttressed, either by direct application or through the general conspiracy statute, Section 37, 18 U.S.C. 88, 18 U.S.C.A. 88,24 are the rights to a fair trial, including freedom from sham trials; to be free from arrest and detention by methods constitutionally forbidden and from extortion of property by such methods; rom extortion of confessions; from mob action incited or shared by state officers; from failure to furnish police protection on proper occasion and demand; from interference with the free exercise of religion, freedom of the press, freedom of speech and assembly; 25 and [325 U.S. 91, 127] the necessary import of the decisions is that the right to be free from deprivation of life itself, without due process of law, that is, through abuse of state power by state officials, is as fully protected as other rights so secured.

So much experience cannot be swept aside, or its teaching annulled, without overthrowing a great, and a firmly established, constitutional tradition. Nor has the feared welter of uncertainty arisen. Defendants have attacked the sections, or their application, often and strenuously. Seldom has complaint been made that they are too vague and uncertain. Objections have centered principally about 'state action,'

including 'color of law' and failure by inaction to discharge official duty, cf. Catlette v. United States, 4 Cir., 132 F.2d 902, and about the strength of federal power to reach particular abuses. 26 More rarely they have touched other matters, such as the limiting effect of official privilege27 and, in occasional instances, mens rea. 28 [325 U.S. 91, 128] In all this wealth of attack accused officials have little used the shield of ambiguity. The omission, like the Court's rejection in the Classic case, cannot have been inadvertent. There are valid reasons for it, apart from the old teaching that the matter has been foreclosed.

Moreover, statutory specificity has two purposes, to give due notice that an act has been made criminal before it is done and to inform one accused of the nature of the offense charged, so that he may adequately prepare and make his defense. More than this certainly the Constitution does not require. Cf. Amend. VI. All difficulty on the latter score vanishes, under Section 20, with the indictment's particularization of the rights infringed and the acts infringing them. If it is not sufficient in either respect, in these as in other cases the motion to quash or one for a bill of particulars is at the defendant's disposal. The decided cases demonstrate that accused persons have had little or no difficulty to ascertain the rights they have been charged with transgressing or the acts of transgression. 29 So it was with the defendants in this case. They were not puzzled to know for what they were indicted, as their proof and their defense upon the law conclusively show. They simply misconceived that the victim had no federal rights and that what they had done was not a crime within the federal power to penalize. 30 That kind of error relieves no one from penalty. [325 U.S. 91, 129] In the other aspect of specificity, two answers, apart from experience, suffice. One is that Section 20, and Section 19, are no more general and vague, Fourteenth Amendment rights included, than other criminal statutes commonly enforced against this objection. The Sherman Act is the most obvious illustration. 31

Furthermore, the argument of vagueness, to warn men of their conduct, ignores the nature of the criminal act itself and the notice necessarily given from this. Section 20 strikes only at abuse of official functions by state officers. It does not reach out for crimes done by men in general. Not murder per se, but murder by state officers in the course of official conduct and done with the aid of state power, is outlawed. These facts, inherent in the crime, give all the warning constitutionally required. For one, so situated, who goes so far in misconduct can have no excuse of innocence or ignorance.

Generally state officials know something of the individual's basic legal rights. If they do not, they should, for they assume that duty when they assume their office. Ignorance of the law is no excuse for men in general. It is less an excuse for men whose special duty is to apply it, and therefore to know and observe it. If their knowledge is not comprehensive, state officials know or should know when they pass the limits of their authority, so far at any rate that their action exceeds honest error of judgment and amounts to abuse of their office and its function. When they enter such a domain in dealing with the citi en's rights, they should do so at their peril, whether that [325 U.S. 91, 130] be created by state or federal law. For their sworn oath and their first duty are to uphold the Constitution, then only the law of the state which too is bound by the charter. Since the statute, as I think, condemns only something more than error of judgment, made in honest effort at once to apply and to follow the law, cf. United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, officials who violate it must act in intentional or reckless disregard of individual rights and cannot be ignorant that they do great wrong. 32 This being true, they must be taken to act at peril of incurring the penalty placed upon such conduct by the federal law, as they do of that the state imposes.

What has been said supplies all the case requires to be decided on the question of criminal intent. If the criminal act is limited, as I think it must be and the statute intends, to infraction of constitutional rights, including rights secured by the Fourteenth Amendment, by conduct which amounts to abuse of one's official place or reckless disregard of duty, no undue hazard or burden can be placed on state officials

honestly seeking to perform the rightful functions of their office. Others are not entitled to greater protection.

But, it is said, a penumbra of rights may be involved, which none can know until decision has been made and infraction may occur before it is had. It seems doubtful this could be true in any case involving the abuse of official function which the statute requires and, if it could, that one guilty of such an abuse should have immunity for that reason. Furthermore, the doubtful character of the [325 U.S. 91, 131] right infringed could give reason at the most to invalidate the particular charge, not for outlawing the statute or narrowly restricting its application in advance of compelling occasion.

For there is a body of well-established, clear-cut fundamental rights, including many secured by the Fourteenth Amendment, to all of which the sections may and do apply, without specific enumeration and without creating hazards of uncertainty for conduct or defense. Others will enter that category. So far, at the least when they have done so, the sections should stand without question of their validity. Beyond this, the character of the act proscribed and the intent it necessarily implies would seem to afford would-be violators all of notice the law requires, that they act at peril of the penalty it places on their misconduct.

We have in this case no instance of mere error in judgment, made in good faith. It would be time enough to reverse and remand a conviction, obtained without instructions along these lines, if such a case should arise. Actually the substance of such instruction was given in the wholly adequate charge concerning the officer's right to use force, though not to excess. When, as here, a state official abuses his place consciously or grossly in abnegation of its rightful obligation, and thereby tramples underfoot the established constitutional rights of men or citizens, his conviction should stand when he has had the fair trial and full defense the petitioners have been given in this case.

III. Two implicit but highly important considerations must be noticed more definitely. One is the fear grounded in concern for possible maladjustment of federal-state relations if this and like convictions are sustained. Enough has been said to show that the f ar is not well grounded. The same fear was expressed, by some in exaggerated and [325 U.S. 91, 132] highly emotional terms, when Section 2 of the Civil Rights Act, the antecedent of Section 20, was under debate in Congress. 33 The history of the legislation's enforcement gives it no support. The fear was not realized in later experience. Eighty years should be enough to remove any remaining vestige. The volume of prosecutions and convictions has been small, in view of the importance of the subject matter and the length of time the statutes have been in force. There are reasons for this, apart from self-restraint of federal prosecuting officials.

One lies in the character of the criminal act and the intent which must be proved. A strong case must be made to show abuse of official function, and therefore to secure indictment or conviction. Trial must be 'by an impartial jury of the State and district wherein the crime shall have been committed.' Const., Amend. VI; cf. Art. III, 2. For all practical purposes this means within the state of which the accused is an officer. Citizens of the state have not been, and will not be, ready to indict or convict their local officers on groundless charges or in doubtful cases. The sections can be applied effectively only when twelve of them concur in a verdict which accords with the prosecuting official's belief that the accused has violated another's fundamental rights. A federal official therefore faces both a delicate and a difficult task when he undertakes to charge and try a state officer under the terms of Sections 19 and 20. The restraint which has been shown is as much enforced by these limitations as it has been voluntary. [325 U.S. 91, 133] These are the reasons why prosecution has not been frequent, has been brought only in cases of gross abuse, and therefore has produced no grave or substantial problem of interference by federal authority in state affairs. But if the problem in this phase of the case were more serious than it has been or is likely to be, the result legally could not be to give state officials immunity from the

obligations and liabilities the Amendment and its supporting legislation have imposed. For the verdict of the struggle which brought about adoption of the Amendment was to the contrary.

Lying beneath all the surface arguments is a deeper implication, which comprehends them. It goes to federal power. It is that Congress could not in so many words denounce as a federal crime the intentional and wrongful taking of an individual's life or liberty by a state official acting in abuse of his official function and applying to the deed all the power of his office. This is the ultimate purport of the notions that state action is not involved and that the crime is against the state alone, not the nation. It is reflected also in the idea that the statute can protect the victim in his many procedural rights encompassed in the right to a fair trial before condemnation, but cannot protect him in the right which comprehends all others, the right to life itself.

Suffice it to say that if these ideas did not pass from the American scene once and for all, as I think they did, upon adoption of the Amendment without more, they have long since done so. Violation of state law there may be. But from this no immunity to federal authority can arise where any part of the Constitution has made it supreme. To the Constitution state officials and the states themselves owe first obligation. The federal power lacks no strength to reach their malfeasance in office when it infringes constituti nal rights. If that is a great power, it is one generated by the Constitution and the Amend- [325 U.S. 91, 134] ments, to which the states have assented and their officials owe prime allegiance. 34

The right not to be deprived of life or liberty by a state officer who takes it by abuse of his office and its power is such a right. To secure these rights is not beyond federal power. This Sections 19 and 20 have done, in a manner history long since has validated.

Accordingly, I would affirm the judgment.

My convictions are as I have stated them. Were it possible for me to adhere to them in my vote, and for the Court at the same time to dispose of the cause, I would act accordingly. The Court, however, is divided in opinion. If each member accords his vote to his belief, the case cannot have disposition. Stalemate should not prevail for any reason, however compelling, in a criminal cause or, if avoidable, in any other. My views concerning appropriate disposition are more nearly in accord with those stated by Mr. Justice DOUGLAS, in which three other members of the Court concur, than they are with the views of my dissenting brethren who favor outright reversal. Accordingly, in order that disposition may be made of this case, my vote has been cast to reverse the decision of the Court of Appeals and remand the cause to the District Court for further proceedings in accordance with the disposition required by the opinion of Mr. Justice DOUGLAS.

Mr. Justice MURPHY, dissenting.

I dissent. Robert Hall, a Negro citizen, has been deprived not only of the right to be tried by a court rather than by ordeal. He has been deprived of the right of life itself. That right belonged to him not because he was a Negro or a member of any particular race or creed. That right was his because he was an American citizen, because [325 U.S. 91, 135] he was a human being. As such, he was entitled to all the respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution. Yet not even the semblance of due process has been accorded him. He has been cruelly and unjustifiably beaten to death by local police officers acting under color of authority derived from the state. It is difficult to believe that such an obvious and necessary right is indefinitely guaranteed by the Constitution or is foreign to the knowledge of local police officers so as to cast any reasonable doubt on the conviction under Section 20 of the Criminal Code of the perpetrators of this 'shocking and revolting episode in law enforcement.'

The Constitution and Section 20 must be read together inasmuch as Section 20 refers in part to certain provisions of the Constitution. Section 20 punishes any one, acting under color of any law, who willfully deprives any person of any right, privilege or immunity secured or protected by the Constitution or laws of the United States. The pertinent part of the Constitution in this instance is Section 1 of the Fourteenth Amendment, which firmly and unmistakably provides that no state shall deprive any person of life without due process of law. Translated in light of this specific provision of the Fourteenth Amendment, Section 20 thus punishes any one, acting under color of state law, who willfully deprives any person of life without due process of law. Such is the clear statutory provision upon which this conviction must stand or fall.

A grave constitutional issue, however, is said to lurk in the alleged indefiniteness of the crime outlawed by Section 20. The rights, privileges and immunities secured or protected by the Constitution or laws of the United States are claimed to be so uncertain and flexible, dependent upon changeable legal concepts, as to leave a state official confused and ignorant as to what actions of his might run afoul of the law. The statute, it is concluded, must be set aside for vagueness. [325 U.S. 91, 136] It is axiomatic, of course, that a criminal statute must give a clear and unmistakable war ing as to the acts which will subject one to criminal punishment. And courts are without power to supply that which Congress has left vague. But this salutary principle does not mean that if a statute is vague as to certain criminal acts but definite as to others the entire statute must fall. Nor does it mean that in the first case involving the statute to come before us we must delineate all the prohibited acts that are obscure and all those that are explicit.

Thus it is idle to speculate on other situations that might involve Section 20 which are not now before us. We are unconcerned here with state officials who have coerced a confession from a prisoner, denied counsel to a defendant or made a faulty tax assessment. Whatever doubt may exist in those or in other situations as to whether the state officials could reasonably anticipate and recognize the relevant constitutional rights is immaterial in this case. Our attention here is directed solely to three state officials who, in the course of their official duties, have unjustifiably beaten and crushed the body of a human being, thereby depriving him of trial by jury and of life itself. The only pertinent inquiry is whether Section 20, by its reference to the Fourteenth Amendment guarantee that no state shall deprive any person of life without due process of law, gives fair warning of state officials that they are criminally liable for violating this right to life.

Common sense gives an affirmative answer to that problem. The reference in Section 20 to rights protected by the Constitution is manifest and simple. At the same time, the right not to be deprived of life without due process of law is distinctly and lucidly protected by the Fourteenth Amendment. There is nothing vague or indefinite in these references to this most basic of all human rights. Knowledge of a comprehensive law library is unnecessary for officers of the law to know that the right to murder [325 U.S. 91, 137] individuals in the course of their duties is unrecognized in this nation. No appreciable amount of intelligence or conjecture on the part of the lowliest state official is needed for him to realize that fact; nor should it surprise him to find out that the Constitution protects persons from his reckless disregard of human life and that statutes punish him therefor. To subject a state official to punishment under Section 20 for such acts is not to penalize him without fair and definite warning. Rather it is to uphold elementary standards of decency and to make American principles of law and our constitutional guarantees mean something more than pious rhetoric.

Under these circumstances it is unnecessary to send this case back for a further trial on the assumption that the jury was not charged on the matter of the willfulness of the state officials, an issue that was not raised below or before us. The evidence is more than convincing that the officials willfully, or at least with wanton disregard of the consequences, deprived Robert Hall of his life without due process of law.

A new trial could hardly make that fact more evident; the failure to charge the jury on willfulness was at most an inconsequential error. Moreover, the presence or absence of willfulness fails to decide the constitutional issue raised before us. Section 20 is very definite and certain in its reference to the right to life as spelled out in the Fourteenth Amendment quite apart from the state of mind of the state officials. A finding of willfulness can add nothing to the clarity of that reference.

It is an illusion to say that the real issue in this case is the alleged failure of Section 20 fully to warn the state officials that their actions were illegal. The Constitution, Section 20 and their own consciences told them that. They knew that they lacked any mandate or authority to take human life unnecessarily or without due process of law in the course of their duties. They knew that their excessive and abusive [325 U.S. 91, 138] use of authority would only subvert the ends of j stice. The significant question, rather, is whether law enforcement officers and those entrusted with authority shall be allowed to violate with impunity the clear constitutional rights of the inarticulate and the friendless. Too often unpopular minorities, such as Negroes, are unable to find effective refuge from the cruelties of bigoted and ruthless authority. States are undoubtedly capable of punishing their officers who commit such outrages. But where, as here, the states are unwilling for some reason to prosecute such crimes the federal government must step in unless constitutional guarantees are to become atrophied.

This necessary intervention, however, will be futile if courts disregard reality and misuse the principle that criminal statutes must be clear and definite. Here state officers have violated with reckless abandon a plain constitutional right of an American citizen. The two courts below have found and the record demonstrates that the trial was fair and the evidence of guilt clear. And Section 20 unmistakably outlaws such actions by state officers. We should therefore affirm the judgment.

Mr. Justice ROBERTS, Mr. Justice FRANKFURTER and Mr. Justice JACKSON, dissenting.

Three law enforcement officers of Georgia, a county sheriff, a special deputy and a city policeman, arrested a young Negro charged with a local crime, that of stealing a tire. While he was in their custody and handcuffed, they so severely beat the lad that he died. This brutal misconduct rendered these lawless law officers guilty of manslaughter, if not of murder, under Georgia law. Instead of leaving this misdeed to vindication by Georgia law, the United States deflected Georgia's responsibility by instituting a federal prosecution. But this was a criminal homicide only under Georgia law. The United States could not prosecute the petitioners for taking life. In- [325 U.S. 91, 139] stead, a prosecution was brought, and the conviction now under review was obtained, under 20 of the Criminal Code, 18 U.S.C. 52, 18 U.S.C.A. 52. Section 20, originating in 2 of the Civil Rights Act of April 9, 1866, 14 Stat. 27, was put on the statute books on May 31, 1870, but for all practical purposes it has remained a dead letter all these years. This section provides that 'Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects ... any inhabitant of any State ... to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States ... shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.' Under 37 of the Criminal Code, 18 U.S. C. 88, 18 U.S.C.A. 88, a conspiracy to commit any federal offense is punishable by imprisonment for two years. The theory of this prosecution is that one charged with crime is entitled to due process of law and that that includes the right to an orderly trial of which the petitioners deprived the Negro.

Of course the petitioners are punishable. The only issue is whether Georgia alone has the power and duty to punish, or whether this patently local crime can be made the basis of a federal prosecution. The practical question is whether the States should be relieved from responsibility to bring their law officers to book for homicide, by allowing prosecutions in the federal courts for a relatively minor offense carrying a short sentence. The legal question is whether, for the purpose of accomplishing this

relaxation of State responsibility, hitherto settled principles for the protection of civil liberties shall be bent and tortured.

I. By the Thirteenth Amendment slavery was abolished. In order to secure equality of treatment for the emancipated, the Fourteenth Amendment was adopted at the [325 U.S. 91, 140] same time. To be sure, the latter Amendment has not been confined to instances of discrimination because of race or color. Undoubtedly, however, the necessary protection of the new freedmen was the most powerful impulse behind he Fourteenth Amendment. The vital part of that Amendment, Section 1, reads as follows: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

By itself, this Amendment is merely an instrument for striking down action by the States in defiance of it. It does not create rights and obligations actively enforceable by federal law. However, like all rights secured by the Constitution of the United States, those created by the Fourteenth Amendment could be enforced by appropriate federal legislation. The general power of Congress to pass measures effectuating the Constitution is given by Art. I, 8, cl. 18-the Necessary-and-Proper- Clause. In order to indicate the importance of enforcing the guarantees of Amendment XIV, its fifth section specifically provides: 'The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.'

Accordingly, Congress passed various measures for its enforcement. It is familiar history that much of this legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction era. Legislative respect for constitutional limitations was not at its height and Congress passed laws clearly unconstitutional. See Civil Rights Cases, 109 U.S. 3 , 3 S.Ct. 18. One of the laws of this period was the Act of May 31, 1870, 16 Stat. 140. In its [325 U.S. 91, 141] present form, as 20, it is now here for the first time on full consideration as to its meaning and its constitutionality, unembarrassed by preoccupation both on the part of counsel and court with the more compelling issue of the power of Congress to control state procedure for the election of federal officers. If 20 were read as other legislation is read, by giving it the meaning which its language in its proper setting naturally and spontaneously yields, it is difficult to believe that there would be real doubt about the proper construction. The unstrained significance of the words chosen by Congress, the disclosed purpose for which they were chosen and to which they were limited, the always relevant implications of our federal system especially in the distribution of power and responsibility for the enforcement of the criminal law as between the States and the National Government, all converge to make plain what conduct Congress outlawed by the Act of 1870 and what impliedly it did not.

The Fourteenth Amendment prohibited a State from so acting as to deprive persons of new federal rights defined by it. Section 5 of the Amendment specifically authorized enabling legislation to enforce that prohibition. Since a State can act only through its officers, Congress provided for the prosecution of any officer who deprives others of their guaranteed rights and denied such an officer the right to defend by claiming the authority of the State for his action. In short, Congress said that no State can empower an officer to commit acts which the Constitution forbade the State from authorizing, whether such unauthorized command be given for the State by its legislative or judicial voice, or by a custom contradicting the written law. See Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 369 , 60 S.Ct. 968, 972. The present prosecution is not based on an officer's claim that that for which the United States seeks his punishment was commanded or authorized by the law of his State. On the contrary, [325 U.S. 91, 142] the present prosecution is based on the theory that Congress made it a federal offense for a

State officer to violate the explicit law of his State. We are asked to construe legislation which was intended to effe tuate prohibitions against States for defiance of the Constitution, to be equally applicable where a State duly obeys the Constitution, but an officer flouts State law and is unquestionably subject to punishment by the State for his disobedience.

So to read 20 disregards not merely the normal function of language to express ideas appropriately. It fails not merely to leave to the States the province of local crime enforcement, that the proper balance of political forces in our federalism requires. It does both, heedless of the Congressional purpose, clearly evinced even during the feverish Reconstruction days, to leave undisturbed the power and the duty of the States to enforce their criminal law by restricting federal authority to the punishment only of those persons who violate federal rights under claim of State authority and not by exerting federal authority against offenders of State authority. Such a distortion of federal power devised against recalcitrant State authority never entered the minds of the proponents of the legislation.

Indeed, we have the weightiest evidence to indicate that they rejected that which now, after seventy-five years, the Government urges. Section 20 of the Criminal Code derived from 2 of the Civil Rights Act of 1866, 14 Stat. 27. During the debate on that section, Senator Trumbull, the Chairman of the Senate Judiciary Committee, answered fears concerning the loose inclusiveness of the phrase 'color of law'. In particular, opponents of the Act were troubled lest it would make criminals of State judges and officials for carrying out their legal duties. Senator Trumbull agreed that they would be guilty if they consciously helped to enforce discriminatory State [325 U.S. 91, 143] legislation. Federal law, replied Senator Trumbull, was directed against those, and only against those, who were not punishable by State law precisely because they acted in obedience to unconstitutional State law and by State law justified their action. Said Senator Trumbull, 'If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection.' Cong.Globe, 39th Cong., 1st Sess., p. 1758. And this language applies equally to 17 of the Act of May 31, 1870, 16 Stat. 140, 144 (now 20 of the Criminal Code) which re-enacted the Civil Rights Act.

That this legislation was confined to attempted deprivations of federal rights by State law and was not extended to breaches of State law by its officials, is likewise confirmed by observations of Senator Sherman, another leading Reconstruction statesman. When asked about the applicability of the 1870 Act to a Negro's right to vote when State law provided for that right, Senator Sherman replied, 'That is not the case with which we are dealing. I intend to propose an amendment to present a question of that kind. This bill only proposes to deal with offenses committed by officers or persons under color of existing State law, under color of existing State constitutions. No man could be convicted under this bill reported by the Judiciary Committee unless the denial of the right to vote was done under color or pretense of State regulation. The whole bill shows that. My honorable friend from California has not read this bill with his usual care if he does not see that that runs through the whole of the provisions of the first and second sections of the bill which [325 U.S. 91, 144] simply punish officers as well as persons for discrimination under color of State laws or constitutions; and so it provides all the way through.' Cong.Globe, 41st Cong., 2d Sess., p. 3663. The debates in Congress are barren of any indication that the supporters of the legislation now before us had the remotest notion of autho izing the National Government to prosecute State officers for conduct which their State had made a State offense where the settled custom of the State did not run counter to formulated law.

Were it otherwise it would indeed be surprising. It was natural to give the shelter of the Constitution to those basic human rights for the vindication of which the successful conduct of the Civil War was the

end of a long process. And the extension of federal authority so as to guard against evasion by any State of these newly created federal rights was an obvious corollary. But to attribute to Congress the making overnight of a revolutionary change in the balance of the political relations between the National Government and the States without reason, is a very different thing. And to have provided for the National Government to take over the administration of criminal justice from the States to the extent of making every lawless act of the policeman on the beat or in the station house, whether by way of third degree or the illegal ransacking for evidence in a man's house (see Gouled v. United States, 255 U.S. 298 , 41 S.Ct. 261; Byars v. United States, 273 U.S. 28 , 47 S.Ct. 248; Brown v. Mississippi, 297 U.S. 278 , 56 S.Ct. 461; Chambers v. Florida, 309 U.S. 227 , 60 S.Ct. 472), a federal offense, would have constituted a revolutionary break with the past overnight. The desire for such a dislocation in our federal system plainly was not contemplated by the Lyman Trumbulls and the John Shermans, and not even by the Thaddeus Stevenses.

Regard for maintaining the delicate balance 'between the judicial tribunals of the Union and of the states' in [325 U.S. 91, 145] the enforcement of the criminal law has informed this Court, as it has influenced Congress, 'in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution.' Ex parte Royall, 117 U.S. 241, 251 , 6 S.Ct. 734, 740. Observance of this basic principle under our system of Government has led this Court to abstain, even under more tempting circumstances than those now here, from needless extension of federal criminal authority into matters that normally are of state concern and for which the States had best be charged with responsibility.

We have reference to 33 of the Judicial Code, as amended, 28 U.S.C . 76, 28 U.S.C.A. 76. That provision gives the right of removal to a federal court of any criminal prosecution begun in a State court against a revenue officer of the United States 'on account of any act done under color of his office or of any such (revenue) law.' Where a state prosecution for manslaughter is resisted by the claim that what was done was justifiably done by a United States officer one would suppose that this Court would be alert to construe very broadly 'under color of his office or of any such law' in order to avoid the hazards of trial, whether through conscious or unconscious discrimination or hostility, of a United States officer accused of homicide and to assure him a trial in a presumably more impartial federal court. But this Court long ago indicated that misuse of federal authority does not come within the statute's protection. State of Tennessee v. Davis, 100 U.S. 257, 261 , 262 S.. More recently, this Court in a series of cases unanimously insisted that a petition for removal must show with particularity that the offense for which the State is prosecuting resulted from a discharge of federal duty. 'It must appear that the prosecution of him for whatever offense has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and [325 U.S. 91, 146] he must by direct averment exclude the possibility that it was based on acts or conduct of his, not justified by his federal duty. ... The defense he is to make is that of his immunity of punishment by the st te, because what he did was justified by his duty under the federal law, and because he did nothing else on which the prosecution could be based.' State of Maryland v. Soper (No. 1), 270 U.S. 9, 33 , 46 S.Ct. 185, 190. And see State of Maryland v. Soper (No. 2), 270 U.S. 36 , 46 S. Ct. 192; State of Maryland v. Soper (No. 3), 270 U.S. 44 , 46 S.Ct. 194; State of Colorado v. Symes, 286 U.S. 510 , 52 S.Ct. 635. To the suggestion that such a limited construction of the removal statute enacted for the protection of the United States officers would restrict its effectiveness, the answer was that if Congress chose to afford even greater protection and to withdraw from the State the right and duty to enforce their criminal law in their own courts, it should express its desire more specifically. State of Maryland v. Soper (No. 2), 270 U.S. 36, 42 , 44 S., 46 S.Ct. 192, 193, 194. That answer should be binding in the situation now before us.

The reasons which led this Court to give such a restricted scope to the removal statute are even more compelling as to 20. The matter concerns policies inherent in our federal system and the undesirable consequences of federal prosecution for crimes which are obviously and predominantly state crimes no

matter how much sophisticated argumentation may give them the appearance of federal crimes. Congress has not expressed a contrary purpose, either by the language of its legislation or by anything appearing in the environment out of which its language came. The practice of government for seventy-five years likewise speaks against it. Nor is there a body of judicial opinion which bids us find in the unbridled excess of a State officer, constituting a crime under his State law, action taken 'under color of law' which federal law forbids.

Only two reported cases considered 20 before United States v. Classic, 313 U.S. 299 , 61 S.Ct. 1031. In United States v. Bun- [325 U.S. 91, 147] tin, C.C., 10 F. 730, a teacher, in reliance on a State statute, refused admittance to a colored child, while in United States v. Stone, D.C., 188 F. 836, election supervisors who acted under a Maryland election law were held to act 'under color of law'. In neither case was there a patent violation of State law but rather an attempt at justification under State law. United States v. Classic, supra, is the only decision that looks the other way. In that case primary election officials were held to have acted 'under color of law' even though the acts complained of as a federal offense were likewise condemned by Louisiana law. The truth of the matter is that the focus of attention in the Classic case was not our present problem, but was the relation of primaries to the protection of the electoral process under the United States Constitution. The views in the Classic case thus reached ought not to stand in the way of a decision on the merits of a question which has now for the first time been fully explored and its implications for the workings of our federal system have been adequately revealed.

It was assumed quite needlessly in the Classic case that the scope of 20 was co-extensive with the Fourteenth Amendment. Because the weight of the case was elsewhere, we did not pursue the difference between the power granted to Congress by that Amendment to bar 'any State' from depriving persons of the newly created constitutional rights and the limited extent to which Congress exercised that power, in what is now 20, by making it an offense for one acting 'under color of any law' to deprive another of such constitutional rights. It may well be that Congress could, within the bounds of the Fourteenth Amendment, treat action taken by a State official even though in defiance of State law and not condoned by ultimate State authority as the action of 'a State'. It has never been satisfactorily explained how a State can be said to deprive a person of liberty or property without [325 U.S. 91, 148] due process of law hen the foundation of the claim is that a minor official has disobeyed the authentic command of his State. See Raymond v. Chicago Union Traction Co., 207 U.S. 20, 40 , 41 S., 28 S.Ct. 7, 14, 12 Ann.Cas. 757. Although action taken under such circumstances has been deemed to be deprivation by a 'State' of rights guaranteed by the Fourteenth Amendment for purposes of federal jurisdiction, the doctrine has had a fluctuating and dubious history. Compare Barney v. City of New York, 193 U.S. 430 , 24 S.Ct. 502, with Raymond v. Chicago Union Traction Co., supra; Memphis v. Cumberland Telephone & Telegraph Co., 218 U.S. 624 , 31 S.Ct. 115, with Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278 , 33 S.Ct. 312. Barney v. City of New York, supra, which ruled otherwise, although questioned, has never been overruled. See, for instance, Iowa-Des Moines Nat. Bank v. Bennett, 284 U.S. 239, 246 , 247 S., 52 S.Ct. 133, 136, and Snowden v. Hughes, 321 U.S. 1, 13 , 64 S.Ct. 397, 403.1

But assuming unreservedly that conduct such as that now before us, perpetrated by State officers in flagrant defiance of State law, may be attributed to the State under the Fourteenth Amendment, this does not make it action under 'color of any law.' Section 20 is much narrower than the power of Congress. Even though Congress might have swept within the federal criminal law any action that could be deemed within the vast reach of the Fourteenth Amendment, Congress did not do so. The presuppositions of our federal system, the pronouncements of the statesmen who shaped this legislation, and the normal meaning of language powerfully counsel against attributing to Congress intrusion into the sphere of criminal law tradition- [325 U.S. 91, 149] ally and naturally reserved for the States alone. When due account is taken of the considerations that have heretofore controlled the political and legal

relations between the States and the National Government, there is not the slightest warrant in the reason of things for torturing language plainly designed for nullifying a claim of acting under a State law that conflicts with the Constitution so as to apply to situations where State law is in conformity with the Constitution and local misconduct is in undisputed violation of that State law. In the absence of clear direction by Congress we should leave to the States the enforcement of their criminal law, and not relieve States of the responsibility for vindicating wrongdoing that is essentially local or weaken the habits of local law enforcement by tempting reliance on federal authority for an occasional unpleasant task of local enforcement.

II. In our view then, the Government's attempt to bring an unjustifiable homicide by local Georgia peace officers within the defined limits of the federal Criminal Code cannot clear the first hurdle of the legal requirement that that which these officers are charged with doing must be done under color of Georgia law.

Since the majority of the Court do not share this conviction that the action of the Georgia peace officers was not perpetrated under color of law, we, too, must consider the constitutionality of 20. All but two members of the Court apparently agree that in so far as 20 purports to subject men to punishment for crime it fails to define what conduct is made criminal. As misuse of the criminal machinery is one of the most potent and familiar instruments of arbitrary government, proper regard for the rational requirement of definiteness in criminal statutes is basic to civil liberties. As such it is included in the constitutional guaranty of due process of law. But four [325 U.S. 91, 150] members of the Court are of the opinion that this plain constitutional principle of definiteness in criminal statutes may be replaced by an elaborate scheme of constitutional exegesis whereby that which Congress has not defined the courts can define from time to time, with varying and conflicting definiteness in the decisions, and that, in any event, an undefined range of conduct may become sufficiently definite if only such undefined conduct is committed 'willfully'.

In subjecting to punishment 'deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States', 20 on its face makes criminal deprivation of the whole range of undefined appeals to the Constitution. Such is the true scope of the forbidden conduct. Its domain is unbounded and therefore too indefinite. Criminal statutes must have more or less specific contours. This has none.

To suggest that the 'right' deprivation of which is made criminal by 20 'has been made specific either by the express terms of the Constitution ... or by decisions interpreting (it)' hardly adds definiteness beyond that of the statute's own terms. What provision is to be deemed 'specific' 'by the express terms of the Constitution' and what not 'specific'? If the First Amendment safeguarding free speech be a 'specific' provision what about the Fourth? 'All unreasonable searches and seizures and absolutely forbidden by the Fourth Amendment.' Nathanson v. United States, 290 U.S. 41, 46 , 54 S.Ct. 11, 13. Surely each is among the 'rights, privileges, or immunities secured or protected by the Constitution', deprivation of which is a crime under 20. In any event, what are the criteria by which to determine what express provisions of the Constitution are 'specific' and what provisions are not 'specific'? And if the terms of 20 in and of themselves are lacking in sufficient definiteness for a criminal statute, restriction within the framework of 'decisions interpret- [325 U.S. 91, 151] ing' the Constitution cannot show the necessary definiteness. The illustrations given in the Court's opinion underline the inescapable vagueness due to the doubts and fluctuating character of decisions interpreting the Constitution.

This intrinsic vagueness of the terms of 20 surely cannot be removed by making the statute applicable only where the defendant has the 'requisite bad purpose'. Does that not amount to saying that the black heart of the defendant enables him to know what are the constitutional rights deprivation of which the

statute forbids, although we as judges are not able to define their classes or their limits, or, at least, are not prepared to state what they are unless it be to say that 20 protects whatever rights the Constitution protects?

Under the construction proposed for 20, in order for a jury to convict, it would be necessary 'to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e.g. the right to be tried by a court rather than by ordeal.' There is no question that Congress could provide for a penalty against deprivation by state officials acting 'under color of any law' of 'the right to be tried by a court rather than by ordeal.' But we cannot restrict the problem raised by 20 to the validity of penalizing a deprivation of this specific constitutional right. We are dealing with the reach of the statute, for Congress has not particularized as the Court now particularizes. Such transforming interpolation is not interpretation. And that is recognized by the sentence just quoted, namely, that the jury in order to convict under 20 must find that an accused 'had the purpose to deprive (another) of a constitutional right', giving this specific constitutional right as 'e.g.,' by way of illustration. Hen e a judge would have to define to the jury what the constitutional rights are deprivation of which is prohibited by 20. If that is a legal question as to which [325 U.S. 91, 152] the jury must take instruction from the court, at least the trial court must be possessed of the means of knowing with sufficient definiteness the range of 'rights' that are 'constitutional'. The court can hardly be helped out in determining that legal question by leaving it to the jury to decide whether the act was 'willfully' committed.

It is not conceivable that this Court would find that a statute cast in the following terms would satisfy the constitutional requirement for definiteness: 'Whoever wilfully commits any act which the Supreme Court of the United States shall find to be a deprivation of any right, privilege, or immunity secured or protected by the Constitution shall be imprisoned not more than, etc.' If such a statute would fall for uncertainty, wherein does 20 as construed by the Court differ and how can it survive?

It was settled early in our history that prosecutions in the federal courts could not be founded on any undefined body of so-called common law. United States v. Hudson, 7 Cranch 32; United States v. Gooding, 12 Wheat. 460. Federal prosecutions must be founded on delineation by Congress of what is made criminal. To base federal prosecutions on the shifting and indeterminate decisions of courts is to sanction prosecutions for crimes based on definitions made by courts. This is tantamount to creating a new body of federal criminal common law.

It cannot be too often emphasized that as basic a difference as any between our notions of law and those of legal systems not founded on Anglo- American conceptions of liberty is that crimes must be defined by the legislature. The legislature does not meet this requirement by issuing a blank check to courts for their retrospective finding that some act done in the past comes within the contingencies and conflicts that inhere in ascertaining the content of the Fourteenth Amendment by 'the gradual process of [325 U.S. 91, 153] judicial inclusion and exclusion.' Davidson v. New Orleans, 96 U.S. 97 , 104. Therefore, to subject to criminal punishment conduct that the court may eventually find to have been within the scope or the limitations of a legal doctrine underlying a decision is to satisfy the vital requirement for definiteness through an appearance of definiteness in the process of constitutional adjudication which every student of law knows not to comport with actuality. What the Constitution requires is a definiteness defined by the legislature, not one argumentatively spelled out through the judicial process which, precisely because it is a process can not avoid incompleteness. A definiteness which requires so much sublety to expound is hardly definite.

It is as novel as it is an inadmissible principle that a criminal statute of indefinite scope can be rendered definite by requiring that a person 'willfully' commit what Congress has not defined but which, if Congress had defined, could constitutionally be outlawed. Of course Congress can prohibit the

deprivation of enumerated constitutional rights. But if Congress makes it a crime to deprive another of any right protected by the Constitution-and that is what 20 does-this Court cannot escape facing decisions as to what constitutional rights are covered by 20 by saying that in any event, whatever they are, they must be taken away 'willfully'. It has not been explained how all the considerations of unconstitutional vagueness which are laid bare in the early part of the Court's opinion evaporate by suggesting that what is otherwise too vaguely defined must be 'willfully' committed.

In the early law an undesired event attributable to a particular person was punished regardless of the state of mind of the actor. The rational development of criminal liability added a mental requirement for criminal culpability, except in a limited class of c ses not here relevant. See United States v. Balint, 258 U.S. 250 , 42 S.Ct. 301. That req- [325 U.S. 91, 154] uisite mental ingredient is expressed in various forms in criminal statutes, of which the word 'willfully' is one of the most common. When a criminal statute prohibits something from being 'willfully' done, 'willfully' never defines the physical conduct or the result the bringing of which to pass is proscribed. 'Willfully' merely adds a certain state of mind as a prerequisite to criminal responsibility for the otherwise proscribed act. If a statute does not satisfy the due-process requirement of giving decent advance notice of what it is which, if happening, will be visited with punishment, so that men may presumably have an opportunity to avoid the happening (see International Harvester Co. v. Kentucky, 234 U.S. 216 , 34 S.Ct. 853; Collins v. Kentucky, 234 U.S. 634 , 34 S. Ct. 924; United States v. L. Cohen Grocery Co., 255 U.S. 81 , 41 S.Ct. 298, 14 A.L.R. 1045; Cline v. Frink Dairy Co., 274 U.S. 445 , 47 S.Ct. 681), then 'willfully' bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable. 'Willfully' doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done 'willfully'. It is true also of a statute that it cannot lift itself up by its bootstraps.

Certainly these considerations of vagueness imply unconstitutionality of the Act at least until 1909. For it was not until 1909, that the word 'willfully' was introduced. But the legislative history of that addition affords no evidence whatever that anybody thought that 'willfully' was added to save the statute from unconstitutionality. The Joint Committee of Congress on the Revision of Laws (which sponsored what became the Criminal Code) gives no such indication, for it did not propose 'willfully'; the reports in neither House of Congress shed any light on the subject, for the bill in neither House proposed that 'willfully' be added; no speech by any one in charge of the [325 U.S. 91, 155] bill in either House sheds any light on the subject; the report of the Conference Committee, from which 'willfully' for the first time emerges, gives no explanation whatever; and the only reference we have is that to which the Court's opinion refers (43 Cong.Rec., p. 3599). And that is an unilluminating remark by Senator Daniel of Virginia, who had no responsibility for the measure and who made the remark in the course of an exchange with Senator Heyburn of Idaho, who was in charge of the measure and who complained of an alleged attitude on the part of Southern members to filibuster against the bill because of the retention of Reconstruction legislation.

All this bears not merely on the significance of 'willfully' in a presumably otherwise unconstitutionally vague statute. It also bears on the fact that, for the purpose of constitutionality, we are dealing not with an old statute that goes back to the Reconstruction days, but only to 1909.

Nor can support be found in the opinions of this Court for the proposition that 'willfully' can make definite prohibitions otherwise indefinite.

In Omaechevarria v. Idaho, 246 U.S. 343 , 38 S.Ct. 323, the Court sustained an Idaho statute prohibiting any person having charge of sheep from allowing them to graze 'upon any range usually

occupied by any cattle grower'. Rev.Codes Idaho, 6872. The statute was attacked under the Due Process Clause in that it failed to provide for the ascertainment of the boundaries of a 'range' or for determining what length of time is necessary to constitute a prior occupation a 'usual' one within the meaning of the Act. This attack upon the Idaho statute was rejected and for the following reasons: 'Men familiar with range conditions and desirous of observing th law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other (grazing) states. This [325 U.S. 91, 156] statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court.' 246 U.S. at page 348, 38 S.Ct. at page 325.

Certainly there is no comparison between a statute employing the concept of a western range and a statute outlawing the whole range of constitutional rights, unascertained if not unascertainable.

To be sure, the opinion of Mr. Justice Brandeis also brought to its support 6314 of Revised Codes of Idaho which provided that 'In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence.' But this is merely an Idaho phrasing of the conventional saw in text-books and decisions dealing with criminal law that there must be a mens rea for every offense. In other words, a guilty state of mind is usually required before one can be punished for an outlawed act. But the definition of the outlawed act is not derived from the state of mind with which it must be committed. All that Mr. Justice Brandeis meant by 'indefiniteness' in the context of this statute was the claim that the statute did not give enough notice as to the act which was outlawed. But notice was given by the common knowledge of what a 'range' was, and for good measure he suggested that under the Act a man would have to know that he was grazing sheep where he had no business to graze them. There is no analogy between the face of this Idaho statute and the face of our statute. The essential difference is that in the Idaho statute the outlawed act was defined; in 20 it is undefined.

In Hygrade Provision Co. v. Sherman, 266 U.S. 497 , 45 S.Ct. 141, New York punished the misrepresentation of meat as 'kosher' or as satisfying 'orthodox Hebrew religious requirements.' Here, too, the objection of indefiniteness was rejected by this Court. The objection bordered on the frivolous. In this case, too, the opinion of the Court, as in the way of opinions, softened the blow by saying that [325 U.S. 91, 157] there was no danger of any one being convicted for not knowing what he was doing, for it required him to have consciousness that he was offering meat as 'kosher' meat when he knew very well that it was not.

Thus in both these cases this Court was saying that the criminal statutes under scrutiny, although very specific, did not expose any innocent person to the hazards of unfair conviction, because not merely did the legislation outlaw specifically defined conduct, but guilty knowledge of such defined criminality was also required. It thereby took the legislation outside the scope of United States v. Balint, 258 U.S. 250 , 42 S.Ct. 301, in which the Court sustained the prosecution of one wholly innocent of knowledge of the act, commission of which the statute explicitly forbade.

This case does not involve denying adequate power to Congress. There is no difficulty in passing effective legislation for the protection of civil rights against improper State action. What we are concerned with here is something basic in a democratic society, namely, the avoidance of the injustice of prohibiting conduct in terms so vague as to make the understanding of what is proscribed a guess-work too difficult for confident judgment even for the judges of the highest Court in the land.

III. By holding, in this case, that State officials who violate State law nevertheless act 'under color of' State law, and by establishing as federal crimes violations of the vast, undisclosed range of the Fourteenth Amendment, this Court now creates new delicate and complicated problems for the

enforcement of the criminal law. The answers given to these problems, in view of the tremendous scope of potential offenses against the Fourteenth Amendment, are bound to produce a confusion detrimental to he administration of criminal justice.

The Government recognizes that 'this is the first case brought before this Court in which Section 20 has been applied [325 U.S. 91, 158] to deprivations of rights secured by the Fourteenth Amendment.' It is not denied that the Government's contention would make a potential offender against this act of any State official who as a judge admitted a confession of crime, or who as judge of a State court of last resort sustained admission of a confession, which we should later hold constitutionally inadmissable, or who as a public service commissioner issued a regulatory order which we should later hold denied due process or who as a municipal officer stopped any conduct we later should hold to be constitutionally protected. The Due Process Clause of the Fourteenth Amendment has a content the scope of which this Court determines only as cases come here from time to time and then not without close division and reversals of position. Such a dubious construction of a criminal statute should not be made unless language compels.

That such a pliable instrument of prosecution is to be feared appears to be recognized by the Government. It urges three safeguards against abuse of the broad powers of prosecution for which it contends. (1) Congress it says will supervise the Department's policies and curb excesses by withdrawal of funds. It surely is casting an impossible burden upon Congress to expect it to police the propriety of prosecutions by the Department of Justice. Nor would such detailed oversight by Congress make for the effective administration of the criminal law. (2) The Government further urges that since prosecutions must be brought in the district where the crime was committed the judge and jurors of that locality can be depended upon to protect against federal interference with state law enforcement. Such a suggestion would, for practical purposes, transfer the functions of this Court, which adjudicate

U.S. Supreme Court

WILLIAMS v. UNITED STATES, 341 U.S. 97 (1951)

341 U.S. 97

WILLIAMS v. UNITED STATES.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.
No. 365.
Argued January 8, 1951.
Decided April 23, 1951.

1. A special police officer who, in his official capacity, by use of force and violence, obtains a confession from a person suspected of crime may be prosecuted under what is now 18 U.S.C. 242, which makes it an offense for any person, under color of law, willfully to subject any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States. Pp. 98-104.

2. Petitioner, a private detective who held a special police officer's card issued by the City of Miami, Fla., and had taken an oath and qualified as a special police officer, was employed by a business corporation to ascertain the identity of thieves who had been stealing its property. Showing his badge and accompanied by a regular policeman, he beat certain suspects and thereby obtained confessions. Held: On the record in this case, petitioner was acting "under color" of law within the meaning of 242, or at least the jury could properly so find. Pp. 99-100.

3. As applied, under the facts of this case, to the denial of rights under the Due Process Clause of the Fourteenth Amendment, 242 is not void for vagueness. Pp. 100-102.

4. Where police take matters into their own hands, seize victims, and beat them until they confess, they

deprive the victims of rights under the Constitution. P. 101.

5. In view of the terms of the indictment, as interpreted by the instructions to the jury, it cannot be said that any issue of vagueness of 242, as construed and applied, is present in this case. Pp. 102-104.

179 F.2d 656, affirmed.

Petitioner was convicted of a violation of what is now 18 U.S.C. 242. The Court of Appeals affirmed. 179 F.2d 656. This Court granted certiorari. 340 U.S. 850 . Affirmed, p. 104. [341 U.S. 97, 98]

Bart A. Riley submitted on brief for petitioner.

Philip Elman argued the cause for the United States. With him on the brief were Solicitor General Perlman, Assistant Attorney General McInerney and Sydney Brodie.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in this case is whether a special police officer who in his official capacity subjects a person suspected of crime to force and violence in order to obtain a confession may be prosecuted under 20 of the Criminal Code, 18 U.S.C. (1946 ed.) 52, now 18 U.S.C. 242.

Section 20 provides in pertinent part:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . shall be fined not more than $1,000, or imprisoned not more than one year, or both."

The facts are these: The Lindsley Lumber Co. suffered numerous thefts and hired petitioner, who operated a detective agency, to ascertain the identity of the thieves. Petitioner held a special police officer's card issued by the City of Miami, Florida, and had taken an oath and qualified as a special police officer. Petitioner and others over a period of three days took four men to a paint shack on the company's premises and used brutal methods to obtain a confession from each of them. A rubber hose, a pistol, a blunt instrument, a sash cord and other implements were used in the project. One man was forced to look at a bright light for fifteen minutes; when he was blinded, he was repeatedly hit with a rubber hose [341 U.S. 97, 99] and a sash cord and finally knocked to the floor. Another was knocked from a chair and hit in the stomach again and again. He was put back in the chair and the procedure was repeated. One was backed against the wall and jammed in the chest with a club. Each was beaten, threatened, and unmercifully punished for several hours until he confessed. One Ford, a policeman, was sent by his superior to lend authority to the proceedings. And petitioner, who committed the assaults, went about flashing his badge.

The indictment charged among other things that petitioner acting under color of law used force to make each victim confess to his guilt and implicate others, and that the victims were denied the right to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the state. Petitioner was found guilty by a jury under instructions which conformed with the rulings of the Court in Screws v. United States, 325 U.S. 91 . The Court of Appeals affirmed. 179 F.2d 656. The case, which is a companion to No. 26, United States v. Williams, ante, p. 70, and No. 134, United States v. Williams, ante, p. 58, decided this day, is here on certiorari. 340 U.S. 850 .

We think it clear that petitioner was acting "under color" of law within the meaning of 20, or at least that the jury could properly so find. We interpreted this phrase of 20 in United States v. Classic, 313 U.S. 299, 326 , "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken `under color of' state law." And see Screws v. United States, supra, 107-111. It is common practice, as we noted in Labor Board v. Jones & Laughlin Co., 331 U.S. 416, 429 , for private guards or detectives to be vested with policemen's powers. We know from the record that that is the policy of Miami, Florida. Moreover, this was an investigation [341 U.S. 97, 100] conducted under the aegis of the State, as evidenced by the fact that a regular police officer was detailed to attend it. We need go no further to conclude that the lower court, to whom we give deference on local law matters, see Gardner v. New Jersey, 329 U.S. 565, 583 , was correct in holding that petitioner was no mere interloper but had a semblance of policeman's power from Florida. There was, therefore, evidence that he acted under authority of Florida law; and the manner of his conduct of the interrogations makes clear that he was asserting the authority granted him and not acting in the role of a private person. In any event, the charge to the jury drew the line between official and unofficial conduct which we explored in Screws v. United States, supra, 111, and gave petitioner all of the protection which "color of" law as used in 20 offers.

The main contention is that the application of 20 so as to sustain a conviction for obtaining a confession by use of force and violence is unconstitutional. The argument is the one that a clear majority of the Court rejected in Screws v. United States, and runs as follows:

Criminal statutes must have an ascertainable standard of guilt or they fall for vagueness. See United States v. Cohen Grocery Co., 255 U.S. 81 ; Winters v. New York, 333 U.S. 507 . Section 20, it is argued, lacks the necessary specificity when rights under the Due Process Clause of the Fourteenth Amendment are involved. We are pointed to the course of decisions by this Court under the Due Process Clause as proof of the vague and fluid standard for "rights, privileges, or immunities secured or protected by the Constitution" as used in 20. We are referred to decisions where we have been closely divided on whether state action violated due process. More specifically we are cited many instances where the Court has been conspicuously in disagreement on the illegal character [341 U.S. 97, 101] of confessions under the Due Process Clause. If the Court cannot agree as to what confessions violate the Fourteenth Amendment, how can one who risks criminal prosecutions for his acts be sure of the standard? Thus it is sought to show that police officers such as petitioner walk on ground far too treacherous for criminal responsibility.

Many criminal statutes might be extended to circumstances so extreme as to make their application unconstitutional. Conversely, as we held in Screws v. United States, a close construction will often save an act from vagueness that is fatal. The present case is as good an illustration as any. It is as plain as a pikestaff that the present confessions would not be allowed in evidence whatever the school of thought concerning the scope and meaning of the Due Process Clause. This is the classic use of force to make a man testify against himself. The result is as plain as if the rack, the wheel, and the thumb screw - the ancient methods of securing evidence by torture (Brown v. Mississippi, 297 U.S. 278, 285 -286; Chambers v. Florida, 309 U.S. 227, 237) - were used to compel the confession. Some day the application of 20 to less obvious methods of coercion may be presented and doubts as to the adequacy of the standard of guilt may be presented. There may be a similar doubt when an officer is tried under 20 for beating a man to death. That was a doubt stirred in the Screws case; and it was the reason we held that the purpose must be plain, the deprivation of the constitutional right willful. But where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court. Hence when officers wring confessions from the accused [341 U.S. 97, 102] by force and violence, they violate some of the most fundamental, basic, and well-established constitutional rights which every citizen enjoys.

Petitioner and his associates acted willfully and purposely; their aim was precisely to deny the protection that the Constitution affords. * It was an arrogant and brutal deprivation of rights which the Constitution specifically guarantees. Section 20 would be denied the high service for which it was designed if rights so palpably plain were denied its protection. Only casuistry could make vague and nebulous what our constitutional scheme makes so clear and specific.

An effort, however, is made to free Williams by an extremely technical construction of the indictment and charge, so as to condemn the application of 20 on the grounds of vagueness.

The indictment charged that petitioners deprived designated persons of rights and privileges secured to them by the Fourteenth Amendment. These deprivations were defined in the indictment to include "illegal" assault and battery. But the meaning of these rights in the context of the indictment was plain, viz. immunity from the use [341 U.S. 97, 103] of force and violence to obtain a confession. Thus count 2 of the indictment charges that the Fourteenth Amendment rights of one Purnell were violated in the following respects:

> ". . . the right and privilege not to be deprived of liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Florida, the right and privilege not to be subjected to punishment without due process of law, the right and privilege to be immune, while in the custody of persons acting under color of the laws of the State of Florida, from illegal assault and battery by any person exercising the authority of said State, and the right and privilege to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Florida; that is to say, on or about the 28th day of March, 1947, the defendants arrested and detained and caused to be arrested and detained the said Frank J. Purnell, Jr., and brought and caused him to be brought to and into a certain building sometimes called a shack on the premises of the Lindsley Lumber Co., at or near 3810 N. W. 17th Avenue, in said City of Miami, Florida, and did there detain the said Frank J. Purnell, Jr., and while he was so detained the defendants did then and there illegally strike, bruise, batter, beat, assault and torture the said Frank J. Purnell, Jr., in order illegally to coerce and force the said Frank J. Purnell, Jr., to make an admission and confession of his guilt in connection with the alleged theft of personal property, alleged to be the property of said Lindsley Lumber Co., and in order illegally to coerce and force the said Frank J. Purnell, Jr., to name and accuse other persons as participants in alleged thefts of personal [341 U.S. 97, 104] property, alleged to be the property of the said Lindsley Lumber Co., and for the purpose of imposing illegal summary punishment upon the said Frank J. Purnell, Jr."

The trial judge in his charge to the jury summarized Count 2 as meaning that the defendants beat Purnell "for the purpose of forcing him to make a confession and for the purpose of imposing illegal summary punishment upon him." He further made clear that the defendants were "not here on trial for a violation of any law of the State of Florida for assault" nor "for assault under any laws of the United States." There cannot be the slightest doubt from the reading of the indictment and charge as a whole that the defendants were charged with and tried for one of the most brutal deprivations of constitutional rights that can be imagined. It therefore strains at technicalities to say that any issue of vagueness of 20 as construed and applied is present in the case. Our concern is to see that substantial justice is done, not to search the record for possible errors which will defeat the great purpose of Congress in enacting 20.

Affirmed.

[Footnote *] The trial judge charged in part on this phase of the case: "The law denies to anyone acting under color of law, statute, ordinance, regulation or custom the right to try a person by ordeal; that is,

for the officer himself to inflict such punishment upon the person as he thinks the person should receive. Now in determining whether this requisite of willful intent was present in this case as to these counts, you gentlemen are entitled to consider all the attendant circumstances; the malice, if any, of the defendants toward these men; the weapon used in the assault, if any; and the character and duration of the investigation, if any, of the assault, if any, and the time and manner in which it was carried out. All these facts and circumstances may be taken into consideration from the evidence that has been submitted for the purpose of determining whether the acts of the defendants were willful and for the deliberate and willful purpose of depriving these men of their Constitutional rights to be tried by a jury just like everyone else."

MR. JUSTICE BLACK dissents.

MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE MINTON, dissenting.

Experience in the effort to apply the doctrine of Screws v. United States, 325 U.S. 91 , leads MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE MINTON to dissent for the reasons set forth in dissent in that case. [341 U.S. 97, 105]

U.S. Supreme Court

JORDAN v. DE GEORGE, 341 U.S. 223 (1951)

341 U.S. 223

JORDAN, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION, v. DE GEORGE.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.
No. 348.
Argued March 5, 1951.
Decided May 7, 1951.

Conspiracy to defraud the United States of taxes on distilled spirits is a "crime involving moral turpitude" within the meaning of 19 (a) of the Immigration Act of 1917, 8 U.S.C. 155 (a), which requires the deportation of any alien who is sentenced more than once to imprisonment for one year or more because of conviction in this country of any such crime. Pp. 223-232.

(a) Crimes in which fraud is an ingredient have always been regarded as involving moral turpitude. Pp. 227-229, 232.

(b) The phrase "crime involving moral turpitude" does not lack sufficiently definite standards to justify this deportation proceeding; and the statute is not unconstitutional for vagueness. Pp. 229-232.

183 F.2d 768, reversed.

In a habeas corpus proceeding to challenge the validity of a deportation order, the District Court dismissed the petition. The Court of Appeals reversed. 183 F.2d 768. This Court granted certiorari. 340

U.S. 890 . Reversed, p. 232.

John F. Davis argued the cause for petitioner. With him on the brief were Solicitor General Perlman, Assistant Attorney General McInerney, L. Paul Winings and Charles Gordon.

Thomas F. Dolan argued the cause for respondent. With him on the brief was Sherlock J. Hartnett.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

This case presents only one question: whether conspiracy to defraud the United States of taxes on distilled [341 U.S. 223, 224] spirits is a "crime involving moral turpitude" within the meaning of 19 (a) of the Immigration Act of 1917. 1

Respondent, a native and citizen of Italy, has lived continuously in the United States since he entered this country in 1921. 2 In 1937, respondent was indicted under 18 U.S.C. 88 3 for conspiring with seven other defendants to violate twelve sections of the Internal Revenue Code. The indictment specifically charged him with possessing whiskey and alcohol "with intent to sell it in fraud of law and evade the tax thereon." He was further accused of removing and concealing liquor "with intent to defraud the United States of the tax thereon." 4 After pleading guilty, respondent was sentenced to imprisonment in a federal penitentiary for a term of one year and one day.

Respondent served his sentence under this conviction, and was released from custody. Less than a year later, he returned to his former activities and in December 1939, he was indicted again with eight other defendants for violating the same federal statutes. He was charged with conspiring to "unlawfully, knowingly, and willfully [341 U.S. 223, 225] defraud the United States of tax on distilled spirits." 5 After being tried and found guilty in 1941, he was sentenced to imprisonment for two years.

While serving his sentence under this second conviction, deportation proceedings were commenced against the respondent under 19 (a) of the Immigration Act which provides:

> ". . . any alien . . . who is hereafter sentenced more than once to such a term of imprisonment [one year or more] because of conviction in this country of any crime involving moral turpitude, committed at any time after entry . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . ." 6

After continued hearings and consideration of the case by the Commissioner of Immigration and Naturalization and by the Board of Immigration Appeals, respondent was ordered to be deported in January 1946, on the ground that he had twice been convicted and sentenced to terms of one year or more of crimes involving moral turpitude. 7 Deportation was deferred from time to time [341 U.S. 223, 226] at respondent's request until 1949, when the District Director of Immigration and Naturalization moved to execute the warrant of deportation.

Respondent then sought habeas corpus in the District Court, claiming that the deportation order was invalid because the crimes of which he had been convicted did not involve moral turpitude. The District Court held a hearing, and dismissed the petition. The Court of Appeals reversed the order of the District Court and ordered that the respondent be discharged. 183 F.2d 768 (1950). The Court of Appeals stated that "crimes involving moral turpitude," as those words were used in the Immigration Act, "were intended to include only crimes of violence, or crimes which are commonly thought of as involving baseness, vileness or depravity. Such a classification does not include the crime of evading the payment of tax on liquor, nor of conspiring to evade that tax." 183 F.2d at 772. We granted certiorari to review

the decision, 340 U.S. 890 (1950), as conflicting with decisions of the courts of appeals in other circuits.

This Court has interpreted the provision of the statute before us "to authorize deportation only where an alien having committed a crime involving moral turpitude and having been convicted and sentenced, once again commits a crime of that nature and is convicted and sentenced for it." Fong Haw Tan v. Phelan, 333 U.S. 6, 9 -10 (1948). Respondent has on two separate occasions been convicted of the same crime, conspiracy to defraud the United States of taxes on distilled spirits. Therefore, our inquiry in this case is narrowed to determining whether this particular offense involves moral turpitude. Whether [341 U.S. 223, 227] or not certain other offenses involve moral turpitude is irrelevant and beside the point.

The term "moral turpitude" has deep roots in the law. The presence of moral turpitude has been used as a test in a variety of situations, including legislation governing the disbarment of attorneys 8 and the revocation of medical licenses. 9 Moral turpitude also has found judicial employment as a criterion in disqualifying and impeaching witnesses, 10 in determining the measure of contribution between joint tort-feasors, 11 and in deciding whether certain language is slanderous. 12

In deciding the case before the Court, we look to the manner in which the term "moral turpitude" has been applied by judicial decision. Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude. In the construction of the specific section of the Statute before us, a court of appeals has stated that fraud has ordinarily been the test to determine whether crimes not of the gravest character involve moral turpitude. United States ex rel. Berlandi v. Reimer, 113 F.2d 429 (1940).

In every deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude. This has been true in a variety of situations [341 U.S. 223, 228] involving fraudulent conduct: obtaining goods under fraudulent pretenses, Bermann v. Reimer, 123 F.2d 331 (1941); conspiracy to defraud by deceit and falsehood, Mercer v. Lence, 96 F.2d 122 (1938); forgery with intent to defraud, United States ex rel. Popoff v. Reimer, 79 F.2d 513 (1935); using the mails to defraud, Ponzi v. Ward, 7 F. Supp. 736 (1934); execution of chattel mortgage with intent to defraud, United States ex rel. Millard v. Tuttle, 46 F.2d 342 (1930); concealing assets in bankruptcy, United States ex rel. Medich v. Burmaster, 24 F.2d 57 (1928); issuing checks with intent to defraud, United States ex rel. Portada v. Day, 16 F.2d 328 (1926). In the state courts, crimes involving fraud have universally been held to involve moral turpitude. 13

Moreover, there have been two other decisions by courts of appeals prior to the decision now under review on the question of whether the particular offense before us in this case involves moral turpitude within the meaning of 19 (a) of the Immigration Act. In United States ex rel. Berlandi v. Reimer, 113 F.2d 429 (1940), and Maita v. Haff, 116 F.2d 337 (1940), courts of appeals specifically decided that the crime of conspiracy to violate the internal revenue laws by possessing and concealing distilled spirits with intent to defraud the United States of taxes involves moral turpitude. Furthermore, in Guarneri v. Kessler, 98 F.{4)d 580 [341 U.S. 223, 229] (1938), a court of appeals held that the crime of smuggling alcohol into the United States with intent to defraud the United States involves moral turpitude.

In view of these decisions, it can be concluded that fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude. It is therefore clear, under an unbroken course of judicial decisions, that the crime of conspiring to defraud the United States is a "crime involving moral turpitude."

But it has been suggested that the phrase "crime involving moral turpitude" lacks sufficiently definite standards to justify this deportation proceeding and that the statute before us is therefore unconstitutional for vagueness. Under this view, no crime, however grave, could be regarded as falling within the meaning of the term "moral turpitude." The question of vagueness was not raised by the parties nor argued before this Court.

It is significant that the phrase has been part of the immigration laws for more than sixty years. 14 As discussed [341 U.S. 223, 230] above, the phrase "crime involving moral turpitude" has also been used for many years as a criterion in a variety of other statutes. No case has been decided holding that the phrase is vague, nor are we able to find any trace of judicial expression which hints that the phrase is so meaningless as to be a deprivation of due process.

Furthermore, this Court has itself construed the phrase "crime involving moral turpitude." In United States ex rel. Volpe v. Smith, Director of Immigration, 289 U.S. 422 (1933), the Court interpreted the same section of the Immigration Statute now before us. There, an alien had been convicted of counterfeiting government obligations with intent to defraud, and one question of the case was whether the crime of counterfeiting involved moral turpitude. This question was raised by the parties and discussed in the briefs. The Court treated the question without hesitation, stating that the crime of counterfeiting obligations of the United States was "plainly a crime involving moral turpitude." 289 U.S. at 423. (Emphasis supplied.)

The essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their conduct. Williams v. United States, 341 U.S. 97 , decided April 23, 1951; Screws v. United States, 325 U.S. 91, 103 -104 (1945). This Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law. Lanzetta v. New Jersey, 306 U.S. 451 (1939); United States v. Cohen Grocery Co., 255 U.S. 81 (1921). It should be emphasized that this statute does not declare certain conduct to be criminal. Its function is to apprise aliens of the consequences which follow after conviction and sentence of the requisite two crimes. [341 U.S. 223, 231]

Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation. The Court has stated that "deportation is a drastic measure and at times the equivalent of banishment or exile . . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." Fong Haw Tan v. Phelan, supra, at 10. We shall, therefore, test this statute under the established criteria of the "void for vagueness" doctrine.

We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. United States v. Wurzbach, 280 U.S. 396, 399 (1930). Impossible standards of specificity are not required. 15 United States v. Petrillo, 332 U.S. 1 (1947). The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured [341 U.S. 223, 232] by common understanding and practices. Connally v. General Construction Co., 269 U.S. 385 (1926).

We conclude that this test has been satisfied here. Whatever else the phrase "crime involving moral turpitude" may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. We have recently stated that doubt as to the adequacy of a standard in less obvious cases does not render that standard unconstitutional for vagueness. See Williams v. United States, supra. But there is no such doubt present

in this case. Fraud is the touchstone by which this case should be judged. The phrase "crime involving moral turpitude" has without exception been construed to embrace fraudulent conduct. We therefore decide that Congress sufficiently forewarned respondent that the statutory consequence of twice conspiring to defraud the United States is deportation.

Reversed.

Footnotes

[Footnote 1] 39 Stat. 889, as amended, 8 U.S.C. 155 (a).

[Footnote 2] Less than three years after entering the United States, respondent was convicted for transporting liquor and sentenced to a term in the reformatory. In 1931, he was convicted and fined for transferring license plates.

[Footnote 3] 35 Stat. 1096, now 18 U.S.C. 371:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

[Footnote 4] These charges were based upon 26 U.S.C. (1934 ed.) 1155 (f), 1440 and 1441.

[Footnote 5] The record establishes that respondent was a large-scale violator engaged in a sizable business. The second indictment alone charged him with possessing 4,675 gallons of alcohol and an undetermined quantity of distilled spirits. At the rate of $2.25 a gallon then in effect, the tax on the alcohol alone would have been over $10,000.

[Footnote 6] 39 Stat. 889, as amended, 8 U.S.C. 155 (a).

[Footnote 7] Section 19 (a) further provides: ". . . The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter . . . ." 39 [341 U.S. 223, 226] Stat. 889, as amended, 8 U.S.C. 155 (a). The record does not indicate that respondent has been pardoned, nor that the sentencing judge recommended that he not be deported, nor that respondent requested that such recommendation be made.

[Footnote 8] In re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L. R. A. 856 (1897). Bartos v. United States District Court, 19 F.2d 722 (1927); see Bradway, Moral Turpitude as the Criterion of Offenses that Justify Disbarment, 24 Cal. L. Rev. 9-27.

[Footnote 9] Fort v. Brinkley, 87 Ark. 400, 404, 112 S. W. 1084, 1085 (1908). "It seems clearly deducible from the above cited authorities that the words `moral turpitude' had a positive and fixed meaning at common law . . . ."

[Footnote 10] 3 Wigmore, Evidence (3d ed.), 540; cases are collected at 40 A. L. R. 1049, and 71 A.

L. R. 219.

[Footnote 11] Fidelity & Cas. Co. v. Christenson, 183 Minn. 182, 236 N. W. 618 (1931).

[Footnote 12] Baxter v. Mohr, 37 Misc. 833, 76 N. Y. S. 982 (1902).

[Footnote 13] State decisions have held that the following crimes involve moral turpitude: passing a check with intent to defraud, Bancroft v. Board of Governors of Registered Dentists of Oklahoma, 202 Okla. 108, 210 P.2d 666 (1949); using the mails to defraud, Neibling v. Terry, 352 Mo. 396, 177 S. W. 2d 502 (1944), In re Comyns, 132 Wash. 391, 232 P. 269 (1925); obtaining money and property by false and fraudulent pretenses, In re Needham, 364 Ill. 65, 4 N. E. 2d 19 (1936); possessing counterfeit money with intent to defraud, Fort v. Brinkley, 87 Ark. 400, 112 S. W. 1084 (1908). One state court has specifically held that the wilful evasion of federal income taxes constitutes moral turpitude. Louisiana State Bar Assn. v. Steiner, 204 La. 1073, 16 So.2d 843 (1944).

[Footnote 14] The term "moral turpitude" first appeared in the Act of March 3, 1891, 26 Stat. 1084, which directed the exclusion of "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." Similar language was reenacted in the Statutes of 1903 and 1907. 2, Act of March 3, 1903, 32 Stat. 1213; 2, Act of Feb. 20, 1907, 34 Stat. 898. It has been suggested that the fact that this phrase has been used in the Immigration Laws for over sixty years has no weight in upholding its constitutionality. Of course, the mere existence of a statute for over sixty years does not provide immunity from constitutional attack. We have recently held an equally ancient statute unconstitutional for vagueness. Winters v. New York, 333 U.S. 507 (1948). There, a statute, which employed vague terminology wholly lacking in common law background or interpretation, was aimed at limiting rights of free speech. Even in the Winters case, however, several dissenting members of this Court were of the view that the venerability of the statute was an element to be considered in deciding the question of vagueness.

[Footnote 15] The phrase "crime involving moral turpitude" presents no greater uncertainty or difficulty than language found in many other statutes repeatedly sanctioned by the Court. The Sherman Act provides the most obvious example, "restraint of trade" as construed to mean "unreasonable or undue restraint of trade," Nash v. United States, 229 U.S. 373 (1913). Compare other statutory language which has survived attack under the vagueness doctrine in this Court: "in excess of the number of employees needed by such licensee to perform actual services," United States v. Petrillo, 332 U.S. 1 (1947); "any offensive, derisive or annoying word," Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); "connected with or related to the national defense," Gorin v. United States, 312 U.S. 19 (1941); "psychopathic personality," Minnesota v. Probate Court, 309 U.S. 270 (1940); "wilfully overvalues any security," Kay v. United States, 303 U.S. 1 (1938); "fair and open competition," Old Dearborn Co. v. Seagram Corp., 299 U.S. 183 (1936); "reasonable variations shall be permitted," United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932); "unreasonable waste of natural gas," Bandini Petroleum [341 U.S. 223, 232] Co. v. Superior Court, 284 U.S. 8 (1931); "political purposes," United States v. Wurzbach, 280 U.S. 396 (1930); "range usually occupied by any cattle grower," Omaechevarria v. Idaho, 246 U.S. 343 (1918).

MR. JUSTICE JACKSON, dissenting.

Respondent, because he is an alien, and because he has been twice convicted of crimes the Court holds involve "moral turpitude," is punished with a life sentence of banishment in addition to the punishment which a citizen would suffer for the identical acts. MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER and I cannot agree, because we believe the phrase "crime involving moral turpitude,"

as found in the Immigration Act, 1 has no sufficiently definite meaning to be a constitutional standard for deportation. [341 U.S. 223, 233]

Respondent migrated to this country from his native Italy in 1921 at the age of seventeen. Here he has lived twenty-nine years, is married to an American citizen, and his son, citizen by birth, is now a university student. In May, 1938, he pleaded guilty to a charge of conspiracy to violate the Internal Revenue Code 2 and was sentenced to imprisonment for one year and one day. On June 6, 1941, he was convicted of a second violation and sentenced to imprisonment for two years. During the decade since, he has not been arrested or charged with any law violation. While still in prison, however, deportation proceedings were instituted against him, resulting in 1946, in a warrant for arrest and deportation.

By habeas corpus proceedings, De George challenged the deportation order upon the ground that his is not a crime "involving moral turpitude." The District Court thought it did and dismissed the writ. The Court of Appeals for the Seventh Circuit thought it did not and reversed. 3 There is a conflict among the circuits. 4

What the Government seeks, and what the Court cannot give, is a basic definition of "moral turpitude" to guide administrators and lower courts.

The uncertainties of this statute do not originate in contrariety of judicial opinion. Congress knowingly conceived it in confusion. During the hearings of the House Committee on Immigration, out of which eventually came the Act of 1917 in controversy, clear warning of its deficiencies was sounded and never denied.

> "Mr. SABATH. . . . [Y]ou know that a crime involving moral turpitude has not been defined. No [341 U.S. 223, 234] one can really say what is meant by saying a crime involving moral turpitude. Under some circumstances, larceny is considered a crime involving moral turpitude - that is, stealing. We have laws in some States under which picking out a chunk of coal on a railroad track is considered larceny or stealing. In some States it is considered a felony. Some States hold that every felony is a crime involving moral turpitude. In some places the stealing of a watermelon or a chicken is larceny. In some States the amount is not stated. Of course, if the larceny is of an article, or a thing which is less than $20 in value, it is a misdemeanor in some States, but in other States there is no distinction." 5

Despite this notice, Congress did not see fit to state what meaning it attributes to the phrase "crime involving moral turpitude." It is not one which has settled significance from being words of art in the profession. If we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant, for turpitude alone means moral wickedness or depravity 6 and moral turpitude seems to mean little more than morally immoral. 7 The Government confesses that [341 U.S. 223, 235] it is "a term that is not clearly defined," and says: "The various definitions of moral turpitude provide no exact test by which we can classify the specific offenses here involved."

Except for the Court's opinion, there appears to be universal recognition that we have here an undefined and undefinable standard. The parties agree that the phrase is ambiguous and have proposed a variety of tests to reduce the abstract provision of this statute to some concrete meaning.

It is proposed by respondent, with strong support in legislative history, that Congress had in mind only crimes of violence. 8 If the Court should adopt this constructions, the statute becomes sufficiently definite, and, of course, would not reach the crimes of the respondent.

The Government suggests seriousness of the crime as a test and says the statute is one by which it is "sought to reach the confirmed criminal, whose criminality has been revealed in two serious penal offenses." (Italics supplied.) But we cannot, and the Court does not, take seriousness [341 U.S. 223, 236] as a test of turpitude. All offenses denounced by Congress, prosecuted by the Executive, and convicted by the courts, must be deemed in some degree "serious" or law enforcement would be a frivolous enterprise. However, use of qualifying words must mean that not all statutory offenses are subject to the taint of turpitude. The higher degrees of criminal gravity are commonly classified as felonies, the lower ones as misdemeanors. If the Act contemplated that repetition of any serious crime would be grounds for deportation, it would have been simple and intelligible to have mentioned felonies. But the language used indicates that there are felonies which are not included and perhaps that some misdemeanors are. We cannot see that seriousness affords any standard of guidance.

Respondent suggests here, and the Government has on other occasions taken the position, that the traditional distinction between crimes mala prohibita and those mala in se will afford a key for the inclusions and exclusions of this statute. 9 But we cannot overlook that what crimes [341 U.S. 223, 237] belong in which category has been the subject of controversy for years. 10 This classification comes to us from common law, which in its early history freely blended religious conceptions of sin with legal conceptions of crime. This statute seems to revert to that practice.

The Government, however, offers the mala prohibita, mala in se doctrine here in slightly different verbiage for determining the nature of these crimes. It says: "Essentially, they must be measured against the moral standards that prevail in contemporary society to determine whether the violations are generally considered essentially immoral."

Can we accept "the moral standards that prevail in contemporary society" as a sufficiently definite standard for the purposes of the Act? This is a large country and [341 U.S. 223, 238] acts that are regarded as criminal in some states are lawful in others. We suspect that moral standards which prevail as to possession or sale of liquor that has evaded tax may not be uniform in all parts of the country, nor in all levels of "contemporary society." How should we ascertain the moral sentiments of masses of persons on any better basis than a guess? 11

The Court seems no more convinced than are we by the Government's attempts to reduce these nebulous abstractions to a concrete working rule, but to sustain this particular deportation it improvises another which fails to convince us. Its thesis is (1) that the statute is sixty years old, (2) that state courts have used the same concept for various purposes, and (3) that fraud imports turpitude into any offense.

1. It is something less than accurate to imply that in any sense relevant to this issue this phrase has been "part of the immigration laws for more than sixty years." 12

But, in any event, venerability of a vague phrase may be an argument for its validity when the passing years [341 U.S. 223, 239] have by administration practice or judicial construction served to make it clear as a word of legal art. To be sure, the phrase in its present context has been on the statute books since 1917. It has never before been in issue before this Court. Reliance today on United States v. Smith, 289 U.S. 422 , is unwarranted. There the Court assumed without analysis or discussion a proposition not seriously relied on. There have, however, been something like fifty cases in lower courts which applied this phrase. No one can read this body of opinions and feel that its application represents a satisfying, rational process. If any consistent pattern of application or consensus of meaning could be distilled from judicial decision, neither the Government nor the Court spells it out. Irrationality is inherent in the task of translating the religious and ethical connotations of the phrase into legal decisions. The lower court cases seem to rest, as we feel this Court's decision does, upon the moral reactions of particular judges to

particular offenses. What is striking about the opinions in these "moral turpitude" cases is the wearisome repetition of cliches attempting to define "moral turpitude," usually a quotation from Bouvier. But the guiding line seems to have no relation to the result reached. The chief impression from the cases is the caprice of the judgments. 13 How many aliens have [341 U.S. 223, 240] been deported who would not have been had some other judge heard their cases, and vice versa, we may only guess. That is not government by law.

2. The use of the phrase by state courts for various civil proceedings affords no teaching for federal courts. The Federal Government has no common-law crimes and the judges are not permitted to define crimes by decision, for they rest solely in statute. 14 Nor are we persuaded that the state courts have been able to divest the phrase of its inherent ambiguities and vagueness.

3. The Court concludes that fraud is "a contaminating component in any crime" and imports "moral turpitude." The fraud involved here is nonpayment of a tax. The alien possessed and apparently trafficked in liquor without paying the Government its tax. That, of course, is a fraud on the revenues. But those who deplore [341 U.S. 223, 241] the traffic regard it as much an exhibition of moral turpitude for the Government to share its revenues as for respondents to withhold them. Those others who enjoy the traffic are not notable for scruples as to whether liquor has a law-abiding pedigree. So far as this offense is concerned with whiskey, it is not particularly un-American, and we see no reason to strain to make the penalty for the same act so much more severe in the case of an alien "bootlegger" than it is in the case of a native "moonshiner." I have never discovered that disregard of the Nation's liquor taxes excluded a citizen from our best society and I see no reason why it should banish an alien from our worst.

But it is said he has cheated the revenues and the total is computed in high figures. If "moral turpitude" depends on the amount involved, respondent is probably entitled to a place in its higher brackets. Whether by popular test the magnitude of the fraud would be an extenuating or an aggravating circumstance, we do not know. We would suppose the basic morality of a fraud on the revenues would be the same for petty as for great cheats. But we are not aware of any keen sentiment of revulsion against one who is a little niggardly on a customs declaration or who evades a sales tax, a local cigarette tax, or fails to keep his account square with a parking meter. But perhaps what shocks is not the offense so much as a conviction.

We should not forget that criminality is one thing - a matter of law - and that morality, ethics and religious teachings are another. Their relations have puzzled the best of men. Assassination, for example, whose criminality no one doubts, has been the subject of serious debate as to its morality. 15 This does not make crime less criminal, [341 U.S. 223, 242] but it shows on what treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case. We usually end up by condemning all that we personally disapprove and for no better reason than that we disapprove it. In fact, what better reason is there? Uniformity and equal protection of the law can come only from a statutory definition of fairly stable and confined bounds.

A different question might be before us had Congress indicated that the determination by the Board of Immigration Appeals that a crime involves "moral turpitude" should be given the weight usually attributed to administrative determinations. But that is not the case, nor have the courts so interpreted the statute. In the fifty-odd cases examined, no weight was attached to the decision of that question by the Board, the court in each case making its own independent analysis and conclusion. Apparently, Congress expected the courts to determine the various crimes includable in this vague phrase. 16 We think that not a judicial function. [341 U.S. 223, 243]

A resident alien is entitled to due process of law. 17 We have said that deportation is equivalent to banishment or exile. 18 Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation. If respondent were a citizen, his aggregate sentences of three years and a day would have been served long since and his punishment ended. But because of his alienage, he is about to begin a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty and we believe due process of law requires standards for imposing it as definite and certain as those for conviction of crime.

Strangely enough, the Court does not even pay the tribute of a citation to its recent decision in Musser v. Utah, 333 U.S. 95 , where a majority joined in vacating and remanding a decision which had sustained convictions under a Utah statute which made criminal a conspiracy "to commit acts injurious to public morals." We said of that statute: "Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order." 333 U.S. at 97. For my part, I am unable to rationalize why "acts injurious to public morals" is vague if "moral turpitude" is not. And on remand, the Supreme Court of [341 U.S. 223, 244] Utah said: "We are . . . unable to place a construction on these words which limits their meaning beyond their general meaning." State v. Musser, ___ Utah ___, ___, 223 P.2d 193, 194 (Oct. 20, 1950).

In Winters v. New York, 333 U.S. 507 , the Court directly struck down for indefiniteness a statute sixty years on the statute books of New York and indirectly like statutes long on the books of half the States of the Union. 19 The New York statute made a person guilty of a misdemeanor who in any way distributes "any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; . . . ." 333 U.S. at 508. That statute was certainly no more vague than the one before us now and had not caused even a fraction of the judicial conflict that "moral turpitude" has.

In Winters v. New York, supra, the Court rested heavily on Connally v. General Construction Co., 269 U.S. 385 , in which this Court found unconstitutional indefiniteness in a statute calling for "the current rate of per diem wages in the locality" where contractors were doing government work. (The sanction of the statute was a relatively small money fine, or a maximum of six months, though of course a corporate violator could only be subjected to the fine.) The test by which vagueness was to be determined according to the Connally case was that legislation uses terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." 269 U.S. at 391. It would seem to be difficult to find a more striking instance [341 U.S. 223, 245] than we have here of such a phrase since it requires even judges to guess and permits them to differ.

We do not disagree with a policy of extreme reluctance to adjudge a congressional Act unconstitutional. But we do not here question the power of Congress to define deportable conduct. We only question the power of administrative officers and courts to decree deportation until Congress has given an intelligible definition of deportable conduct.

[Footnote 1] Section 19 (a) of the Immigration Act of February 5, 1917, 39 Stat. 889, as amended, 8 U.S.C. 155 (a).

[Footnote 2] 53 Stat. 401, 26 U.S.C. 3321.

[Footnote 3] 183 F.2d 768.

[Footnote 4] United States ex rel. Berlandi v. Reimer, 113 F.2d 429 (C. A. 2d Cir.) and Maita v. Haff, 116 F.2d 337 (C. A. 9th Cir.) hold this crime involves moral turpitude. Cf. Guarneri v. Kessler, 98 F.2d 580 (C. A. 5th Cir.), cert. denied, 305 U.S. 648 .

[Footnote 5] Hearings before House Committee on Immigration and Naturalization on H. R. 10384, 64th Cong., 1st Sess. 8.

[Footnote 6] Black's Law Dictionary defines turpitude as: "[I]nherent baseness or vileness of principle or action; shameful wickedness; depravity." An example of its use alone to signify immorality may be taken from Macaulay, whose most bitter critics would admit he was a master of the English word. "[T]he artists corrupted the spectators, and the spectators the artists, till the turpitude of the drama became such as must astonish all who are not aware that extreme relaxation is the natural effect of extreme restraint." History of England, Vol. I (1849 ed.), p. 374.

[Footnote 7] Bouvier's Law Dictionary, Rawles Third Revision, defines "moral turpitude" as "An act of baseness, vileness or depravity in the private [341 U.S. 223, 235] and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

[Footnote 8] "Mr. WOODS. . . . I would make provisions to get rid of an alien in this country who comes here and commits felonies and burglaries, holds you up on the streets, and commits crimes against our daughters, because we do not want that kind of alien here, and they have no right to be here. . . . The rule is that if we get a man in this country who has not become a citizen, who knocks down people in the street, who murders or who attempts to murder people, who burglarizes our houses with blackjack and revolver, who attacks our women in the city, those people should not be here. . . ." Hearings before House Committee on Immigration and Naturalization on H. R. 10384, 64th Cong., 1st Sess. 14. Mr. Woods was not an ordinary witness. As the then Police Commissioner of New York City, his testimony appears to have been most influential in this provision of the 1917 Act.

[Footnote 9] In Volume II of Administrative Decisions under Immigration and Nationality Laws of the United States, p. 141, there is an administrative interpretation by the Department then having the administration of the Act. In an opinion on a deportation proceeding decided by the Board June 26, 1944, and approved by the Attorney General July 12, 1944, the statement was quoted with approval:

> "`A crime involving moral turpitude may be either a felony or misdemeanor, existing at common law or created by statute, and is an act or omission which is malum in se and not merely malum prohibitum; which is actuated by malice or committed with knowledge and intention and not done innocently or [without advertence] or reflection; which is so far contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons; but which is not the outcome merely of natural passion, of animal spirits, of infirmity of temper, of weakness of character, of mistaken principles, unaccompanied by a vicious motive or a corrupt mind. [Italics supplied.]"

[Footnote 10] Crimes mala in se, according to Blackstone, are offenses against "[t]hose rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, . . . the worship of God, the maintenance of children, and the like." They are "crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled mala in se (crimes in

themselves), such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature." According to Blackstone, crimes mala prohibita "enjoin only positive duties, and forbid only such things as are not mala in se . . . without any intermixture of moral guilt." Illustrative of this type of crime are "exercising trades without serving an apprenticeship thereto, for not burying the dead in woollen, for not performing the statute-work on the public roads, and for innumerable other positive misdemeanors. Now these prohibitory laws do not make the transgression a moral offense, or sin: the only obligation in conscience is to submit to the penalty, if levied." "[A]nd his conscience will be clear, which ever side of the alternative he thinks proper to embrace." Cooley's Blackstone, Vol. I (4th ed.), pp. [*]54, [*]58. Of this, J. W. C. Turner says: "Some of the weak points in this doctrine were detected by an early editor of Blackstone, and in modern times it is generally regarded as quite discredited." The Modern Approach to Criminal Law 221. And cf. United States v. Balint, 258 U.S. 250 .

[Footnote 11] As Judge Learned Hand put it, in attempting to resolve a similar conflict: "Even though we could take a poll, it would not be enough merely to count heads, without any appraisal of the voters. A majority of the votes of those in prisons and brothels, for instance, ought scarcely to outweigh the votes of accredited churchgoers. Nor can we see any reason to suppose that the opinion of clergymen would be a more reliable estimate than our own." Schmidt v. United States, 177 F.2d 450, 451 (C. A. 2d Cir.).

[Footnote 12] We are construing the Act of 1917 and not the earlier Immigration Acts, those of March 3, 1891, 26 Stat. 1084; March 3, 1903, 32 Stat. 1213; February 20, 1907, 34 Stat. 898. All of these prior statutes allowed deportation for conviction for every felony or crime, which meant for conviction of every crime involving a sentence of not less than a year. It then added another deportable category, to wit, misdemeanors involving moral turpitude. In addition to all crimes involving a sentence of a year or more, the earlier Acts carved out a small category of petty offenses, when they were of a kind [341 U.S. 223, 239] "involving moral turpitude," i.e., offenses even though carrying a small sentence having a manifestation of intrinsic badness. But that creates a very different problem from requiring us to discriminate among all offenses, felonies and misdemeanors on the basis of intrinsic badness.

[Footnote 13] How unguiding the guide "moral turpitude" is, in relation to the enforcement of the Act of 1917, can be shown by three pairs of cases:

(1) In Tillinghast v. Edmead, 31 F.2d 81, the First Circuit, over a pungent dissent, held that a conviction for petty larceny by an "ignorant colored girl" working as a domestic was an offense involving "moral turpitude." On the other hand, in United States v. Uhl, [341 U.S. 223, 240] 107 F.2d 399, the Second Circuit held that conviction for possession of a jimmy, with intent to use it in the commission of some crime, the jimmy being "adapted, designed and commonly used for the commission of the crimes of burglary and larceny" was not for an offense involving "moral turpitude."

(2) In United States v. Day, 15 F.2d 391 (D.C. S. D. N. Y.), Judge Knox held that an assault in the second degree, though by one intoxicated, constituted a crime involving "moral turpitude." But in United States v. Zimmerman, 71 F. Supp. 534 (D.C. E. D. Pa.), Judge Maris held that jail-breaking by a bank robber awaiting trial was not an offense involving "moral turpitude."

(3) In Rousseau v. Weedin, 284 F. 565, the Ninth Circuit held that one who was convicted of being a "jointist" under a Washington statute prohibiting "the unlawful sale of intoxicating liquor" was deportable as having committed a crime involving "moral turpitude." While in Hampton v. Wong Ging, 299 F. 289, it held (with the same two judges sitting in both cases) that a conviction under the Narcotic Act was not of itself a crime of "moral turpitude," since the record did not show whether the offense for

which conviction was had was "of such an aggravated character as to involve moral turpitude."

[Footnote 14] Viereck v. United States, 318 U.S. 236, 241 .

[Footnote 15] John Stuart Mill, referring to the morality of assassination of political usurpers, passed by examination of the subject of Tyrannicide, as follows: "I shall content myself with saying that the subject [341 U.S. 223, 242] has been at all times one of the open questions of morals; that the act of a private citizen in striking down a criminal, who, by raising himself above the law, has placed himself beyond the reach of legal punishment or control, has been accounted by whole nations, and by some of the best and wisest of men, not a crime, but an act of exalted virtue; and that, right or wrong, it is not of the nature of assassination, but of civil war." Mill, On Liberty and Considerations on Representative Government, p. 14, n. 1.

The vice of leaving statutes that inflict penalties so vague in definition that they throw the judge in each case back upon his own notions is the unconscious tendency to

> "Compound for Sins they are inclin'd to, By damning those they have no mind to."

Butler, Hudibras, Vol. I (1772 ed.), 28.

[Footnote 16] However, a statement by the Chairman of the Committee on Immigration and Naturalization may suggest another explanation: "My recollection is that the Supreme Court of the United States has [341 U.S. 223, 243] determined what crimes are crimes involving moral turpitude under the Federal law, and if so, that would control, I should think." Hearings before House Committee on Immigration and Naturalization on H. R. 10384, 64th Cong., 1st Sess. 8.

[Footnote 17] Wong Yang Sung v. McGrath, 339 U.S. 33 .

[Footnote 18] Fong Haw Tan v. Phelan, 333 U.S. 6, 10 .

[Footnote 19] The Court's reference to the dissent in the Winters case would seem to make questionable its present force as an authority. [341 U.S. 223, 246]

334 Pa. 211, 5 A.2d 899, and Leff v. N. Kaufman's Inc., 1941, 342 Pa. 342, 20 A.2d 786, 139 A.L.R. 267. Applying these principles to the case at bar, I find that defendant corporation has placed in issue the question whether anyone other than plaintiff Hertz has asserted a claim to the certificate since September 23, 1946. In view of the specific jury finding in the Court of Common Pleas of Erie County, Pennsylvania, that Hertz is not the sole and absolute owner of the stock in his own right, I believe it is not unreasonable under the circumstances for defendant corporation to require plaintiffs to prove the ownership of the stock before the registration is transferred.

[4, 5] The motion of defendant for judgment on the pleadings is based primarily upon the theory that the same question has been already decided in the Court of Common Pleas of Erie County. The short answer to this contention is that, as far as is known to this Court, final judgment has never been entered in that proceeding. Moreover, the nature of the relief requested here differs, and Horvitz has joined formally as a plaintiff in the request for relief. It is obvious that defendant corporation cannot legally both deny transfer of registration and retain the certificate which Hertz surrendered to it. The other grounds assigned by defendant need not be discussed in detail.

register transfer of the security, the issuer must register the transfer as requested if

"(a) the security is fully endorsed for transfer in conformity with the following section; and

"(b) the issuer has no knowledge of the unrightfulness of the transfer and no duty to inquire into its rightfulness (Section 8–403); and

"(c) proof is submitted of payment or waiver of any taxes applicable to the transfer or of consent to transfer.

"(2) Where the issuer has registered a transfer pursuant to this section, he is not liable to any person suffering loss as a result of such registration."

"Section 8–403. Duty to Inquire Into Rightfulness of Transfer.

"(1) Where a security presented for registration is fully endorsed for transfer, the issuer is under no duty to inquire into the rightfulness of the transfer unless he has notice of another claim to an interest in the security.

"(2) The fact that the issuer has notice that the registered owner holds the security for a third person or that the security is registered in the name of a fiduciary does not create a duty of inquiry into the rightfulness of the transfer. If, however, the issuer has notice that the transfer is to the fiduciary in his individual capacity or that the proceeds of the purchase have been placed in the individual account of the fiduciary or are made payable in cash or to the fiduciary individually or otherwise has reason to know that such proceeds are being used or that the transaction is for the individual benefit of the fiduciary, the issuer is under a duty to inquire into the rightfulness of the transfer." Uniform Commercial Code, American Law Institute, Final Text Edition, November, 1951.

UNITED STATES v. DE CADENA et al.

No. 10728.

United States District Court, N. D. California, N. D.

June 6, 1952.

Defendants were indicted for conspiracy to violate immigration laws of the United States, and they moved to dismiss. The District Court, Oliver J. Carter, J., held that statutory provision that any person, including owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who knowing that "he" is in United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law is subject to certain penalties is void under the "void for vagueness doctrine" as a denial of due process.

Motion granted.

1. Criminal Law ⇐13

The essential purpose of the "void for vagueness doctrine" with respect to interpretation of a criminal statute, is to warn individuals of the criminal consequences of their conduct.

See publication Words and Phrases, for other judicial constructions and definitions of "Void for Vagueness Doctrine".

2. Constitutional Law ⇐258

The due process clause of the 5th amendment to the federal constitution requires that criminal statutes give due notice that an act has been made criminal before it is done. U.S.C.A.Const. Amend. 5.

3. Constitutional Law ⇐258

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. U.S.C.A. Const. Amend. 5.

4. Constitutional Law ⇐258

A statute challenged as repugnant to the due process clause of the fifth amendment must be tested on its face, since it is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. U.S.C.A. Const. Amend. 5.

5. Statutes ⇐241(1)

Traditionally, criminal statutes have been strictly construed in favor of the defendant, but that rule is only one of several factors to be considered as an aid in determining the meaning of the penal laws.

6. Statutes ⇐181(1)

One of the factors in considering criminal statutes is the intent which Congress had in enacting the statutes.

7. Constitutional Law ⇐48

Where Congress, in proper exercise of its powers, has exhibited clearly the purpose to proscribe certain conduct as criminal, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evident purpose.

8. Constitutional Law ⇐70(1)

The presumption of validity of a criminal statute is subject to limitation that judiciary cannot perform a legislative function in order to bring about the presumed validity.

9. Constitutional Law ⇐258

Though criminal statute be construed in sense which best harmonizes with manifest intent and purpose of Congress, and evils sought to be overcome be given special attention, and meaning of statute be sought from a consideration of it as a whole, terms thereof must so clearly define what acts clearly are forbidden that men of common intelligence can determine what actions are criminal and what are not, and otherwise the statute is so uncertain as to be unconstitutional. U.S.C.A.Const. Amend. 5.

10. Constitutional Law ⇐70(1)

Ambiguities in a criminal statute are not to be resolved so as to embrace offenses not clearly within the statute.

11. Aliens ⇐40
Constitutional Law ⇐258

Statutory provision that any person, including owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who knowing that "he" is in United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than 3 years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law is subject to certain penalties is void under the "void for vagueness doctrine" as a denial of due process. Immigration Act of 1917, § 8, as amended, 8 U.S.C.A. § 144(a) (2); U.S.C.A.Const. Amend. 5.

Thomas W. Martin, Asst. U. S. Atty. Northern D. of California, Northern Div., Oroville, Cal., for plaintiff.

William T. Sweigert, San Francisco, Cal., for Ramon Marquez.

Francis B. Dillon, Sacramento, Cal., for defendants Josefa Holquin de Cadena, Dionicio Morales-Heredia, and Jose Martinez-Carrillo.

OLIVER J. CARTER, District Judge.

Defendants stand indicted for an alleged conspiracy to violate the immigration laws of the United States, to wit: Section 8 of the Immigration Act of 1917, as amended, Public Law 283, 82nd Congress, 2nd Ses-

sion, approved March 20, 1952; 8 U.S.C.A. § 144. The indictment is drawn upon the theory that among the acts proscribed by the statute is that of knowingly transporting within the United States an alien not duly admitted to the United States by an immigration officer, with the knowledge that such alien last entered the United States less than three years prior thereto.[1]

[1] At the conclusion of the government's case defendants moved to dismiss the indictment upon the ground that the statute in question is unconstitutional under the test of the "void for vagueness"[2] doctrine. This constitutional attack is based upon the premise that the meaning of this statute is so uncertain as to render the statute void.[3]

[2, 3] The due process clause of the Fifth Amendment requires that "criminal statutes * * * give due notice that an act has been made criminal before it is done * * *." Jordan v. De George, 341 U.S. 223, 230, 71 S.Ct. 703, 707, 95 L.Ed. 886. "Every man should be able to know with certainty when he is committing a crime." United States v. Reese, 92 U.S. 214, 220, 23 L.Ed. 563. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of the due process of law. Connally v. General Construction Company, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322.

[4] A statute challenged as repugnant to the due process clause of the Fifth Amendment must be tested "on its face"; because it is "the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888; United States v. Petrillo, 332 U.S. 1, 6–7, 67 S.Ct. 1538, 91 L.Ed. 1877; cf. Dennis v. United States, 341 U.S. 494, 515, 71 S.Ct. 857, 95 L.Ed. 1137, Opinion of Vinson, C. J.

[5–8] Traditionally criminal statutes have been strictly construed in favor of the defendant,[4] but that rule is only one of several factors to be considered as an aid in determining the meaning of penal laws.[5]

1. The indictment charges that the defendants named therein did "* * * conspire to commit an offense against the United States of America, and the laws thereof, the offense being to knowingly transport within the United States Pascuala Flores-Flores knowing said Pascuala Flores-Flores to be an alien, not duly admitted to the United States by an Immigration Officer, and knowing that the date of entry of said Pascuala Flores-Flores to the United States was less than three years prior to the date of said transportation, and knowing that said transportation was in furtherance of the violation of the immigration laws of the United States by said Pascuala Flores-Flores."

2. For origin of the "void for vagueness" doctrine, see Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888; for development of doctrine, see Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495; Williams v. United States, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774; Jordan v. De George, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886.

3. The essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their conduct. Jordan v. De George, 341 U.S. 223, 230, 71 S.Ct. 703, 95 L.Ed. 886; Williams v. United States, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774; Screws v. United States, 325 U.S. 91, 103–104, 65 S.Ct. 1031, 89 L.Ed. 1495. Criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law. Jordan v. De George, 341 U.S. 223, 230, 71 S.Ct. 703, 95 L.Ed. 886; Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888; United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516.

4. See United States v. Wiltberger, 5 Wheat. 76, 95, 18 U.S. 76, 95, 5 L.Ed. 37; United States v. Fruit Growers' Express Co., 279 U.S. 363, 49 S.Ct. 374, 73 L.Ed. 739; McBoyle v. United States, 283 U.S. 25, 51 S.Ct. 340, 75 L.Ed. 816; 3 Sutherland on Statutory Construction, p. 49, Sec. 5604. For a discussion of the historical development of the rule, see Hall, Strict or Liberal Construction of Penal Statutes (1935) 48 Harv.L.Rev. 748, 750.

5. See 3 Sutherland on Statutory Construction, p. 56, Sec. 5606.

Another factor equally as important in construing such statutes is the intent which Congress had in enacting the statute. United States v. Corbett, 215 U.S. 233, 30 S.Ct. 81, 54 L.Ed. 173; Holy Trinity Church v. United States, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226. Where Congress, in the proper exercise of its powers, has exhibited clearly the purpose to proscribe certain conduct as criminal, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evident purpose. United States v. Brown, 333 U.S. 18, 68 S.Ct. 376, 92 L.Ed. 442. However, in United States v. Evans, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823, it was pointed out that the presumption of validity is subject to the limitation that the judiciary cannot perform a legislative function in order to bring about the presumed validity. The court said, 333 U.S. at page 486, 68 S.Ct. at page 636:

"But strong as the presumption of validity may be, there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions. But given some legislative edict, the margin between the necessary and proper judicial function of construing statutes and that of filling gaps so large that doing so becomes essentially legislative, is necessarily one of degree."

The challenged statute as amended March 20, 1952 reads as follows:

"Sec. 8. (a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

"(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

"(2) Knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

"(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

"(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of any alien, including an alien seaman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

The particular acts charged in the indictment (transportation of an alien unlawfully in the United States) show an attempt by the government to bring this case within the provisions of paragraph (2) of subsection (a) of Section 8.

The defendants contend that subsection (a) as a whole, and paragraph (2) thereof in particular, is vague, indefinite, uncertain and unintelligible. They point out that paragraphs (1), (2), (3) and (4) are in the disjunctive by reason of the use of the word "or" at the end of paragraph (3),

and that as now punctuated, the language of paragraphs (1), (2) and (3) standing alone are meaningless, and taken collectively or separately define no offense. The government argues that Congress must have intended that each of the first three paragraphs of subsection (a) be read in conjunction with paragraph (4) thereof, and particularly with that portion thereof commencing with the words "* * * any alien, including an alien seaman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States * * *". In fact, the government concedes that only by so reading the statute can paragraph (2) be held to define a crime. Ignoring the problems of punctuation, the government contends that the court should read the statute in the following manner:

> "Sec. 8. (a) Any person * * * who—* * * (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law; * * * (4) * * * any alien, including an alien seaman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony * * *."

This contention must be based on the premise that it was the intention of Congress, by enacting the Amendment to broaden the scope of Section 8(a), to proscribe as criminal the transporting and moving of aliens unlawfully in the United States.[6] This purpose is indicated by the House Report[7] on this Amendment, which reads:

"Section 1 of this bill is designed to amend section 8 of the Immigration Act of 1917, as amended, in light of the decision of the Supreme Court of the United States in the case of United States v. Evans, 333 U.S. 483 [68 S.Ct. 634, 92 L.Ed. 823] * * *.

"Subsection (a) of this bill is designed to overcome the deficiencies in existing section 8 as illustrated by the Supreme Court decision and will also strengthen the statute generally. The accomplishment of this purpose was the first recommendation made by the President in his aforesaid message (H.Doc. 192, 82nd Cong., 1st sess.).

"Paragraph (1) of subsection (a) of section 1 is substantially the same as existing law found in section 8 of the Immigration Act of 1917 (8 U.S.C. 144). Paragraph (2) of the same subdivision, punishing the transporters of illegally entering aliens would require knowledge that the transported alien was in the United States in violation of law and would also require proof or reasonable grounds for belief that the transported alien had entered the United States within the preceding 3 years."

[9] Though the statute be construed in the sense which best harmonizes with the manifest intent and purpose of Congress,[8] and the evils sought to be overcome be given special attention,[9] and the meaning of the statute be sought from a consideration of it as a whole,[10] the terms thereof must so clearly define what acts are forbidden that men of common intelligence can determine what actions are criminal and what are not. Otherwise the statute is so uncertain as to be unconstitutional. Connally v. General Construction Company, supra.

Assuming, but not deciding, that the court could remedy the obvious errors in

6. For a history of Section 8(a) prior to the 1952 Amendment, see discussion in United States v. Evans, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823.

7. House of Representatives Report No. 1377, Eighty-second Congress, 2nd Session.

8. United States v. Betteridge, D.C.N.D. Ohio, 43 F.Supp. 53, 56.

9. Janof v. Newsom, 60 App.D.C. 291, 53 F.2d 149, 152.

10. Crabb v. Zerbst, 5 Cir., 99 F.2d 562, 564.

punctuation which are patent upon the face of the statute, so that the section would read as proposed by the government, the sense of paragraph (2) still could not be reduced to one certain meaning. The phrase, "knowing that *he* is in the United States in violation of law, and knowing or having reasonable grounds to believe that *his* last entry into the United States occurred less than three years prior thereto," (emphasis added) is not clear as to which word is the antecedent of the words "he" and "his." This portion of the statute is susceptible of two radically different interpretations, depending upon the determination of whether these words refer to "any person" or "any alien." The sequence of the words used in the statute indicate that "he" and "his" refer to "any person" and not to "any alien." Such an interpretation would require as a necessary element of the crime, which paragraph (2) purports to define, that the transporter as well as the alien transported be unlawfully in the United States. The legislative history of the Amendment which added the words of paragraph (2) to the statute fails to indicate that Congress intended to so narrowly define the crime. However, there is nothing therein which clearly rules out the possibility that such an intention may have existed. This possibility of interpretation is further fortified by the language of paragraph (1), which reads:

> "(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, *by himself* or through another, to bring into or land in the United States, by any means of transportation or otherwise;" (emphasis added.)

The words "by himself" obviously refer to the transporter ("any person") and not to the person transported ("any alien").

The factual situation in this case aptly illustrates the incongruous result which could occur as a result of the application of the statute as it is now written. The defendants fall into three groups, namely, those who are aliens and admittedly in this country in violation of law; those who are aliens and who claim to be lawfully in this country; and one who claims to be a citizen of this country. It is therefore possible that the statute would make criminal the acts of the defendants unlawfully in this country and at the same time not apply to the other defendants, even though all of them had performed the same acts with the same intention.

The other phrase in paragraph (2) which presents doubts as to its meaning is "in furtherance of such violations of law." The problem is again one of reference. Which violation of law is meant—that of the transported ("any alien") or of the transporter ("any person")?

[10, 11] These phrases present patent ambiguities. Ambiguities are not to be resolved so as to embrace offenses not clearly within the law. Krichman v. United States, 256 U.S. 363, 367, 41 S.Ct. 514, 65 L.Ed. 992. The words of a criminal statute must be such as to leave no reasonable doubt as to the intention of the legislature, and where such doubt exists the liberty of the defendant is favored. United States v. Corbett, 215 U.S. 233, 30 S.Ct. 81, 54 L.Ed. 173.

This court is mindful that the amendment to the statute here considered was prompted in part to remedy defects pointed out by the judiciary.[11] The provisions of paragraph (2), however, are new to the statute and were not adopted to cure the disclosed defect. Consequently, it is not now decided that any of the numbered paragraphs of subsection (a), other than paragraph (2), are so uncertain as to be void.

[11] But, paragraph (2), whether read alone, or in conjunction with paragraph (4), lacks sufficient certainty to meet the requirements of due process of the fifth Amendment. It is not for the courts to resolve this uncertainty. It is better for Congress, and more in accord with its function, to revise the statute than for the courts to guess at the revision it would make. United States v. Evans, supra.

For the reasons stated, defendants' motion to dismiss should be and the same is hereby granted.

11. Statute held not to include offense of harboring or concealing an alien. United States v. Evans, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823.

§ 7701. Definitions

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(1) Person

The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

(2) Partnership and partner

The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

(3) Corporation

The term "corporation" includes associations, joint-stock companies, and insurance companies.

(4) Domestic

The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State unless, in the case of a partnership, the Secretary provides otherwise by regulations.

(5) Foreign

The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.

(6) Fiduciary

The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

(7) Stock

The term "stock" includes shares in an association, joint-stock company, or insurance company.

(8) Shareholder

The term "shareholder" includes a member in an association, joint-stock company, or insurance company.

(9) United States

The term "United States" when used in a geographical sense includes only the States and the District of Columbia.

(10) State

The term "State" shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title.

(11) Secretary of the Treasury and Secretary

(A) Secretary of the Treasury

The term "Secretary of the Treasury" means the Secretary of the Treasury, personally, and shall not include any delegate of his.

(B) Secretary

The term "Secretary" means the Secretary of the Treasury or his delegate.

(12) Delegate

(A) In general

The term "or his delegate"—

(i) when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context; and

(ii) when used with reference to any other official of the United States, shall be similarly construed.

(B) Performance of certain functions in Guam or American Samoa

The term "delegate," in relation to the performance of functions in Guam or American Samoa with respect to the taxes imposed by chapters 1, 2, and 21, also includes any officer or employee of any other department or agency of the United States, or of any possession thereof, duly authorized by the Secretary (directly, or indirectly by one or more redelegations of authority) to perform such functions.

(13) Commissioner

The term "Commissioner" means the Commissioner of Internal Revenue.

(14) Taxpayer

The term "taxpayer" means any person subject to any internal revenue tax.

(15) Military or naval forces and armed forces of the United States

The term "military or naval forces of the United States" and the term "Armed Forces of the United States" each includes all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, and each term also includes the Coast Guard. The members of such forces include commissioned officers and personnel below the grade of commissioned officers in such forces.

(16) Withholding agent

The term "withholding agent" means any person required to deduct and withhold any tax under the provisions of section 1441, 1442, 1443, or 1461.

(17) Husband and wife

As used in sections 682 and 2516, if the husband and wife therein referred to are divorced, wherever appropriate to the meaning of such sections, the term "wife" shall be read "former wife" and the term "husband" shall be read "former husband"; and, if the payments described in such sections are made by or on behalf of the wife or former wife to the husband or former husband instead of vice versa, wherever appropriate to the meaning of such sections, the term "husband" shall be read "wife" and the term "wife" shall be read "husband."

(18) International organization

The term "international organization" means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f).

(19) Domestic building and loan association

The term "domestic building and loan association" means a domestic building and loan association, a domestic savings and loan association, and a Federal savings and loan association—

(A) which either (i) is an insured institution within the meaning of section 401(a) [1] of the National Housing Act (12 U.S.C., sec. 1724 (a)), or (ii) is subject by law to supervision and examination by State or Federal authority having supervision over such associations;

(B) the business of which consists principally of acquiring the savings of the public and investing in loans; and

(C) at least 60 percent of the amount of the total assets of which (at the close of the taxable year) consists of—

(i) cash,

(ii) obligations of the United States or of a State or political subdivision thereof, and stock or obligations of a corporation which is an instrumentality of the United States or of a State or political

subdivision thereof, but not including obligations the interest on which is excludable from gross income under section 103,

(iii) certificates of deposit in, or obligations of, a corporation organized under a State law which specifically authorizes such corporation to insure the deposits or share accounts of member associations,

(iv) loans secured by a deposit or share of a member,

(v) loans (including redeemable ground rents, as defined in section 1055) secured by an interest in real property which is (or, from the proceeds of the loan, will become) residential real property or real property used primarily for church purposes, loans made for the improvement of residential real property or real property used primarily for church purposes, provided that for purposes of this clause, residential real property shall include single or multifamily dwellings, facilities in residential developments dedicated to public use or property used on a nonprofit basis for residents, and mobile homes not used on a transient basis,

(vi) loans secured by an interest in real property located within an urban renewal area to be developed for predominantly residential use under an urban renewal plan approved by the Secretary of Housing and Urban Development under part A or part B of title I of the Housing Act of 1949, as amended, or located within any area covered by a program eligible for assistance under section 103 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended, and loans made for the improvement of any such real property,

(vii) loans secured by an interest in educational, health, or welfare institutions or facilities, including structures designed or used primarily for residential purposes for students, residents, and persons under care, employees, or members of the staff of such institutions or facilities,

(viii) property acquired through the liquidation of defaulted loans described in clause (v), (vi), or (vii),

(ix) loans made for the payment of expenses of college or university education or vocational training, in accordance with such regulations as may be prescribed by the Secretary,

(x) property used by the association in the conduct of the business described in subparagraph (B), and

(xi) any regular or residual interest in a REMIC, but only in the proportion which the assets of such REMIC consist of property described in any of the preceding clauses of this subparagraph; except that if 95 percent or more of the assets of such REMIC are assets described in clauses (i) through (x), the entire interest in the REMIC shall qualify.

At the election of the taxpayer, the percentage specified in this subparagraph shall be applied on the basis of the average assets outstanding during the taxable year, in lieu of the close of the taxable year, computed under regulations prescribed by the Secretary. For purposes of clause (v), if a multifamily structure securing a loan is used in part for nonresidential purposes, the entire loan is deemed a residential real property loan if the planned residential use exceeds 80 percent of the property's planned use (determined as of the time the loan is made). For purposes of clause (v), loans made to finance the acquisition or development of land shall be deemed to be loans

secured by an interest in residential real property if, under regulations prescribed by the Secretary, there is reasonable assurance that the property will become residential real property within a period of 3 years from the date of acquisition of such land; but this sentence shall not apply for any taxable year unless, within such 3-year period, such land becomes residential real property. For purposes of determining whether any interest in a REMIC qualifies under clause (xi), any regular interest in another REMIC held by such REMIC shall be treated as a loan described in a preceding clause under principles similar to the principles of clause (xi); except that, if such REMIC's are part of a tiered structure, they shall be treated as 1 REMIC for purposes of clause (xi).

(20) Employee

For the purpose of applying the provisions of section 79 with respect to group-term life insurance purchased for employees, for the purpose of applying the provisions of sections 104, 105, and 106 with respect to accident and health insurance or accident and health plans, and for the purpose of applying the provisions of subtitle A with respect to contributions to or under a stock bonus, pension, profit-sharing, or annuity plan, and with respect to distributions under such a plan, or by a trust forming part of such a plan, and for purposes of applying section 125 with respect to cafeteria plans, the term "employee" shall include a full-time life insurance salesman who is considered an employee for the purpose of chapter 21, or in the case of services performed before January 1, 1951, who would be considered an employee if his services were performed during 1951.

(21) Levy

The term "levy" includes the power of distraint and seizure by any means.

(22) Attorney General

The term "Attorney General" means the Attorney General of the United States.

(23) Taxable year

The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the taxable income is computed under subtitle A. "Taxable year" means, in the case of a return made for a fractional part of a year under the provisions of subtitle A or under regulations prescribed by the Secretary, the period for which such return is made.

(24) Fiscal year

The term "fiscal year" means an accounting period of 12 months ending on the last day of any month other than December.

(25) Paid or incurred, paid or accrued

The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the taxable income is computed under subtitle A.

(26) Trade or business

The term "trade or business" includes the performance of the functions of a public office.

(27) Tax Court

The term "Tax Court" means the United States Tax Court.

(28) Other terms

Any term used in this subtitle with respect to the application of, or in connection with, the provisions of any other subtitle of this title shall have the same meaning as in such provisions.

(29) Internal Revenue Code

The term "Internal Revenue Code of 1986" means this title, and the term "Internal Revenue Code of 1939" means the Internal Revenue Code enacted February 10, 1939, as amended.

(30) United States person

The term "United States person" means—

(A) a citizen or resident of the United States,

(B) a domestic partnership,

(C) a domestic corporation,

(D) any estate (other than a foreign estate, within the meaning of paragraph (31)), and

(E) any trust if—

(i) a court within the United States is able to exercise primary supervision over the administration of the trust, and

(ii) one or more United States persons have the authority to control all substantial decisions of the trust.

(31) Foreign estate or trust

(A) Foreign estate

The term "foreign estate" means an estate the income of which, from sources without the United States which is not effectively connected with the conduct of a trade or business within the United States, is not includible in gross income under subtitle A.

(B) Foreign trust

The term "foreign trust" means any trust other than a trust described in subparagraph (E) of paragraph (30).

(32) Cooperative bank

The term "cooperative bank" means an institution without capital stock organized and operated for mutual purposes and without profit, which—

(A) either—

(i) is an insured institution within the meaning of section 401 (a) [2] of the National Housing Act (12 U.S.C., sec. 1724 (a)), or

(ii) is subject by law to supervision and examination by State or Federal authority having supervision over such institutions, and

(B) meets the requirements of subparagraphs (B) and (C) of paragraph (19) of this subsection (relating to definition of domestic building and loan association).

In determining whether an institution meets the requirements referred to

in subparagraph (B) of this paragraph, any reference to an association or to a domestic building and loan association contained in paragraph (19) shall be deemed to be a reference to such institution.

(33) Regulated public utility

The term "regulated public utility" means—

(A) A corporation engaged in the furnishing or sale of—

(i) electric energy, gas, water, or sewerage disposal services, or

(ii) transportation (not included in subparagraph (C)) on an intrastate, suburban, municipal, or interurban electric railroad, on an intrastate, municipal, or suburban trackless trolley system, or on a municipal or suburban bus system, or

(iii) transportation (not included in clause (ii)) by motor vehicle—

if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof, by an agency or instrumentality of the United States, by a public service or public utility commission or other similar body of the District of Columbia or of any State or political subdivision thereof, or by a foreign country or an agency or instrumentality or political subdivision thereof.

(B) A corporation engaged as a common carrier in the furnishing or sale of transportation of gas by pipe line, if subject to the jurisdiction of the Federal Energy Regulatory Commission.

(C) A corporation engaged as a common carrier

(i) in the furnishing or sale of transportation by railroad, if subject to the jurisdiction of the Surface Transportation Board, or

(ii) in the furnishing or sale of transportation of oil or other petroleum products (including shale oil) by pipe line, if subject to the jurisdiction of the Federal Energy Regulatory Commission or if the rates for such furnishing or sale are subject to the jurisdiction of a public service or public utility commission or other similar body of the District of Columbia or of any State.

(D) A corporation engaged in the furnishing or sale of telephone or telegraph service, if the rates for such furnishing or sale meet the requirements of subparagraph (A).

(E) A corporation engaged in the furnishing or sale of transportation as a common carrier by air, subject to the jurisdiction of the Secretary of Transportation.

(F) A corporation engaged in the furnishing or sale of transportation by a water carrier subject to jurisdiction under subchapter II of chapter 135 of title 49.

(G) A rail carrier subject to part A of subtitle IV of title 49, if

(i) substantially all of its railroad properties have been leased to another such railroad corporation or corporations by an agreement or agreements entered into before January 1, 1954,

(ii) each lease is for a term of more than 20 years, and

(iii) at least 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from such leases and from sources described in subparagraphs (A) through (F), inclusive. For purposes of the preceding sentence, an agreement for lease of railroad properties entered into before January 1, 1954, shall be

considered to be a lease including such term as the total number of years of such agreement may, unless sooner terminated, be renewed or continued under the terms of the agreement, and any such renewal or continuance under such agreement shall be considered part of the lease entered into before January 1, 1954.

(H) A common parent corporation which is a common carrier by railroad subject to part A of subtitle IV of title 49 if at least 80 percent of its gross income (computed without regard to capital gains or losses) is derived directly or indirectly from sources described in subparagraphs (A) through (F), inclusive. For purposes of the preceding sentence, dividends and interest, and income from leases described in subparagraph (G), received from a regulated public utility shall be considered as derived from sources described in subparagraphs (A) through (F), inclusive, if the regulated public utility is a member of an affiliated group (as defined in section 1504) which includes the common parent corporation.

The term "regulated public utility" does not (except as provided in subparagraphs (G) and (H)) include a corporation described in subparagraphs (A) through (F), inclusive, unless 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from sources described in subparagraphs (A) through (F), inclusive. If the taxpayer establishes to the satisfaction of the Secretary that (i) its revenue from regulated rates described in subparagraph (A) or (D) and its revenue derived from unregulated rates are derived from the operation of a single interconnected and coordinated system or from the operation of more than one such system, and (ii) the unregulated rates have been and are substantially as favorable to users and consumers as are the regulated rates, then such revenue from such unregulated rates shall be considered, for purposes of the preceding sentence, as income derived from sources described in subparagraph (A) or (D).

[(34) Repealed. Pub. L. 98–369, div. A, title IV, §●4112(b)(11), July 18, 1984, 98 Stat. 792]

(35) Enrolled actuary

The term "enrolled actuary" means a person who is enrolled by the Joint Board for the Enrollment of Actuaries established under subtitle C of the title III of the Employee Retirement Income Security Act of 1974.

(36) Income tax return preparer

(A) In general

The term "income tax return preparer" means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by subtitle A or any claim for refund of tax imposed by subtitle A. For purposes of the preceding sentence, the preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund.

(B) Exceptions

A person shall not be an "income tax return preparer" merely because such person—

(i) furnishes typing, reproducing, or other mechanical assistance,

(ii) prepares a return or claim for refund of the employer (or of an officer or employee of the employer) by whom he is regularly and continuously employed,

(iii) prepares as a fiduciary a return or claim for refund for any person, or

(iv) prepares a claim for refund for a taxpayer in response to any notice of deficiency issued to such taxpayer or in response to any waiver of restriction after the commencement of an audit of such taxpayer or another taxpayer if a determination in such audit of such other taxpayer directly or indirectly affects the tax liability of such taxpayer.

(37) Individual retirement plan

The term "individual retirement plan" means—

(A) an individual retirement account described in section 408 (a), and

(B) an individual retirement annuity described in section 408 (b).

(38) Joint return

The term "joint return" means a single return made jointly under section 6013 by a husband and wife.

(39) Persons residing outside United States

If any citizen or resident of the United States does not reside in (and is not found in) any United States judicial district, such citizen or resident shall be treated as residing in the District of Columbia for purposes of any provision of this title relating to—

(A) jurisdiction of courts, or

(B) enforcement of summons.

(40) Indian tribal government

(A) In general

The term "Indian tribal government" means the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary, after consultation with the Secretary of the Interior, to exercise governmental functions.

(B) Special rule for Alaska Natives

No determination under subparagraph (A) with respect to Alaska Natives shall grant or defer any status or powers other than those enumerated in section 7871. Nothing in the Indian Tribal Governmental Tax Status Act of 1982, or in the amendments made thereby, shall validate or invalidate any claim by Alaska Natives of sovereign authority over lands or people.

(41) TIN

The term "TIN" means the identifying number assigned to a person under section 6109.

(42) Substituted basis property

The term "substituted basis property" means property which is—

(A) transferred basis property, or

(B) exchanged basis property.

(43) Transferred basis property

The term "transferred basis property" means property having a basis determined under any provision of subtitle A (or under any corresponding provision of prior income tax law) providing that the basis shall be determined in whole or in part by reference to the basis in the hands of the donor, grantor, or other transferor.

(44) Exchanged basis property

The term "exchanged basis property" means property having a basis determined under any provision of subtitle A (or under any corresponding provision of prior income tax law) providing that the basis shall be determined in whole or in part by reference to other property held at any time by the person for whom the basis is to be determined.

(45) Nonrecognition transaction

The term "nonrecognition transaction" means any disposition of property in a transaction in which gain or loss is not recognized in whole or in part for purposes of subtitle A.

(46) Determination of whether there is a collective bargaining agreement

In determining whether there is a collective bargaining agreement between employee representatives and 1 or more employers, the term "employee representatives" shall not include any organization more than one-half of the members of which are employees who are owners, officers, or executives of the employer. An agreement shall not be treated as a collective bargaining agreement unless it is a bona fide agreement between bona fide employee representatives and 1 or more employers.

(47) Executor

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent.

(48) Off-highway vehicles

(A) Off-highway transportation vehicles

(i) In general A vehicle shall not be treated as a highway vehicle if such vehicle is specially designed for the primary function of transporting a particular type of load other than over the public highway and because of this special design such vehicle's capability to transport a load over the public highway is substantially limited or impaired.

(ii) Determination of vehicle's design For purposes of clause (i), a vehicle's design is determined solely on the basis of its physical characteristics.

(iii) Determination of substantial limitation or impairment For purposes of clause (i), in determining whether substantial limitation or impairment exists, account may be taken of factors such as the size of the vehicle, whether such vehicle is subject to the licensing, safety, and other requirements applicable to highway vehicles, and whether such vehicle can transport a load at a sustained speed of at least 25 miles per hour. It is immaterial that a vehicle can transport a greater load off the public highway than such vehicle is permitted to transport over the public highway.

(B) Nontransportation trailers and semitrailers

A trailer or semitrailer shall not be treated as a highway vehicle if it is specially designed to function only as an enclosed stationary shelter for the carrying on of an off-highway function at an off-highway site.

(b) Definition of resident alien and nonresident alien

(1) In general

For purposes of this title (other than subtitle B)—

(A) Resident alien

An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):

(i) Lawfully admitted for permanent residence Such individual is a lawful permanent resident of the United States at any time during such calendar year.

(ii) Substantial presence test Such individual meets the substantial presence test of paragraph (3).

(iii) First year election Such individual makes the election provided in paragraph (4).

(B) Nonresident alien

An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A)).

(2) Special rules for first and last year of residency

(A) First year of residency

(i) In general If an alien individual is a resident of the United States under paragraph (1)(A) with respect to any calendar year, but was not a resident of the United States at any time during the preceding calendar year, such alien individual shall be treated as a resident of the United States only for the portion of such calendar year which begins on the residency starting date.

(ii) Residency starting date for individuals lawfully admitted for permanent residence In the case of an individual who is a lawfully permanent resident of the United States at any time during the calendar year, but does not meet the substantial presence test of paragraph (3), the residency starting date shall be the first day in such calendar year on which he was present in the United States while a lawful permanent resident of the United States.

(iii) Residency starting date for individuals meeting substantial presence test In the case of an individual who meets the substantial presence test of paragraph (3) with respect to any calendar year, the residency starting date shall be the first day during such calendar year on which the individual is present in the United States.

(iv) Residency starting date for individuals making first year election In the case of an individual who makes the election provided by paragraph (4) with respect to any calendar year, the residency starting date shall be the 1st day during such calendar year on which the individual is treated as a resident of the United

States under that paragraph.

(B) Last year of residency

An alien individual shall not be treated as a resident of the United States during a portion of any calendar year if—

(i) such portion is after the last day in such calendar year on which the individual was present in the United States (or, in the case of an individual described in paragraph (1)(A)(i), the last day on which he was so described),

(ii) during such portion the individual has a closer connection to a foreign country than to the United States, and

(iii) the individual is not a resident of the United States at any time during the next calendar year.

(C) Certain nominal presence disregarded

(i) In general For purposes of subparagraphs (A)(iii) and (B), an individual shall not be treated as present in the United States during any period for which the individual establishes that he has a closer connection to a foreign country than to the United States.

(ii) Not more than 10 days disregarded Clause (i) shall not apply to more than 10 days on which the individual is present in the United States.

(3) Substantial presence test

(A) In general

Except as otherwise provided in this paragraph, an individual meets the substantial presence test of this paragraph with respect to any calendar year (hereinafter in this subsection referred to as the "current year") if—

(i) such individual was present in the United States on at least 31 days during the calendar year, and

(ii) the sum of the number of days on which such individual was present in the United States during the current year and the 2 preceding calendar years (when multiplied by the applicable multiplier determined under the following table) equals or exceeds 183 days:

The applicable In the case of days in: multiplier is: Current year 1 1st preceding year 1/3 2nd preceding year 1/6

(B) Exception where individual is present in the United States during less than one-half of current year and closer connection to foreign country is established

An individual shall not be treated as meeting the substantial presence test of this paragraph with respect to any current year if—

(i) such individual is present in the United States on fewer than 183 days during the current year, and

(ii) it is established that for the current year such individual has a tax home (as defined in section 911 (d)(3) without regard to the second sentence thereof) in a foreign country and has a closer connection to such foreign country than to the United States.

(C) Subparagraph (B) not to apply in certain cases

Subparagraph (B) shall not apply to any individual with respect to

any current year if at any time during such year—

(i) such individual had an application for adjustment of status pending, or

(ii) such individual took other steps to apply for status as a lawful permanent resident of the United States.

(D) Exception for exempt individuals or for certain medical conditions

An individual shall not be treated as being present in the United States on any day if—

(i) such individual is an exempt individual for such day, or

(ii) such individual was unable to leave the United States on such day because of a medical condition which arose while such individual was present in the United States.

(4) First-year election

(A) An alien individual shall be deemed to meet the requirements of this subparagraph if such individual—

(i) is not a resident of the United States under clause (i) or (ii) of paragraph (1)(A) with respect to a calendar year (hereinafter referred to as the "election year"),

(ii) was not a resident of the United States under paragraph (1)(A) with respect to the calendar year immediately preceding the election year,

(iii) is a resident of the United States under clause (ii) of paragraph (1)(A) with respect to the calendar year immediately following the election year, and

(iv) is both—

(I) present in the United States for a period of at least 31 consecutive days in the election year, and

(II) present in the United States during the period beginning with the first day of such 31-day period and ending with the last day of the election year (hereinafter referred to as the "testing period") for a number of days equal to or exceeding 75 percent of the number of days in the testing period (provided that an individual shall be treated for purposes of this subclause as present in the United States for a number of days during the testing period not exceeding 5 days in the aggregate, notwithstanding his absence from the United States on such days).

(B) An alien individual who meets the requirements of subparagraph (A) shall, if he so elects, be treated as a resident of the United States with respect to the election year.

(C) An alien individual who makes the election provided by subparagraph (B) shall be treated as a resident of the United States for the portion of the election year which begins on the 1st day of the earliest testing period during such year with respect to which the individual meets the requirements of clause (iv) of subparagraph (A).

(D) The rules of subparagraph (D)(i) of paragraph (3) shall apply for purposes of determining an individual's presence in the United States under this paragraph.

(E) An election under subparagraph (B) shall be made on the individual's tax return for the election year, provided that such election may not be made before the individual has met the substantial presence test of paragraph (3) with respect to the calendar year immediately following the election year.

(F) An election once made under subparagraph (B) remains in effect for the election year, unless revoked with the consent of the Secretary.

(5) Exempt individual defined

For purposes of this subsection—

(A) In general

An individual is an exempt individual for any day if, for such day, such individual is—

(i) a foreign government-related individual,

(ii) a teacher or trainee,

(iii) a student, or

(iv) a professional athlete who is temporarily in the United States to compete in a charitable sports event described in section 274 (l)(1)(B).

(B) Foreign government-related individual

The term "foreign government-related individual" means any individual temporarily present in the United States by reason of—

(i) diplomatic status, or a visa which the Secretary (after consultation with the Secretary of State) determines represents full-time diplomatic or consular status for purposes of this subsection,

(ii) being a full-time employee of an international organization, or

(iii) being a member of the immediate family of an individual described in clause (i) or (ii).

(C) Teacher or trainee

The term "teacher or trainee" means any individual—

(i) who is temporarily present in the United States under subparagraph (J) or (Q) of section 101(15) of the Immigration and Nationality Act (other than as a student), and

(ii) who substantially complies with the requirements for being so present.

(D) Student

The term "student" means any individual—

(i) who is temporarily present in the United States—

(I) under subparagraph (F) or (M) of section 101(15) of the Immigration and Nationality Act, or

(II) as a student under subparagraph (J) or (Q) of such section 101 (15), and

(ii) who substantially complies with the requirements for being so

present.

(E) Special rules for teachers, trainees, and students

(i) Limitation on teachers and trainees An individual shall not be treated as an exempt individual by reason of clause (ii) of subparagraph (A) for the current year if, for any 2 calendar years during the preceding 6 calendar years, such person was an exempt person under clause (ii) or (iii) of subparagraph (A). In the case of an individual all of whose compensation is described in section 872 (b)(3), the preceding sentence shall be applied by substituting "4 calendar years" for "2 calendar years".

(ii) Limitation on students For any calendar year after the 5th calendar year for which an individual was an exempt individual under clause (ii) or (iii) of subparagraph (A), such individual shall not be treated as an exempt individual by reason of clause (iii) of subparagraph (A), unless such individual establishes to the satisfaction of the Secretary that such individual does not intend to permanently reside in the United States and that such individual meets the requirements of subparagraph (D)(ii).

(6) Lawful permanent resident

For purposes of this subsection, an individual is a lawful permanent resident of the United States at any time if—

(A) such individual has the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, and

(B) such status has not been revoked (and has not been administratively or judicially determined to have been abandoned).

(7) Presence in the United States

For purposes of this subsection—

(A) In general

Except as provided in subparagraph (B), (C), or (D), an individual shall be treated as present in the United States on any day if such individual is physically present in the United States at any time during such day.

(B) Commuters from Canada or Mexico

If an individual regularly commutes to employment (or self-employment) in the United States from a place of residence in Canada or Mexico, such individual shall not be treated as present in the United States on any day during which he so commutes.

(C) Transit between 2 foreign points

If an individual, who is in transit between 2 points outside the United States, is physically present in the United States for less than 24 hours, such individual shall not be treated as present in the United States on any day during such transit.

(D) Crew members temporarily present

An individual who is temporarily present in the United States on any day as a regular member of the crew of a foreign vessel engaged in transportation between the United States and a foreign country or a possession of the United States shall not be treated as present in the United States on such day unless such individual otherwise engages

in any trade or business in the United States on such day.

(8) Annual statements

The Secretary may prescribe regulations under which an individual who (but for subparagraph (B) or (D) of paragraph (3)) would meet the substantial presence test of paragraph (3) is required to submit an annual statement setting forth the basis on which such individual claims the benefits of subparagraph (B) or (D) of paragraph (3), as the case may be.

(9) Taxable year

(A) In general

For purposes of this title, an alien individual who has not established a taxable year for any prior period shall be treated as having a taxable year which is the calendar year.

(B) Fiscal year taxpayer

If—

(i) an individual is treated under paragraph (1) as a resident of the United States for any calendar year, and

(ii) after the application of subparagraph (A), such individual has a taxable year other than a calendar year,

he shall be treated as a resident of the United States with respect to any portion of a taxable year which is within such calendar year.

(10) Coordination with section 877

If—

(A) an alien individual was treated as a resident of the United States during any period which includes at least 3 consecutive calendar years (hereinafter referred to as the "initial residency period"), and

(B) such individual ceases to be treated as a resident of the United States but subsequently becomes a resident of the United States before the close of the 3rd calendar year beginning after the close of the initial residency period,

such individual shall be taxable for the period after the close of the initial residency period and before the day on which he subsequently became a resident of the United States in the manner provided in section 877 (b). The preceding sentence shall apply only if the tax imposed pursuant to section 877 (b) exceeds the tax which, without regard to this paragraph, is imposed pursuant to section 871.

(11) Regulations

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection.

(c) Includes and including

The terms "includes" and "including" when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.

(d) Commonwealth of Puerto Rico

Where not otherwise distinctly expressed or manifestly incompatible with the

intent thereof, references in this title to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.

(e) Treatment of certain contracts for providing services, etc.

For purposes of chapter 1—

(1) In general

A contract which purports to be a service contract shall be treated as a lease of property if such contract is properly treated as a lease of property, taking into account all relevant factors including whether or not —

(A) the service recipient is in physical possession of the property,

(B) the service recipient controls the property,

(C) the service recipient has a significant economic or possessory interest in the property,

(D) the service provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract,

(E) the service provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient, and

(F) the total contract price does not substantially exceed the rental value of the property for the contract period.

(2) Other arrangements

An arrangement (including a partnership or other pass-thru entity) which is not described in paragraph (1) shall be treated as a lease if such arrangement is properly treated as a lease, taking into account all relevant factors including factors similar to those set forth in paragraph (1).

(3) Special rules for contracts or arrangements involving solid waste disposal, energy, and clean water facilities

(A) In general

Notwithstanding paragraphs (1) and (2), and except as provided in paragraph (4), any contract or arrangement between a service provider and a service recipient—

(i) with respect to—

(I) the operation of a qualified solid waste disposal facility,

(II) the sale to the service recipient of electrical or thermal energy produced at a cogeneration or alternative energy facility, or

(III) the operation of a water treatment works facility, and

(ii) which purports to be a service contract,

shall be treated as a service contract.

(B) Qualified solid waste disposal facility

For purposes of subparagraph (A), the term "qualified solid waste disposal facility" means any facility if such facility provides solid waste disposal services for residents of part or all of 1 or more governmental units and substantially all of the solid waste processed

at such facility is collected from the general public.

(C) Cogeneration facility

For purposes of subparagraph (A), the term "cogeneration facility" means a facility which uses the same energy source for the sequential generation of electrical or mechanical power in combination with steam, heat, or other forms of useful energy.

(D) Alternative energy facility

For purposes of subparagraph (A), the term "alternative energy facility" means a facility for producing electrical or thermal energy if the primary energy source for the facility is not oil, natural gas, coal, or nuclear power.

(E) Water treatment works facility

For purposes of subparagraph (A), the term "water treatment works facility" means any treatment works within the meaning of section 212(2) of the Federal Water Pollution Control Act.

(4) Paragraph (3) not to apply in certain cases

(A) In general

Paragraph (3) shall not apply to any qualified solid waste disposal facility, cogeneration facility, alternative energy facility, or water treatment works facility used under a contract or arrangement if—

(i) the service recipient (or a related entity) operates such facility,

(ii) the service recipient (or a related entity) bears any significant financial burden if there is nonperformance under the contract or arrangement (other than for reasons beyond the control of the service provider),

(iii) the service recipient (or a related entity) receives any significant financial benefit if the operating costs of such facility are less than the standards of performance or operation under the contract or arrangement, or

(iv) the service recipient (or a related entity) has an option to purchase, or may be required to purchase, all or a part of such facility at a fixed and determinable price (other than for fair market value).

For purposes of this paragraph, the term "related entity" has the same meaning as when used in section 168 (h).

(B) Special rules for application of subparagraph (A) with respect to certain rights and allocations under the contract

For purposes of subparagraph (A), there shall not be taken into account—

(i) any right of a service recipient to inspect any facility, to exercise any sovereign power the service recipient may possess, or to act in the event of a breach of contract by the service provider, or

(ii) any allocation of any financial burden or benefits in the event of any change in any law.

(C) Special rules for application of subparagraph (A) in the case of certain events

(i) Temporary shut-downs, etc. For purposes of clause (ii) of subparagraph (A), there shall not be taken into account any temporary shut-down of the facility for repairs, maintenance, or capital improvements, or any financial burden caused by the bankruptcy or similar financial difficulty of the service provider.

(ii) Reduced costs For purposes of clause (iii) of subparagraph (A), there shall not be taken into account any significant financial benefit merely because payments by the service recipient under the contract or arrangement are decreased by reason of increased production or efficiency or the recovery of energy or other products.

(5) Exception for certain low-income housing

This subsection shall not apply to any property described in clause (i), (ii), (iii), or (iv) of section 1250 (a)(1)(B) (relating to low-income housing) if—

(A) such property is operated by or for an organization described in paragraph (3) or (4) of section 501 (c), and

(B) at least 80 percent of the units in such property are leased to low-income tenants (within the meaning of section 167 (k)(3)(B)) (as in effect on the day before the date of the enactment of the Revenue Reconcilation [3] Act of 1990).

(6) Regulations

The Secretary may prescribe such regulations as may be necessary or appropriate to carry out the provisions of this subsection.

(f) Use of related persons or pass-thru entities

The Secretary shall prescribe such regulations as may be necessary or appropriate to prevent the avoidance of those provisions of this title which deal with—

(1) the linking of borrowing to investment, or

(2) diminishing risks,

through the use of related persons, pass-thru entities, or other intermediaries.

(g) Clarification of fair market value in the case of nonrecourse indebtedness

For purposes of subtitle A, in determining the amount of gain or loss (or deemed gain or loss) with respect to any property, the fair market value of such property shall be treated as being not less than the amount of any nonrecourse indebtedness to which such property is subject.

(h) Motor vehicle operating leases

(1) In general

For purposes of this title, in the case of a qualified motor vehicle operating agreement which contains a terminal rental adjustment clause —

(A) such agreement shall be treated as a lease if (but for such terminal rental adjustment clause) such agreement would be treated as a lease under this title, and

(B) the lessee shall not be treated as the owner of the property

subject to an agreement during any period such agreement is in effect.

(2) Qualified motor vehicle operating agreement defined

For purposes of this subsection—

(A) In general

The term "qualified motor vehicle operating agreement" means any agreement with respect to a motor vehicle (including a trailer) which meets the requirements of subparagraphs (B), (C), and (D) of this paragraph.

(B) Minimum liability of lessor

An agreement meets the requirements of this subparagraph if under such agreement the sum of—

(i) the amount the lessor is personally liable to repay, and

(ii) the net fair market value of the lessor's interest in any property pledged as security for property subject to the agreement,

equals or exceeds all amounts borrowed to finance the acquisition of property subject to the agreement. There shall not be taken into account under clause (ii) any property pledged which is property subject to the agreement or property directly or indirectly financed by indebtedness secured by property subject to the agreement.

(C) Certification by lessee; notice of tax ownership

An agreement meets the requirements of this subparagraph if such agreement contains a separate written statement separately signed by the lessee—

(i) under which the lessee certifies, under penalty of perjury, that it intends that more than 50 percent of the use of the property subject to such agreement is to be in a trade or business of the lessee, and

(ii) which clearly and legibly states that the lessee has been advised that it will not be treated as the owner of the property subject to the agreement for Federal income tax purposes.

(D) Lessor must have no knowledge that certification is false

An agreement meets the requirements of this subparagraph if the lessor does not know that the certification described in subparagraph (C)(i) is false.

(3) Terminal rental adjustment clause defined

(A) In general

For purposes of this subsection, the term "terminal rental adjustment clause" means a provision of an agreement which permits or requires the rental price to be adjusted upward or downward by reference to the amount realized by the lessor under the agreement upon sale or other disposition of such property.

(B) Special rule for lessee dealers

The term "terminal rental adjustment clause" also includes a provision of an agreement which requires a lessee who is a dealer in motor vehicles to purchase the motor vehicle for a predetermined

price and then resell such vehicle where such provision achieves substantially the same results as a provision described in subparagraph (A).

(i) Taxable mortgage pools

(1) Treated as separate corporations

A taxable mortgage pool shall be treated as a separate corporation which may not be treated as an includible corporation with any other corporation for purposes of section 1501.

(2) Taxable mortgage pool defined

For purposes of this title—

(A) In general

Except as otherwise provided in this paragraph, a taxable mortgage pool is any entity (other than a REMIC) if—

(i) substantially all of the assets of such entity consists of debt obligations (or interests therein) and more than 50 percent of such debt obligations (or interests) consists of real estate mortgages (or interests therein),

(ii) such entity is the obligor under debt obligations with 2 or more maturities, and

(iii) under the terms of the debt obligations referred to in clause (ii) (or underlying arrangement), payments on such debt obligations bear a relationship to payments on the debt obligations (or interests) referred to in clause (i).

(B) Portion of entities treated as pools

Any portion of an entity which meets the definition of subparagraph (A) shall be treated as a taxable mortgage pool.

(C) Exception for domestic building and loan

Nothing in this subsection shall be construed to treat any domestic building and loan association (or portion thereof) as a taxable mortgage pool.

(D) Treatment of certain equity interests

To the extent provided in regulations, equity interest of varying classes which correspond to maturity classes of debt shall be treated as debt for purposes of this subsection.

(3) Treatment of certain REIT's

If—

(A) a real estate investment trust is a taxable mortgage pool, or

(B) a qualified REIT subsidiary (as defined in section 856(i)(2)) of a real estate investment trust is a taxable mortgage pool,

under regulations prescribed by the Secretary, adjustments similar to the adjustments provided in section 860E (d) shall apply to the shareholders of such real estate investment trust.

(j) Tax treatment of Federal Thrift Savings Fund

(1) In general

For purposes of this title—

(A) the Thrift Savings Fund shall be treated as a trust described in section 401 (a) which is exempt from taxation under section 501 (a);

(B) any contribution to, or distribution from, the Thrift Savings Fund shall be treated in the same manner as contributions to or distributions from such a trust; and

(C) subject to section 401 (k)(4)(B) and any dollar limitation on the application of section 402 (e)(3), contributions to the Thrift Savings Fund shall not be treated as distributed or made available to an employee or Member nor as a contribution made to the Fund by an employee or Member merely because the employee or Member has, under the provisions of subchapter III of chapter 84 of title 5, United States Code, and section 8351 of such title 5, an election whether the contribution will be made to the Thrift Savings Fund or received by the employee or Member in cash.

(2) Nondiscrimination requirements

Notwithstanding any other provision of law, the Thrift Savings Fund is not subject to the nondiscrimination requirements applicable to arrangements described in section 401 (k) or to matching contributions (as described in section 401 (m)), so long as it meets the requirements of this section.

(3) Coordination with Social Security Act

Paragraph (1) shall not be construed to provide that any amount of the employee's or Member's basic pay which is contributed to the Thrift Savings Fund shall not be included in the term "wages" for the purposes of section 209 of the Social Security Act or section 3121 (a) of this title.

(4) Definitions

For purposes of this subsection, the terms "Member", "employee", and "Thrift Savings Fund" shall have the same respective meanings as when used in subchapter III of chapter 84 of title 5, United States Code.

(5) Coordination with other provisions of law

No provision of law not contained in this title shall apply for purposes of determining the treatment under this title of the Thrift Savings Fund or any contribution to, or distribution from, such Fund.

(k) Treatment of certain amounts paid to charity

In the case of any payment which, except for section 501(b) of the Ethics in Government Act of 1978, might be made to any officer or employee of the Federal Government but which is made instead on behalf of such officer or employee to an organization described in section 170 (c)—

(1) such payment shall not be treated as received by such officer or employee for all purposes of this title and for all purposes of any tax law of a State or political subdivision thereof, and

(2) no deduction shall be allowed under any provision of this title (or of any tax law of a State or political subdivision thereof) to such officer or employee by reason of having such payment made to such organization.

For purposes of this subsection, a Senator, a Representative in, or a Delegate

or Resident Commissioner to, the Congress shall be treated as an officer or employee of the Federal Government.

(l) Regulations relating to conduit arrangements

The Secretary may prescribe regulations recharacterizing any multiple-party financing transaction as a transaction directly among any 2 or more of such parties where the Secretary determines that such recharacterization is appropriate to prevent avoidance of any tax imposed by this title.

(m) Designation of contract markets

Any designation by the Commodity Futures Trading Commission of a contract market which could not have been made under the law in effect on the day before the date of the enactment of the Commodity Futures Modernization Act of 2000 shall apply for purposes of this title except to the extent provided in regulations prescribed by the Secretary.

(n) Special rules for determining when an individual is no longer a United States citizen or long-term resident

An individual who would (but for this subsection) cease to be treated as a citizen or resident of the United States shall continue to be treated as a citizen or resident of the United States, as the case may be, until such individual—

(1) gives notice of an expatriating act or termination of residency (with the requisite intent to relinquish citizenship or terminate residency) to the Secretary of State or the Secretary of Homeland Security, and

(2) provides a statement in accordance with section 6039G.

(o) Cross references

(1) Other definitions

For other definitions, see the following sections of Title 1 of the United States Code:

(1) Singular as including plural, section 1.

(2) Plural as including singular, section 1.

(3) Masculine as including feminine, section 1.

(4) Officer, section 1.

(5) Oath as including affirmation, section 1.

(6) County as including parish, section 2.

(7) Vessel as including all means of water transportation, section 3.

(8) Vehicle as including all means of land transportation, section 4.

(9) Company or association as including successors and assigns, section 5.

(2) Effect of cross references

For effect of cross references in this title, see section 7806 (a).

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[1] See References in Text note below.

[2] See References in Text note below.

[3] So in original. Probably should be "Reconciliation".

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TITLE 26—INTERNAL REVENUE CODE

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CHAPTER 79—DEFINITIONS

How Current is This?

Sec. 7701. - Definitions

(a)

When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof -

(1) Person

The term ''person'' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

(2) Partnership and partner

The term ''partnership'' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term ''partner'' includes a member in such a syndicate, group, pool, joint venture, or organization.

(3) Corporation

The term ''corporation'' includes associations, joint-stock companies, and insurance companies.

(4) Domestic

The term ''domestic'' when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State unless, in the case of a partnership, the Secretary provides otherwise by regulations.

(5) Foreign

The term ''foreign'' when applied to a corporation or partnership means a corporation or partnership which is

not domestic.

(6) Fiduciary

The term ''fiduciary'' means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

(7) Stock

The term ''stock'' includes shares in an association, joint-stock company, or insurance company.

(8) Shareholder

The term ''shareholder'' includes a member in an association, joint-stock company, or insurance company.

(9) United States

The term ''United States'' when used in a geographical sense includes only the States and the District of Columbia.

(10) State

The term ''State'' shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title.

(11) Secretary of the Treasury and Secretary

(A) Secretary of the Treasury

The term ''Secretary of the Treasury'' means the Secretary of the Treasury, personally, and shall not include any delegate of his.

(B) Secretary

The term ''Secretary'' means the Secretary of the Treasury or his delegate.

(12) Delegate

(A) In general

The term ''or his delegate'' -

(i)

when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the

Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context; and

(ii)

when used with reference to any other official of the United States, shall be similarly construed.

(B) Performance of certain functions in Guam or American Samoa

The term ''delegate,'' in relation to the performance of functions in Guam or American Samoa with respect to the taxes imposed by chapters 1, 2, and 21, also includes any officer or employee of any other department or agency of the United States, or of any possession thereof, duly authorized by the Secretary (directly, or indirectly by one or more redelegations of authority) to perform such functions.

(13) Commissioner

The term ''Commissioner'' means the Commissioner of Internal Revenue.

(14) Taxpayer

The term ''taxpayer'' means any person subject to any internal revenue tax.

(15) Military or naval forces and armed forces of the United States

The term ''military or naval forces of the United States'' and the term ''Armed Forces of the United States'' each includes all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, and each term also includes the Coast Guard. The members of such forces include commissioned officers and personnel below the grade of commissioned officers in such forces.

(16) Withholding agent

The term ''withholding agent'' means any person required to deduct and withhold any tax under the provisions of section 1441, 1442, 1443, or 1461.

(17) Husband and wife

As used in sections 152(b)(4), 682, and 2516, if the husband and wife therein referred to are divorced, wherever appropriate to the meaning of such sections, the term ''wife'' shall be read ''former wife'' and the term ''husband'' shall be read ''former husband''; and, if the payments described in such sections are made by or on behalf of the wife or former wife to the husband or former husband instead of vice versa, wherever appropriate to the meaning of such sections, the term ''husband'' shall be read ''wife'' and the term ''wife'' shall be read ''husband.''

(18) International organization

The term ''international organization'' means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288-288f).

(19) Domestic building and loan association

The term ''domestic building and loan association'' means a domestic building and loan association, a domestic savings and loan association, and a Federal savings and loan association -

(A)

which either

(i)

is an insured institution within the meaning of section 401(a) [1] of the National Housing Act (12 U.S.C., sec. 1724(a)), or

(ii)

is subject by law to supervision and examination by State or Federal authority having supervision over such associations;

(B)

the business of which consists principally of acquiring the savings of the public and investing in loans; and

(C)

at least 60 percent of the amount of the total assets of which (at the close of the taxable year) consists of -

(i)

cash,

(ii)

obligations of the United States or of a State or political subdivision thereof, and stock or obligations of a corporation which is an instrumentality of the United States or of a State or political subdivision thereof, but not including obligations the interest on which is excludable from gross income under section 103,

(iii)

certificates of deposit in, or obligations of, a corporation organized under a State law which specifically authorizes such corporation to insure the deposits or share accounts of member associations,

(iv)

loans secured by a deposit or share of a member,

(v)

loans (including redeemable ground rents, as defined in section 1055) secured by an interest in real property which is (or, from the proceeds of the loan, will become) residential real property or real property used primarily for church purposes, loans made for the improvement of residential real property or real property used primarily for church purposes, provided that for purposes of this clause, residential real property shall include single or multifamily dwellings, facilities in residential developments dedicated to public use or property used on a nonprofit basis for residents, and mobile homes not used on a transient basis,

(vi)

loans secured by an interest in real property located within an urban renewal area to be developed for predominantly residential use under an urban renewal plan approved by the Secretary of Housing and Urban Development under part A or part B of title I of the Housing Act of 1949, as amended, or located within any area covered by a program eligible for assistance under section 103 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended, and loans

made for the improvement of any such real property,

(vii)

loans secured by an interest in educational, health, or welfare institutions or facilities, including structures designed or used primarily for residential purposes for students, residents, and persons under care, employees, or members of the staff of such institutions or facilities,

(viii)

property acquired through the liquidation of defaulted loans described in clause (v), (vi), or (vii),

(ix)

loans made for the payment of expenses of college or university education or vocational training, in accordance with such regulations as may be prescribed by the Secretary,

(x)

property used by the association in the conduct of the business described in subparagraph (B), and

(xi)

any regular or residual interest in a REMIC, and any regular interest in a FASIT, but only in the proportion which the assets of such REMIC or FASIT consist of property described in any of the preceding clauses of this subparagraph; except that if 95 percent or more of the assets of such REMIC or FASIT are assets described in clauses (i) through (x), the entire interest in the REMIC or FASIT shall qualify.

At the election of the taxpayer, the percentage specified in this subparagraph shall be applied on the basis of the average assets outstanding during the taxable year, in lieu of the close of the taxable year, computed under regulations prescribed by the Secretary. For purposes of clause (v), if a multifamily structure securing a loan is used in part for nonresidential purposes, the entire loan is deemed a residential real property loan if the planned residential use exceeds 80 percent of the property's planned use (determined as of the time the loan is made). For purposes of clause (v), loans made to finance the

acquisition or development of land shall be deemed to be loans secured by an interest in residential real property if, under regulations prescribed by the Secretary, there is reasonable assurance that the property will become residential real property within a period of 3 years from the date of acquisition of such land; but this sentence shall not apply for any taxable year unless, within such 3-year period, such land becomes residential real property. For purposes of determining whether any interest in a REMIC qualifies under clause (xi), any regular interest in another REMIC held by such REMIC shall be treated as a loan described in a preceding clause under principles similar to the principles of clause (xi); except that, if such REMIC's are part of a tiered structure, they shall be treated as 1 REMIC for purposes of clause (xi).

(20) Employee

For the purpose of applying the provisions of section 79 with respect to group-term life insurance purchased for employees, for the purpose of applying the provisions of sections 104, 105, and 106 with respect to accident and health insurance or accident and health plans, and for the purpose of applying the provisions of subtitle A with respect to contributions to or under a stock bonus, pension, profit-sharing, or annuity plan, and with respect to distributions under such a plan, or by a trust forming part of such a plan, and for purposes of applying section 125 with respect to cafeteria plans, the term ''employee'' shall include a full-time life insurance salesman who is considered an employee for the purpose of chapter 21, or in the case of services performed before January 1, 1951, who would be considered an employee if his services were performed during 1951.

(21) Levy

The term ''levy'' includes the power of distraint and seizure by any means.

(22) Attorney General

The term ''Attorney General'' means the Attorney General of the United States.

(23) Taxable year

The term ''taxable year'' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the taxable income is computed under subtitle A. ''Taxable year'' means, in the case of a return

made for a fractional part of a year under the provisions of subtitle A or under regulations prescribed by the Secretary, the period for which such return is made.

(24) Fiscal year

The term ''fiscal year'' means an accounting period of 12 months ending on the last day of any month other than December.

(25) Paid or incurred, paid or accrued

The terms ''paid or incurred'' and ''paid or accrued'' shall be construed according to the method of accounting upon the basis of which the taxable income is computed under subtitle A.

(26) Trade or business

The term ''trade or business'' includes the performance of the functions of a public office.

(27) Tax Court

The term ''Tax Court'' means the United States Tax Court.

(28) Other terms

Any term used in this subtitle with respect to the application of, or in connection with, the provisions of any other subtitle of this title shall have the same meaning as in such provisions.

(29) Internal Revenue Code

The term ''Internal Revenue Code of 1986'' means this title, and the term ''Internal Revenue Code of 1939'' means the Internal Revenue Code enacted February 10, 1939, as amended.

(30) United States person

The term ''United States person'' means -

(A)

a citizen or resident of the United States,

(B)

a domestic partnership,

(C)

a domestic corporation,

(D)

any estate (other than a foreign estate, within the meaning of paragraph (31)), and

(E)

any trust if -

(i)

a court within the United States is able to exercise primary supervision over the administration of the trust, and

(ii)

one or more United States persons have the authority to control all substantial decisions of the trust.

(31) Foreign estate or trust

(A) Foreign estate

The term ''foreign estate'' means an estate the income of which, from sources without the United States which is not effectively connected with the conduct of a trade or business within the United States, is not includible in gross income under subtitle A.

(B) Foreign trust

The term ''foreign trust'' means any trust other than a trust described in subparagraph (E) of paragraph (30).

(32) Cooperative bank

The term ''cooperative bank'' means an institution without capital stock organized and operated for mutual purposes and without profit, which -

(A)

either -

(i)

is an insured institution within the meaning of section 401(a) [2] of the National Housing Act (12

U.S.C., sec. 1724(a)), or

(ii)

is subject by law to supervision and examination by State or Federal authority having supervision over such institutions, and

(B)

meets the requirements of subparagraphs (B) and (C) of paragraph (19) of this subsection (relating to definition of domestic building and loan association).

In determining whether an institution meets the requirements referred to in subparagraph (B) of this paragraph, any reference to an association or to a domestic building and loan association contained in paragraph (19) shall be deemed to be a reference to such institution.

(33) Regulated public utility

The term ''regulated public utility'' means -

(A)

A corporation engaged in the furnishing or sale of -

(i)

electric energy, gas, water, or sewerage disposal services, or

(ii)

transportation (not included in subparagraph (C)) on an intrastate, suburban, municipal, or interurban electric railroad, on an intrastate, municipal, or suburban trackless trolley system, or on a municipal or suburban bus system, or

(iii)

transportation (not included in clause (ii)) by motor vehicle - if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof, by an agency or instrumentality of the United States, by a public service or public utility commission or other similar body of the District of Columbia or of any State or political subdivision thereof, or by a foreign country or an agency or instrumentality or political subdivision thereof.

(B)

A corporation engaged as a common carrier in the furnishing or sale of transportation of gas by pipe line, if subject to the jurisdiction of the Federal Energy Regulatory Commission.

(C)

A corporation engaged as a common carrier

(i)

in the furnishing or sale of transportation by railroad, if subject to the jurisdiction of the Surface Transportation Board, or

(ii)

in the furnishing or sale of transportation of oil or other petroleum products (including shale oil) by pipe line, if subject to the jurisdiction of the Federal Energy Regulatory Commission or if the rates for such furnishing or sale are subject to the jurisdiction of a public service or public utility commission or other similar body of the District of Columbia or of any State.

(D)

A corporation engaged in the furnishing or sale of telephone or telegraph service, if the rates for such furnishing or sale meet the requirements of subparagraph (A).

(E)

A corporation engaged in the furnishing or sale of transportation as a common carrier by air, subject to the jurisdiction of the Secretary of Transportation.

(F)

A corporation engaged in the furnishing or sale of transportation by a water carrier subject to jurisdiction under subchapter II of chapter 135 of title 49.

(G)

A rail carrier subject to part A of subtitle IV of title 49, if

(i)

substantially all of its railroad properties have been

leased to another such railroad corporation or corporations by an agreement or agreements entered into before January 1, 1954,

(ii)

each lease is for a term of more than 20 years, and

(iii)

at least 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from such leases and from sources described in subparagraphs (A) through (F), inclusive. For purposes of the preceding sentence, an agreement for lease of railroad properties entered into before January 1, 1954, shall be considered to be a lease including such term as the total number of years of such agreement may, unless sooner terminated, be renewed or continued under the terms of the agreement, and any such renewal or continuance under such agreement shall be considered part of the lease entered into before January 1, 1954.

(H)

A common parent corporation which is a common carrier by railroad subject to part A of subtitle IV of title 49 if at least 80 percent of its gross income (computed without regard to capital gains or losses) is derived directly or indirectly from sources described in subparagraphs (A) through (F), inclusive. For purposes of the preceding sentence, dividends and interest, and income from leases described in subparagraph (G), received from a regulated public utility shall be considered as derived from sources described in subparagraphs (A) through (F), inclusive, if the regulated public utility is a member of an affiliated group (as defined in section 1504) which includes the common parent corporation.

The term ''regulated public utility'' does not (except as provided in subparagraphs (G) and (H)) include a corporation described in subparagraphs (A) through (F), inclusive, unless 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from sources described in subparagraphs (A) through (F), inclusive. If the taxpayer establishes to the satisfaction of the Secretary that

(i)

its revenue from regulated rates described in subparagraph (A) or (D) and its revenue derived from unregulated rates are derived from the operation of a single interconnected and coordinated system or from the operation of more than one such system, and

(ii)

the unregulated rates have been and are substantially as favorable to users and consumers as are the regulated rates, then such revenue from such unregulated rates shall be considered, for purposes of the preceding sentence, as income derived from sources described in subparagraph (A) or (D).

(34)

Repealed. Pub. L. 98-369, div. A, title IV, Sec. 4112 (b)(11), July 18, 1984, 98 Stat. 792)

(35) Enrolled actuary

The term ''enrolled actuary'' means a person who is enrolled by the Joint Board for the Enrollment of Actuaries established under subtitle C of the title III of the Employee Retirement Income Security Act of 1974.

(36) Income tax return preparer

(A) In general

The term ''income tax return preparer'' means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by subtitle A or any claim for refund of tax imposed by subtitle A. For purposes of the preceding sentence, the preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund.

(B) Exceptions

A person shall not be an ''income tax return preparer'' merely because such person -

(i)

furnishes typing, reproducing, or other mechanical assistance,

(ii)

prepares a return or claim for refund of the employer (or of an officer or employee of the employer) by whom he is regularly and continuously employed,

(iii)

prepares as a fiduciary a return or claim for refund for any person, or

(iv)

prepares a claim for refund for a taxpayer in response to any notice of deficiency issued to such taxpayer or in response to any waiver of restriction after the commencement of an audit of such taxpayer or another taxpayer if a determination in such audit of such other taxpayer directly or indirectly affects the tax liability of such taxpayer.

(37) Individual retirement plan

The term ''individual retirement plan'' means -

(A)

an individual retirement account described in section 408(a), and

(B)

an individual retirement annuity described in section 408(b).

(38) Joint return

The term ''joint return'' means a single return made jointly under section 6013 by a husband and wife.

(39) Persons residing outside United States

If any citizen or resident of the United States does not reside in (and is not found in) any United States judicial district, such citizen or resident shall be treated as residing in the District of Columbia for purposes of any provision of this title relating to -

(A)

jurisdiction of courts, or

(B)

enforcement of summons.

(40) Indian tribal government

(A) In general

The term ''Indian tribal government'' means the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary, after consultation with the Secretary of the Interior, to exercise governmental functions.

(B) Special rule for Alaska Natives

No determination under subparagraph (A) with respect to Alaska Natives shall grant or defer any status or powers other than those enumerated in section 7871. Nothing in the Indian Tribal Governmental Tax Status Act of 1982, or in the amendments made thereby, shall validate or invalidate any claim by Alaska Natives of sovereign authority over lands or people.

(41) TIN

The term ''TIN'' means the identifying number assigned to a person under section 6109.

(42) Substituted basis property

The term ''substituted basis property'' means property which is -

(A)

transferred basis property, or

(B)

exchanged basis property.

(43) Transferred basis property

The term ''transferred basis property'' means property having a basis determined under any provision of subtitle A (or under any corresponding provision of prior income tax law) providing that the basis shall be determined in whole or in part by reference to the basis in the hands of the donor, grantor, or other transferor.

(44) Exchanged basis property

The term ''exchanged basis property'' means property

having a basis determined under any provision of subtitle A (or under any corresponding provision of prior income tax law) providing that the basis shall be determined in whole or in part by reference to other property held at any time by the person for whom the basis is to be determined.

(45) Nonrecognition transaction

The term ''nonrecognition transaction'' means any disposition of property in a transaction in which gain or loss is not recognized in whole or in part for purposes of subtitle A.

(46) Determination of whether there is a collective bargaining agreement

In determining whether there is a collective bargaining agreement between employee representatives and 1 or more employers, the term ''employee representatives'' shall not include any organization more than one-half of the members of which are employees who are owners, officers, or executives of the employer. An agreement shall not be treated as a collective bargaining agreement unless it is a bona fide agreement between bona fide employee representatives and 1 or more employers.

(b) Definition of resident alien and nonresident alien

(1) In general

For purposes of this title (other than subtitle B) -

(A) Resident alien

An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):

(i) Lawfully admitted for permanent residence

Such individual is a lawful permanent resident of the United States at any time during such calendar year.

(ii) Substantial presence test

Such individual meets the substantial presence test of paragraph (3).

(iii) First year election

Such individual makes the election provided in paragraph (4).

(B) Nonresident alien

An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A)).

(2) Special rules for first and last year of residency

(A) First year of residency

(i) In general

If an alien individual is a resident of the United States under paragraph (1)(A) with respect to any calendar year, but was not a resident of the United States at any time during the preceding calendar year, such alien individual shall be treated as a resident of the United States only for the portion of such calendar year which begins on the residency starting date.

(ii) Residency starting date for individuals lawfully admitted for permanent residence

In the case of an individual who is a lawfully permanent resident of the United States at any time during the calendar year, but does not meet the substantial presence test of paragraph (3), the residency starting date shall be the first day in such calendar year on which he was present in the United States while a lawful permanent resident of the United States.

(iii) Residency starting date for individuals meeting substantial presence test

In the case of an individual who meets the substantial presence test of paragraph (3) with respect to any calendar year, the residency starting date shall be the first day during such calendar year on which the individual is present in the United States.

(iv) Residency starting date for individuals making first year election

In the case of an individual who makes the election provided by paragraph (4) with respect to any calendar year, the residency starting date shall be

the 1st day during such calendar year on which the individual is treated as a resident of the United States under that paragraph.

(B) Last year of residency

An alien individual shall not be treated as a resident of the United States during a portion of any calendar year if -

(i)

such portion is after the last day in such calendar year on which the individual was present in the United States (or, in the case of an individual described in paragraph (1)(A)(i), the last day on which he was so described),

(ii)

during such portion the individual has a closer connection to a foreign country than to the United States, and

(iii)

the individual is not a resident of the United States at any time during the next calendar year.

(C) Certain nominal presence disregarded

(i) In general

For purposes of subparagraphs (A)(iii) and (B), an individual shall not be treated as present in the United States during any period for which the individual establishes that he has a closer connection to a foreign country than to the United States.

(ii) Not more than 10 days disregarded

Clause (i) shall not apply to more than 10 days on which the individual is present in the United States.

(3) Substantial presence test

(A) In general

Except as otherwise provided in this paragraph, an individual meets the substantial presence test of this paragraph with respect to any calendar year (hereinafter in this subsection referred to as the ''current year'') if -

(i)

such individual was present in the United States on at least 31 days during the calendar year, and

(ii)

the sum of the number of days on which such individual was present in the United States during the current year and the 2 preceding calendar years (when multiplied by the applicable multiplier determined under the following table) equals or exceeds 183 days: The applicable In the case of days in: multiplier is: Current year 1 1st preceding year 1/3 2nd preceding year 1/6

(B) Exception where individual is present in the United States during less than one-half of current year and closer connection to foreign country is established

An individual shall not be treated as meeting the substantial presence test of this paragraph with respect to any current year if -

(i)

such individual is present in the United States on fewer than 183 days during the current year, and

(ii)

it is established that for the current year such individual has a tax home (as defined in section 911(d)(3) without regard to the second sentence thereof) in a foreign country and has a closer connection to such foreign country than to the United States.

(C) Subparagraph (B) not to apply in certain cases

Subparagraph (B) shall not apply to any individual with respect to any current year if at any time during such year -

(i)

such individual had an application for adjustment of status pending, or

(ii)

such individual took other steps to apply for status as a lawful permanent resident of the United States.

(D) Exception for exempt individuals or for certain medical conditions

An individual shall not be treated as being present in the United States on any day if -

(i)

such individual is an exempt individual for such day, or

(ii)

such individual was unable to leave the United States on such day because of a medical condition which arose while such individual was present in the United States.

(4) First -year election

(A)

An alien individual shall be deemed to meet the requirements of this subparagraph if such individual -

(i)

is not a resident of the United States under clause (i) or (ii) of paragraph (1)(A) with respect to a calendar year (hereinafter referred to as the ''election year''),

(ii)

was not a resident of the United States under paragraph (1)(A) with respect to the calendar year immediately preceding the election year,

(iii)

is a resident of the United States under clause (ii) of paragraph (1)(A) with respect to the calendar year immediately following the election year, and

(iv)

is both -

(I)

present in the United States for a period of at least 31 consecutive days in the election year, and

(II)

present in the United States during the period beginning with the first day of such 31-day period and ending with the last day of the election year (hereinafter referred to as the ''testing period'') for a number of days equal to or exceeding 75 percent of the number of days in the testing period (provided that an individual shall be treated for purposes of this subclause as present in the United States for a number of days during the testing period not exceeding 5 days in the aggregate, notwithstanding his absence from the United States on such days).

(B)

An alien individual who meets the requirements of subparagraph (A) shall, if he so elects, be treated as a resident of the United States with respect to the election year.

(C)

An alien individual who makes the election provided by subparagraph (B) shall be treated as a resident of the United States for the portion of the election year which begins on the 1st day of the earliest testing period during such year with respect to which the individual meets the requirements of clause (iv) of subparagraph (A).

(D)

The rules of subparagraph (D)(i) of paragraph (3) shall apply for purposes of determining an individual's presence in the United States under this paragraph.

(E)

An election under subparagraph (B) shall be made on the individual's tax return for the election year, provided that such election may not be made before the individual has met the substantial presence test of paragraph (3) with respect to the calendar year immediately following the election year.

(F)

An election once made under subparagraph (B) remains in effect for the election year, unless revoked with the consent of the Secretary.

(5) Exempt individual defined

For purposes of this subsection -

(A) In general

An individual is an exempt individual for any day if, for such day, such individual is -

(i)

a foreign government-related individual,

(ii)

a teacher or trainee,

(iii)

a student, or

(iv)

a professional athlete who is temporarily in the United States to compete in a charitable sports event described in section 274(l)(1)(B).

(B) Foreign government-related individual

The term ''foreign government-related individual'' means any individual temporarily present in the United States by reason of -

(i)

diplomatic status, or a visa which the Secretary (after consultation with the Secretary of State) determines represents full-time diplomatic or consular status for purposes of this subsection,

(ii)

being a full-time employee of an international organization, or

(iii)

being a member of the immediate family of an individual described in clause (i) or (ii).

(C) Teacher or trainee

The term ''teacher or trainee'' means any individual -

(i)

who is temporarily present in the United States under subparagraph (J) or (Q) of section 101(15) of the Immigration and Nationality Act (other than as a student), and

(ii)

who substantially complies with the requirements for being so present.

(D) Student

The term ''student'' means any individual -

(i)

who is temporarily present in the United States -

(I)

under subparagraph (F) or (M) of section 101 (15) of the Immigration and Nationality Act, or

(II)

as a student under subparagraph (J) or (Q) of such section 101(15), and (ii) who substantially complies with the requirements for being so present.

(E) Special rules for teachers, trainees, and students

(i) Limitation on teachers and trainees

An individual shall not be treated as an exempt individual by reason of clause (ii) of subparagraph (A) for the current year if, for any 2 calendar years during the preceding 6 calendar years, such person was an exempt person under clause (ii) or (iii) of subparagraph (A). In the case of an individual all of whose compensation is described in section 872(b) (3), the preceding sentence shall be applied by substituting ''4 calendar years'' for ''2 calendar years''.

(ii) Limitation on students

For any calendar year after the 5th calendar year for which an individual was an exempt individual under clause (ii) or (iii) of subparagraph (A), such individual shall not be treated as an exempt individual by reason of clause (iii) of subparagraph (A), unless such individual establishes to the satisfaction of the Secretary that such individual

does not intend to permanently reside in the United States and that such individual meets the requirements of subparagraph (D)(ii).

(6) Lawful permanent resident

For purposes of this subsection, an individual is a lawful permanent resident of the United States at any time if -

(A)

such individual has the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, and

(B)

such status has not been revoked (and has not been administratively or judicially determined to have been abandoned).

(7) Presence in the United States

For purposes of this subsection -

(A) In general

Except as provided in subparagraph (B), (C), or (D), an individual shall be treated as present in the United States on any day if such individual is physically present in the United States at any time during such day.

(B) Commuters from Canada or Mexico

If an individual regularly commutes to employment (or self-employment) in the United States from a place of residence in Canada or Mexico, such individual shall not be treated as present in the United States on any day during which he so commutes.

(C) Transit between 2 foreign points

If an individual, who is in transit between 2 points outside the United States, is physically present in the United States for less than 24 hours, such individual shall not be treated as present in the United States on any day during such transit.

(D) Crew members temporarily present

An individual who is temporarily present in the

United States on any day as a regular member of the crew of a foreign vessel engaged in transportation between the United States and a foreign country or a possession of the United States shall not be treated as present in the United States on such day unless such individual otherwise engages in any trade or business in the United States on such day.

(8) Annual statements

The Secretary may prescribe regulations under which an individual who (but for subparagraph (B) or (D) of paragraph (3)) would meet the substantial presence test of paragraph (3) is required to submit an annual statement setting forth the basis on which such individual claims the benefits of subparagraph (B) or (D) of paragraph (3), as the case may be.

(9) Taxable year

(A) In general

For purposes of this title, an alien individual who has not established a taxable year for any prior period shall be treated as having a taxable year which is the calendar year.

(B) Fiscal year taxpayer

If -

(i)

an individual is treated under paragraph (1) as a resident of the United States for any calendar year, and

(ii)

after the application of subparagraph (A), such individual has a taxable year other than a calendar year,

he shall be treated as a resident of the United States with respect to any portion of a taxable year which is within such calendar year.

(10) Coordination with section 877

If -

(A)

an alien individual was treated as a resident of the United States during any period which includes at least 3 consecutive calendar years (hereinafter referred to as the ''initial residency period''), and

(B)

such individual ceases to be treated as a resident of the United States but subsequently becomes a resident of the United States before the close of the 3rd calendar year beginning after the close of the initial residency period,

such individual shall be taxable for the period after the close of the initial residency period and before the day on which he subsequently became a resident of the United States in the manner provided in section 877(b). The preceding sentence shall apply only if the tax imposed pursuant to section 877(b) exceeds the tax which, without regard to this paragraph, is imposed pursuant to section 871.

(11) Regulations

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection.

(c) Includes and including

The terms ''includes'' and ''including'' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.

(d) Commonwealth of Puerto Rico

Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, references in this title to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.

(e) Treatment of certain contracts for providing services, etc.

For purposes of chapter 1 -

(1) In general

A contract which purports to be a service contract shall be treated as a lease of property if such contract is properly treated as a lease of property, taking into account all relevant factors including whether or not -

(A)

the service recipient is in physical possession of the property,

(B)

the service recipient controls the property,

(C)

the service recipient has a significant economic or possessory interest in the property,

(D)

the service provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract,

(E)

the service provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient, and

(F)

the total contract price does not substantially exceed the rental value of the property for the contract period.

(2) Other arrangements

An arrangement (including a partnership or other pass-thru entity) which is not described in paragraph (1) shall be treated as a lease if such arrangement is properly treated as a lease, taking into account all relevant factors including factors similar to those set forth in paragraph (1).

(3) Special rules for contracts or arrangements involving solid waste disposal, energy, and clean water facilities

(A) In general

Notwithstanding paragraphs (1) and (2), and except as provided in paragraph (4), any contract or arrangement between a service provider and a service recipient -

(i)

with respect to -

(I)

the operation of a qualified solid waste disposal facility,

(II)

the sale to the service recipient of electrical or thermal energy produced at a cogeneration or alternative energy facility, or

(III)

the operation of a water treatment works facility, and

(ii)

which purports to be a service contract,

shall be treated as a service contract.

(B) Qualified solid waste disposal facility

For purposes of subparagraph (A), the term ''qualified solid waste disposal facility'' means any facility if such facility provides solid waste disposal services for residents of part or all of 1 or more governmental units and substantially all of the solid waste processed at such facility is collected from the general public.

(C) Cogeneration facility

For purposes of subparagraph (A), the term ''cogeneration facility'' means a facility which uses the same energy source for the sequential generation of electrical or mechanical power in combination with steam, heat, or other forms of useful energy.

(D) Alternative energy facility

For purposes of subparagraph (A), the term ''alternative energy facility'' means a facility for producing electrical or thermal energy if the primary energy source for the facility is not oil, natural gas, coal, or nuclear power.

(E) Water treatment works facility

For purposes of subparagraph (A), the term ''water treatment works facility'' means any treatment works within the meaning of section 212(2) of the Federal Water Pollution Control Act.

(4) Paragraph (3) not to apply in certain cases

(A) In general

Paragraph (3) shall not apply to any qualified solid waste disposal facility, cogeneration facility, alternative energy facility, or water treatment works facility used under a contract or arrangement if -

(i)

the service recipient (or a related entity) operates such facility,

(ii)

the service recipient (or a related entity) bears any significant financial burden if there is nonperformance under the contract or arrangement (other than for reasons beyond the control of the service provider),

(iii)

the service recipient (or a related entity) receives any significant financial benefit if the operating costs of such facility are less than the standards of performance or operation under the contract or arrangement, or

(iv)

the service recipient (or a related entity) has an option to purchase, or may be required to purchase, all or a part of such facility at a fixed and determinable price (other than for fair market value).

For purposes of this paragraph, the term ''related entity'' has the same meaning as when used in section 168(h).

(B) Special rules for application of subparagraph (A) with respect to certain rights and allocations under the contract

For purposes of subparagraph (A), there shall not be taken into account -

(i)

any right of a service recipient to inspect any facility, to exercise any sovereign power the service recipient may possess, or to act in the event of a breach of contract by the service provider, or

(ii)

any allocation of any financial burden or benefits in the event of any change in any law.

(C) Special rules for application of subparagraph (A) in the case of certain events

(i) Temporary shut-downs, etc.

For purposes of clause (ii) of subparagraph (A), there shall not be taken into account any temporary shut-down of the facility for repairs, maintenance, or capital improvements, or any financial burden caused by the bankruptcy or similar financial difficulty of the service provider.

(ii) Reduced costs

For purposes of clause (iii) of subparagraph (A), there shall not be taken into account any significant financial benefit merely because payments by the service recipient under the contract or arrangement are decreased by reason of increased production or efficiency or the recovery of energy or other products.

(5) Exception for certain low-income housing

This subsection shall not apply to any property described in clause (i), (ii), (iii), or (iv) of section 1250(a)(1)(B) (relating to low-income housing) if -

(A)

such property is operated by or for an organization described in paragraph (3) or (4) of section 501(c), and

(B)

at least 80 percent of the units in such property are leased to low-income tenants (within the meaning of section 167(k)(3)(B)) (as in effect on the day before the date of the enactment of the Revenue Reconcilation [3] Act of 1990). ''Reconciliation''.

(6) Regulations

The Secretary may prescribe such regulations as may be necessary or appropriate to carry out the provisions of this subsection.

(f) Use of related persons or pass-thru entities

The Secretary shall prescribe such regulations as may be necessary or appropriate to prevent the avoidance of those provisions of this title which deal with -

(1)

the linking of borrowing to investment, or

(2)

diminishing risks,

through the use of related persons, pass-thru entities, or other intermediaries.

(g) Clarification of fair market value in the case of nonrecourse indebtedness

For purposes of subtitle A, in determining the amount of gain or loss (or deemed gain or loss) with respect to any property, the fair market value of such property shall be treated as being not less than the amount of any nonrecourse indebtedness to which such property is subject.

(h) Motor vehicle operating leases

(1) In general

For purposes of this title, in the case of a qualified motor vehicle operating agreement which contains a terminal rental adjustment clause -

(A)

such agreement shall be treated as a lease if (but for such terminal rental adjustment clause) such agreement would be treated as a lease under this title, and

(B)

the lessee shall not be treated as the owner of the property subject to an agreement during any period such agreement is in effect.

(2) Qualified motor vehicle operating agreement defined

For purposes of this subsection -

(A) In general

The term ''qualified motor vehicle operating agreement'' means any agreement with respect to a motor vehicle (including a trailer) which meets the

requirements of subparagraphs (B), (C), and (D) of this paragraph.

(B) Minimum liability of lessor

An agreement meets the requirements of this subparagraph if under such agreement the sum of -

(i)

the amount the lessor is personally liable to repay, and

(ii)

the net fair market value of the lessor's interest in any property pledged as security for property subject to the agreement,

equals or exceeds all amounts borrowed to finance the acquisition of property subject to the agreement. There shall not be taken into account under clause (ii) any property pledged which is property subject to the agreement or property directly or indirectly financed by indebtedness secured by property subject to the agreement.

(C) Certification by lessee; notice of tax ownership

An agreement meets the requirements of this subparagraph if such agreement contains a separate written statement separately signed by the lessee -

(i)

under which the lessee certifies, under penalty of perjury, that it intends that more than 50 percent of the use of the property subject to such agreement is to be in a trade or business of the lessee, and

(ii)

which clearly and legibly states that the lessee has been advised that it will not be treated as the owner of the property subject to the agreement for Federal income tax purposes.

(D) Lessor must have no knowledge that certification is false

An agreement meets the requirements of this subparagraph if the lessor does not know that the certification described in subparagraph (C)(i) is false.

(3) Terminal rental adjustment clause defined

(A) In general

For purposes of this subsection, the term ''terminal rental adjustment clause'' means a provision of an agreement which permits or requires the rental price to be adjusted upward or downward by reference to the amount realized by the lessor under the agreement upon sale or other disposition of such property.

(B) Special rule for lessee dealers

The term ''terminal rental adjustment clause'' also includes a provision of an agreement which requires a lessee who is a dealer in motor vehicles to purchase the motor vehicle for a predetermined price and then resell such vehicle where such provision achieves substantially the same results as a provision described in subparagraph (A).

(i) Taxable mortgage pools

(1) Treated as separate corporations

A taxable mortgage pool shall be treated as a separate corporation which may not be treated as an includible corporation with any other corporation for purposes of section 1501.

(2) Taxable mortgage pool defined

For purposes of this title -

(A) In general

Except as otherwise provided in this paragraph, a taxable mortgage pool is any entity (other than a REMIC or a FASIT) if -

(i)

substantially all of the assets of such entity consists of debt obligations (or interests therein) and more than 50 percent of such debt obligations (or interests) consists of real estate mortgages (or interests therein),

(ii)

such entity is the obligor under debt obligations with 2 or more maturities, and

(iii)

under the terms of the debt obligations referred to in clause (ii) (or underlying arrangement), payments on such debt obligations bear a relationship to payments on the debt obligations (or interests) referred to in clause (i).

(B) Portion of entities treated as pools

Any portion of an entity which meets the definition of subparagraph (A) shall be treated as a taxable mortgage pool.

(C) Exception for domestic building and loan

Nothing in this subsection shall be construed to treat any domestic building and loan association (or portion thereof) as a taxable mortgage pool.

(D) Treatment of certain equity interests

To the extent provided in regulations, equity interest of varying classes which correspond to maturity classes of debt shall be treated as debt for purposes of this subsection.

(3) Treatment of certain REIT's

If -

(A)

a real estate investment trust is a taxable mortgage pool, or

(B)

a qualified REIT subsidiary (as defined in section 856(i)(2)) of a real estate investment trust is a taxable mortgage pool,

under regulations prescribed by the Secretary, adjustments similar to the adjustments provided in section 860E(d) shall apply to the shareholders of such real estate investment trust.

(j) Tax treatment of Federal Thrift Savings Fund

(1) In general

For purposes of this title -

(A)

the Thrift Savings Fund shall be treated as a trust described in section 401(a) which is exempt from taxation under section 501(a);

(B)

any contribution to, or distribution from, the Thrift Savings Fund shall be treated in the same manner as contributions to or distributions from such a trust; and

(C)

subject to section 401(k)(4)(B) and any dollar limitation on the application of section 402(e)(3), contributions to the Thrift Savings Fund shall not be treated as distributed or made available to an employee or Member nor as a contribution made to the Fund by an employee or Member merely because the employee or Member has, under the provisions of subchapter III of chapter 84 of title 5, United States Code, and section 8351 of such title 5, an election whether the contribution will be made to the Thrift Savings Fund or received by the employee or Member in cash.

(2) Nondiscrimination requirements

Notwithstanding any other provision of law, the Thrift Savings Fund is not subject to the nondiscrimination requirements applicable to arrangements described in section 401(k) or to matching contributions (as described in section 401(m)), so long as it meets the requirements of this section.

(3) Coordination with Social Security Act

Paragraph (1) shall not be construed to provide that any amount of the employee's or Member's basic pay which is contributed to the Thrift Savings Fund shall not be included in the term ''wages'' for the purposes of section 209 of the Social Security Act or section 3121(a) of this title.

(4) Definitions

For purposes of this subsection, the terms ''Member'', ''employee'', and ''Thrift Savings Fund'' shall have the same respective meanings as when used in subchapter III of chapter 84 of title 5, United States Code.

(5) Coordination with other provisions of law

No provision of law not contained in this title shall apply for purposes of determining the treatment under

this title of the Thrift Savings Fund or any contribution to, or distribution from, such Fund.

(k) Treatment of certain amounts paid to charity

In the case of any payment which, except for section 501 (b) of the Ethics in Government Act of 1978, might be made to any officer or employee of the Federal Government but which is made instead on behalf of such officer or employee to an organization described in section 170(c) -

(1)

such payment shall not be treated as received by such officer or employee for all purposes of this title and for all purposes of any tax law of a State or political subdivision thereof, and

(2)

no deduction shall be allowed under any provision of this title (or of any tax law of a State or political subdivision thereof) to such officer or employee by reason of having such payment made to such organization.

For purposes of this subsection, a Senator, a Representative in, or a Delegate or Resident Commissioner to, the Congress shall be treated as an officer or employee of the Federal Government.

(l) Regulations relating to conduit arrangements

The Secretary may prescribe regulations recharacterizing any multiple-party financing transaction as a transaction directly among any 2 or more of such parties where the Secretary determines that such recharacterization is appropriate to prevent avoidance of any tax imposed by this title.

(m) Designation of contract markets

Any designation by the Commodity Futures Trading Commission of a contract market which could not have been made under the law in effect on the day before the date of the enactment of the Commodity Futures Modernization Act of 2000 shall apply for purposes of this title except to the extent provided in regulations prescribed by the Secretary.

(n) Cross references

(1) Other definitions For other definitions, see the following sections of Title 1

For other definitions, see the following sections of

Title 1 of the United States Code:

(1)

Singular as including plural, section 1.

(2)

Plural as including singular, section 1.

(3)

Masculine as including feminine, section 1.

(4)

Officer, section 1.

(5)

Oath as including affirmation, section 1.

(6)

County as including parish, section 2.

(7)

Vessel as including all means of water transportation, section 3.

(8)

Vehicle as including all means of land transportation, section 4.

(9)

Company or association as including successors and assigns, section 5.

(2) Effect of cross references For effect of cross references in this title, see section

For effect of cross references in this title, see section 7806(a)

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[1] See References in Text note below.

[2] See References in Text note below.

[3] So in original. Probably should be

Next

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The following decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of Red Wing Malting Co. *v.* Willcuts, collector of internal revenue, is published for the information of internal-revenue officers and others concerned.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved February 23, 1927:
A. W. MELLON,
Secretary of the Treasury.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

Red Wing Malting Co., plaintiff in error, v. *Levi M. Willcuts, collector of internal revenue, etc., defendant in error*

ERROR to the United States District Court for the District of Minnesota

(November 5, 1926)

KENYON, Circuit Judge, delivered the opinion of the court:

This is an action brought by the Red Wing Malting Co., a corporation, plaintiff in error (designated for convenience as plaintiff), against Levi M. Willcuts, collector of internal revenue for the district of Minnesota, defendant in error (designated for convenience as defendant), for the recovery of $29,893.44 income and profits taxes alleged to have been erroneously assessed for the fiscal year ending August 31, 1918, and which were paid by plaintiff.

Plaintiff prior to the advent of prohibition was engaged in the business of manufacturing barley malt and selling the same to brewers engaged in the manufacture of fermented malt liquors. That was its sole business. Its market was destroyed as a result of the prohibition amendment and the acts of Congress relating to the manufacture and sale of intoxicating liquors.

There is no dispute as to the facts. We set forth a number of the court's findings thereon, as follows:

That on March 1, 1913, the plaintiff had built up a large and profitable business and had a good will of large value. That at said date, namely, March 1, 1913, the good will of the plaintiff's business was worth the sum of $153,618.75.

11. That by reason of the acts of Congress and the presidential proclamations thereunder, the business and trade of plaintiff, built up over a number of years, was totally destroyed, for although the plaintiff still had the right to manufacture its malt, its customers were, by said acts of Congress and presidential proclamations thereunder, all put out of business and prohibited by law from using the products of this plaintiff. That as a result of this action the market for plaintiff's products was wholly destroyed and as a result plaintiff closed its plant and ceased all manufacturing operations in May, 1918. That in December, 1918, plaintiff sold its plant, including its real estate, machinery and equipment to the Fleischmann Yeast Co. under a contract, for $150,000.

12. That as plaintiff was forced out of business by reason of the foregoing facts the good will of said business went with it and ceased to be.

For the fiscal year ending August 31, 1918, the Commissioner of Internal Revenue determined plaintiff's taxable net income to be $120,536.42. Plaintiff claims that in arriving at its taxable net income for said fiscal year a deduction

for obsolescence of good will in the sum of $153,618.75, being the entire March 1, 1913, agreed value of its good will, should have been deducted. This would have left no taxable income for that year. Plaintiff seeks to recover the total income and profits taxes paid by it for said year.

The District Court held against the contention of the plaintiff, and from that holding this writ of error is prosecuted. The issue presented is a narrow and precise one, viz, is plaintiff in computing its taxable net income for the fiscal year ending August 31, 1918, entitled to a deduction on account of obsolescence or loss of good will?

The statute involved is the revenue act of 1918 (40 Stat. L. 1057, 1077). The particular portions thereof are parts of section 234 (a), reading as follows:

That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * * * *

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise;

* * * * * * *

(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

It is the theory of plaintiff that the phrase in subsection (7) of said statute "including a reasonable allowance for obsolescence" created a new and additional tax deduction to the "exhaustion, wear and tear" clause of said subsection.

It is the contention of defendant that an allowance for obsolescence under the statute is merely supplementary to the allowance for "exhaustion, wear and tear," in those cases where by reason of economic circumstances the allowance for "exhaustion, wear and tear" based upon the estimated normal period of utility would be insufficient to restore to the taxpayer the cost of the capital investment. That the allowance for obsolescence applies only to property of a depreciable character. It will thus be seen that the matter presented raises legal questions of far-reaching importance.

Plaintiff contends that the Treasury Department has established an interpretation of the various acts relating to depreciation for the purpose of arriving at taxable income through office decisions, Treasury decisions, an Advisory Tax Board, the Committee on Appeals and Review, and that such construction has been that obsolescence of intangible property is permissible as a deduction in arriving at taxable income.

Article 163 of Regulations 45 promulgated by the Treasury Department construing the revenue act of 1918 is as follows:

Depreciation of intangible property.—Intangibles, the use of which in the trade or business is definitely limited in duration, may be the subject of a depreciation allowance. Examples are patents and copyrights, licenses and franchises. Intangibles, the use of which in the business or trade is not so limited, will not usually be a proper subject of such an allowance. If, however, an intangible asset acquired through capital outlay is known from experience to be of value in the business for only a limited period, the length of which can be estimated from experience with reasonable certainty, such intangible asset may be the subject of a depreciation allowance, provided the facts are fully shown in the return or prior thereto to the satisfaction of the Commissioner. There can be no such allowance in respect of good will, trade names, trade-marks, trade brands, secret formulæ, or processes.

This would seem to indicate the attitude of the Treasury Department at that time. It is true that after the promulgation of this regulation the Internal Revenue Bureau recognized for a time at least deductions for obsolescence of good will, the taxpayer having the burden of proving the beginning and end of the claimed obsolescence period. The deduction for good will was recognized only where it was assignable as distinguished from good will attached to the owning or carrying on of the business, or connected with the premises on which

the business was conducted. No allowance for good will was recognized where it would be valuable in another business after the termination of the business in which the taxpayer was engaged.

The case of Rock Spring Distilling Co. (2 Board of Tax Appeals, 207) was a case considering somewhat the question of obsolescence of good will, and the board held there was no such thing under the revenue act of 1916. It does not decide that such deduction was permissible under the act of 1918. We have been unable to find any decision of the Board of Tax Appeals passing directly upon the question of whether under the act of 1918 a deduction could be allowed for obsolescence of good will.

In the decision on the appeal of the Brevoort Hotel Co. case before the Committee on Appeals and Review, and in its holdings as to hotels operating bars, there is language justifying the claim that a good will value may be established for the loss of which an allowance for obsolescence may be made as distinct from the good will of the hotel. In the hotel cases may be noted the following language of the opinion: "It is, therefore, held that hotels which can establish a good-will value which might have been assigned separate and distinct from the good will of the hotel, are entitled to obsolescence for the loss of their good will due to national prohibition legislation."

We have examined the references in the brief of plaintiff to the cumulative bulletins of the Treasury Department and the tax rulings contained therein bearing on this question, the holdings of the Committee on Appeals and Review, and the decisions of the Tax Appeals Board, and conclude that either side to this controversy may find some comfort therein.

Courts have respect for and give weight to departmental construction of a statute, although such construction is not controlling. (22 Cyc. 1606; Baltzell *v.* Mitchell, 3 F. (2d) 428.) Certainly, however, there has been no such consistent and uniform construction of the statute in question as to be persuasive with the court or of appreciable assistance. Nor do we see much force in the claim that Congress has reenacted in 1921, 1924, and 1926 the section under consideration substantially as in the act of 1918, and thereby has acquiesced in the interpretation by the Treasury Department of the congressional intent as to obsolescence of good will as a tax deduction entity. There is no decision of the Treasury Department construing the act of 1918 as authorizing a deduction for obsolescence of good will as a separate and distinct entity, nor is there any such definite and uniform construction of provisions in other statutes to warrant a conclusion that Congress was adopting any particular construction of the Treasury Department. The very claim here was denied by the Committee on Appeals and Review. It may as well be argued therefore that Congress in reenacting the section after such action of the Treasury Department has adopted its conclusion. Further, the revenue act of 1926 containing section 234 (a) (7) in substantially the same form as in the revenue act of 1918 was enacted after the decision of the lower court in the case at bar. Therefore, if there was a practice of the Treasury Department relied on in conflict with said decision there would be no substance in the claim that Congress had ratified, by passing the revenue act of 1926, the practice of the bureau. We content ourselves with saying that in the confusion of rulings of the solicitors of the Treasury Department and the various boards created therein to pass on tax questions, or the decisions of the Board of Tax Appeals, no long-continued and uniform construction of the statute here involved can be found. Therefore, we pretermit this phase of the matter, calling attention to the language of the Supreme Court of the United States in Iselin *v.* United States (270 U. S. 245, 251), "It suggests that these facts imply legislative recognition and approval of the executive construction of the statute. But the construction was neither uniform, general, nor long continued; neither is the statute ambiguous. Such departmental construction can not be given the force and effect of law. (Compare United States *v.* Falk & Bro., 204 U. S. 143; National Lead Co. *v.* United States, 252 U. S. 140, 146.)"

The only case cited or that we have been able to find which bears directly on the question at issue is Haberle Crystal Springs Brewing Co. *v.* Jesse W. Clarke, collector of internal revenue. A referee's opinion therein construes the statute as contended for by plaintiff. It is of note that the opinion of said referee has not as yet been adopted by the United States District Court of the Northern District of New York, where the case is pending. The case of Kentucky Tobacco Products Co. *v.* Lucas, collector of internal revenue (5 Fed. (2d) 723), refers to the statute in question, but does not discuss the proposition here raised.

We are satisfied this case is one of first impression, and the question is squarely before this court as to the construction of subsection (7) of section 234 (a) of the revenue act of 1918.

Some legal propositions argued are assumedly beyond controversy, e. g.,

(a) A statute should receive a natural and not a strained construction, and its plain, obvious, and rational meaning should be adhered to. (Lynch *v.* Alworth-Stephens Co., 294 Fed. 190.)

(b) Tax laws if doubtful are to be construed in favor of the taxpayer. (Gould *v.* Gould, 245 U. S. 151; United States *v.* Merriam, 263 U. S. 179.)

(c) The term property in the act under consideration is not used in a restricted sense. (Lynch, executrix, etc., *v.* Alworth-Stephens Co., 267 U. S. 364.)

(d) Good will is property of an intangible nature, and the term property includes good will. (28 Corpus Juris, 730; Metropolitan Bank *v.* St. Louis Dispatch Co., 149 U. S. 436; The Coca-Cola Bottling Co. *v.* The Coca-Cola Co., 269 Fed. 796; Washburn *v.* National Wall-Paper Co. et al., 81 Fed. 17.)

(e) Good will has no existence except in connection with a continuing business. (Kaufmann *v.* Kaufmann (Pa.), 86 Atl. 634; Metropolitan Nat. Bank *v.* St. Louis Dispatch Co. et al., 36 Fed. 722.)

(f) It may be bought and sold in connection therewith as an incident thereof. (Camden *v.* Stuart, 144 U. S. 104; The Coca-Cola Bottling Co. *v.* The Coca-Cola Co., 269 Fed. 796, 805; Commonwealth *v.* Kentucky Distilleries & Warehouse Co. (Ky.), 116 S. W. 766; Sawilowsky *v.* Brown, 288 Fed. 533.)

With these general propositions in mind we proceed to a discussion of the statute in question. No difficulty arises as to the first part of subsection (7) of section 234 (a), "a reasonable allowance for the exhaustion, wear and tear of property used in the business." That is clear enough as defining the deduction. The controversy is over the part of the subsection following these words, viz, "including a reasonable allowance for obsolescence." Does this provide for a new, distinct deduction, or is it so attached and related to the previous phrase in subdivision (7) that it applies only to such property used in the business as is subject to exhaustion, wear and tear? The case relied on by plaintiff is Haberle Crystal Springs Brewing Co. *v.* Clarke, collector of internal revenue (heretofore referred to) in the United States District Court, Northern District of New York, and the opinion of the referee in said case is attached as an appendix to plaintiff's brief. Plaintiff there claimed it was entitled under the 1918 statute to a reasonable allowance for the obsolescence of its good will, liquor licenses, and national plant, for which items no deductions were allowed in the computation of the tax which the plaintiff paid, and the referee there held that good will was property used in the business within the meaning of subsection (7) of section 234 (a) of the revenue act of 1918, and that the purpose of the language of the statute as to allowance for obsolescence was to create a new and additional deduction. The position taken by the referee is presented with clearness and fortified by

substantial reasoning, and states that theory of construction as well, we think, as it can be done.

We are, however, unable to reach the same conclusion. If it had been intended by the Congress to create a new and additional deduction not connected with property used in the business subject to "exhaustion, wear and tear," it would have been very easy for Congress, instead of using the word "including," to have said, "a reasonable allowance for exhaustion, wear and tear, and obsolescence of property used in the business." That would have made the matter clear.

The first part of the subsection provides for a deduction in arriving at tax income for the depreciation by exhaustion, wear and tear of property used in the business. Depreciation was the matter sought to be remedied in order to restore to the owner the basis of original value. It is perfectly apparent that an allowance for depreciation due to exhaustion, wear and tear of property might not sufficiently provide for the restoration of capital over the period of useful life of an asset, and it might be entirely inadequate to effect restoration of the March 1, 1913, value thereof. The meaning of the word "including" as used in the statute is important. It evidently refers to the preceding part of the subsection, and must be recognized as occupying a significant and important place. It can not be brushed aside and ignored. This court should not attempt to write new language into the statute, nor ignore language there used, but must endeavor from the language of the statute itself to arrive at the meaning of the Congress. This word has received considerable discussion in opinions of the courts. It has been productive of much controversy. The word "include" is defined in the New Standard Dictionary as follows:

(1) To comprise, comprehend, or embrace as a component part, item, or member; as, this volume *includes* all his works; the bill *includes* his last purchase.
(2) To enclose within; contain; confine; as, an oyster shell sometimes *includes* a pearl.

It is defined by Webster as follows:

To comprehend or comprise, as a genus of the species, the whole a part, an argument or reason the inference; to take or reckon in; to contain; embrace; as this volume includes the essays; to and including the tenth.

The Century Dictionary defines "including," thus: "to comprise as a part."

Perhaps the most interesting discussion of the word "including" is found in Montello Salt Co. *v.* State of Utah (221 U. S. 452). There the court referred to and discussed some of the cases where the word "including" had been under consideration. For instance, the court pointed out in Brainard *v.* Darling (132 Mass. 218) "that a legacy of $100, 'including money trusteed at a certain bank,' could not be construed as meaning that the sum of $100 was in addition to the sum in bank." Also in Henry's Executor *v.* Henry's Executor (81 Ky. 342) "a bequest of $14,000, 'including certain notes,' was held to mean that the notes formed a part of the $14,000 and were not in addition thereto." Also the case of Neher *v.* McCook County (11 S. Dak. 422; 78 N. W. 998), where "it was held that a certain section of the laws of the State which provided that the sheriff's fees should be $16 for summoning a jury, 'including mileage,' did not entitle him to mileage in addition to the $16." And the Supreme Court after its reference to these cases says of the case before it, "The court also considered that the word 'including' was used as a word of enlargement, the learned court being of opinion that such was its ordinary sense. With this we can not concur. It is its exceptional sense, as the dictionaries and cases indicate. We may concede to 'and' the additive power attributed to it." We refer to a few other cases:

In Sullivan Machinery Co. *v.* United States (168 Fed. 561), the word "including" used in the tariff act was construed as a word of addition. In Maben *v.* Rosser et al (Okl.; 103 Pac. 674, 676), the court, discussing the meaning of the

word "including," says: "This word has also been defined as having an accumulative sense and as classing that which follows with that which has gone before."

In Kennedy *v.* Industrial Accident Commission of California et al. (Cal.; 195 Pac. 267, 271), the court says: " 'Including' is not a word of limitation. Rather it is a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language that precedes it. * * * As here employed, the word 'including' is used to express the idea that the specific power to review, grant or regrant, diminish, increase, or terminate an award upon the ground that the disability has recurred, increased, diminished, or terminated—particular power specifically referred to in the section of the present act—is but a part of the larger and more comprehensive power conferred by the more general language of the immediately preceding clause of the section."

In Dumas *v.* Boulin (La.; 1 McGloin, 275, 278), it is pointed out that the word "include" has two shades of meaning. The court says, " 'Include' has two shades of meaning. It may apply where that which is affected is the only thing included, and it is also used to express the idea that the thing in question constitutes a part only of the contents of some other thing. It is more commonly used in the latter sense."

That the word "includes" is a word of enlargement is held in Fraser *v.* Bentel et al. (Cal.; 119 Pac. 509); Cooper *v.* Stinson (5 Minn. 522); Calhoun *v.* Memphis & P. R. Co. (4 Fed. Cas. 1045).

Perhaps the most lucid statement the books afford on the subject is in Blanck et al. *v.* Pioneer Mining Co. et al. (Wash.; 159 Pac. 1077, 1079), namely, "the word 'including' is a term of enlargement and not a term of limitation, and necessarily implies that something is intended to be embraced in the permitted deductions beyond the general language which precedes it. But granting that the word 'including' is a term of enlargement, it is clear that it only performs that office by introducing the specific elements constituting the enlargement. It thus, and thus only, enlarges the otherwise more limited, preceding general language. * * * The word 'including' introduces an enlarging definition of the preceding general words, 'actual cost of the labor,' thus of necessity excluding the idea of a further enlargement than that furnished by the enlarging clause so introduced. When read in its immediate context, as on all authority it must be read, the word 'including' is obviously used in the sense of its synonyms 'comprising; comprehending; embracing.' "

It seems to us that the language "including a reasonable allowance for obsolescence" is but a part of and an enlargement of the previous phrase of the said subsection (7) relating to exhaustion, wear and tear, and that the first part of the sentence was intended to cover the subject matter thereof. It does not add a new kind of deduction, but merely permits the inclusion of an additional element, namely, obsolescence of such property used in the business as is subject to exhaustion, wear and tear. The allowance for obsolescence was intended to be in connection with the allowance for exhaustion, wear and tear, that being at times insufficient to restore the proper basis of capital values.

The history leading up to the enactment of subsection (7) of section 234 (a) of the 1918 act is important. The excise tax act of 1909 permitted deduction of "a reasonable allowance for depreciation of property, if any." Regulations of the Treasury Department provided that the deduction should be the loss "that arises from exhaustion, wear and tear, or obsolescence out of the uses to which the property is put." The United States District Court for the Northern District of California in San Francisco & P. S. S. Co. *v.* Scott, collector (253 Fed. 854, 855), discussed depreciation as used in that statute, and said: "It is intended to cover the estimated lessening in value of the original property, if any, due to wear and tear, decay, or gradual decline from natural causes, inade-

quacy, obsolescence, etc., which at some time in the future will require the abandonment or replacement of the property, in spite of ordinary current repairs."

The revenue act of 1913 had this provision, "a reasonable allowance for depreciation by use, wear and tear of property, if any."

The regulations under this act recognized the interpretation put upon the word, "depreciation" under the previous act, and made an allowance for obsolescence "out of the uses to which the property is put."

The 1916 act dropped the word "depreciation" and the deduction permitted was "a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the trade or business." After that there was no basis for a deduction for obsolescence, as the depreciation deduction under the 1916 act excluded obsolescence.

When the revenue act of 1918 was before the Congress the House wrote a provision the same as in the 1916 and 1917 acts providing an allowance for "exhaustion, wear and tear" of property. The Senate adopted an amendment substituting the word "depreciation" for "exhaustion, wear and tear." In conference the word "depreciation" was stricken out, the words "exhaustion, wear and tear" restored, and the words "including a reasonable allowance for obsolescence" included. In this form the bill passed. It would seem quite apparent, therefore, that Congress was not intending to add a new and independent deduction. It was merely trying to provide the restoration of capital value of a depreciable asset over the period of its useful life by allowing something known as obsolescence as an additional element to exhaustion, wear and tear. This legislative history sustains, we think, the conclusion to which we are forced, that the phrase, "including a reasonable allowance for obsolescence" is one of specification and enlargement; that it is closely connected with and relates to the subject matter of the other phrase of said subsection (7), and applies only to such property therein designated used in the business as is subject to exhaustion, wear and tear.

That leads to the query, is good will such property?

Good will is property of an intangible nature. It differs from such intangibles as patents, copyrights, licenses and franchises, because while in a certain sense it inheres in and is used in the business, it is not subject to depreciation, as that term is commonly understood and commonly used in the statutes. The Supreme Court of the United States in Metropolitan Bank *v.* St. Louis Dispatch Co. (149 U. S. 436, 446), says: "Undoubtedly, good will is in many cases a valuable thing, although there is difficulty in deciding accurately what is included under the term. It is tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently. Mr. Justice Story defined good will to be 'the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessity, or even from ancient partialities or prejudices.' (Story Part. sec. 99.)"

The opinion of the referee in the case hereinbefore referred to, relied upon by plaintiff, of Haberle Crystal Springs Brewing Co. *v.* Jesse W. Clarke, collector of internal revenue, so holds, because the referee says, "ordinarily it has an indefinite existence and value."

Opinions of expert accountants are not without value in considering the peculiar nature and status of good will in business. In Montgomery's "Auditing Theory and Practice," we find the following enlightening paragraph:

This asset is in a class by itself. The question of depreciation certainly can not be applied to it as to other items. If earnings decline for any reason, the

value of good will declines correspondingly, because by its very nature its value depends on earnings of a certain amount being maintained. Good will, however, always appears, or should appear, on the balance sheet as a separate item, and well-established practice permits it to appear at cost, irrespective of fluctuations which affect its value. As a matter of fact, its actual value changes from day to day, and there would be so much uncertainty in any attempt to adjust its book value that by common consent it is left alone, except in cases where earnings are unusually large, and it is considered advisable to write it off. In such cases the very fact of there being sufficient earnings to write it off would justify its retention, whereas earnings not up to expectations, and insufficient to enable a concern to write it off, would indicate that its book value is inflated. As good will does not suffer wear and tear, does not become obsolescent, is not used up in the operation of the business, depreciation, as such, can not be charged against it. * * * While good will does not depreciate, it is constantly liable to fluctuations. Good will is not usually written off, and the question of the amount at which it shall stand in the balance sheet was not formerly deemed to be within the scope of the auditor's work, but the present range of an auditor's duties compels him to give serious thought to this item.

In "Higher Accountancy Principles and Practice" (under supervision of William Arthur Chase), the following:

The increased or decreased value of the good will does not show in any ordinary profit and loss account. Its growth cannot be attributed to any particular year.

In a private concern good will is only ascertainable by actually selling the business. In case of a public company the good will is known from day to day.

The whole question of good will is a difficult one, because each case stands by itself.

From "Modern Accounting" by Henry Rand Hatfield:

But in valuing Goodwill for the inventory the limitation of its value to its cost must be most rigorously observed. It has been seen that the restriction of inventory value to cost price is of rather general application, but its force is much greater when the goods to be valued are immaterial. No one would object to the inclusion in the inventory of treasure trove even though it cost the finder nothing. But Goodwill is rigorously excluded unless it has been secured at a cost. Hence it is recognized as legitimate for the purchaser of Goodwill to include it among his assets, but accounting practice prudently, though perhaps illogically, forbids the firm which created the Goodwill to place in the balance sheet any value on the clientele which it has built up and which it could at any moment sell for a large sum.

We are satisfied there can be no wear or tear of good will, or exhaustion thereof by use, and even should we assume that good will separate and distinct from tangible property is property used in the business, section 234 (a), subsection (7) of the 1918 revenue act, limits the allowance for obsolescence to such property as is susceptible to exhaustion, wear and tear by use in the business, and good will is not such property.

We turn therefore to the question of whether the allowance claimed can be made under section 234 (a), subsection (4). It is suggested in the reply brief of plaintiff that if defendant's argument be conceded to be correct as to the obsolescence feature of the statute, this court could decide the case under the loss section, section 234 (a), subsection (4), hereinbefore set out, and it is claimed that under the pleadings the requested allowance could be granted under that subsection as a loss sustained in plaintiff's fiscal year ending August 31, 1918.

Defendant in its brief states: "Plaintiff and defendant agree that unless a deduction for obsolescence of good will is authorized by section 234 (a) (7) of the act plaintiff's claim must of necessity be denied." Apparently this statement is incorrect. However, the case was tried and determined principally upon the question of the construction of section 234 (a), subsection (7). We refer to this suggested proposition briefly.

We have heretofore pointed out that good will has no existence separate and apart from an established business. With the termination of that business it is ended. While a capital asset, it is not the subject of purchase, sale or assignment

separate from the business itself. It is not an assignable asset distinct from the business. It is different in this respect from such intangibles as patents, contracts or franchises which may be sold. When a business is disposed of its value and realized selling price may be enhanced by the existence of good will. If sold at a loss the loss of good will is reflected in the transaction. The claim is somewhat novel, therefore, and rather startling that loss of good will can be made the subject of an independent claim for a tax deduction separate and distinct from the business of which it is an incident.

When the property of the Red Wing Malting Co. was sold at a depreciated value by reason of prohibition the loss of good will was reflected in the general loss. This loss might possibly be a basis for a deduction under section 234 (a), subsection (4) of the statute. We are not advised whether or not such allowance has been made. To hold that a claimant is entitled to segregate good will from the property and business to which it is attached as an incident and from which it is inseparable and permit a separate deduction for its loss might result in a double deduction and have far-reaching consequences. If the court is to open the door to claimants for tax deductions under the statute for the loss of good will apart from the tangible property with which it is connected, the right should clearly appear from the statute. We think it does not so appear. While we have indicated our view of the matter, we are not confident that this question is before us. It does not appear from the record that any claim under subsection (4) for refund covering the loss of good will as a sustained loss during the taxable year was presented to the Commissioner of Internal Revenue prior to bringing this action and a refund requested. The application for refund does not appear in the record. Such application is a condition precedent to the jurisdiction of this court in matters of this character. The precise ground upon which the refund is demanded must be stated in the application to the commissioner, and we think if that is not done a party can not base a recovery in the court upon an entirely different and distinct ground from that presented to the commissioner. We have reached the conclusion that the action of the trial court in dismissing plaintiff's petition and rendering judgment for defendant was correct, and the same is affirmed.

(T. D. 3981)

Income tax

Section 29, revenue act of 1916, as amended—Section 4, revenue act of 1917

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Section 29, revenue act of 1916, as amended by section 1211 of the revenue act of 1917, provides as follows:

That in assessing income tax the net income embraced in the return shall also be credited with the amount of any excess profits tax imposed by Act of Congress and assessed for the same calendar or fiscal year upon the taxpayer, and, in the case of a member of a partnership, with his proportionate share of such excess profits tax imposed upon the partnership.

Section 4, revenue act of 1917, provides in part as follows:

That in addition to the tax imposed by subdivision (a) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this

Act, there shall be levied, assessed, collected, and paid a like tax of four per centum upon the income received in the calendar year nineteen hundred and seventeen and every calendar year thereafter, by every corporation, joint-stock company or association, or insurance company, subject to the tax imposed by that subdivision of that section, except that if it has fixed its own fiscal year, the tax imposed by this section for the fiscal year ending during the calendar year nineteen hundred and seventeen shall be levied, assessed, collected, and paid only on that proportion of its income for such fiscal year which the period between January first, nineteen hundred and seventeen, and the end of such fiscal year bears to the whole of such fiscal year.

Pursuant to the above-quoted provisions, in the case of a corporation, joint-stock company or association, or insurance company returning income for a fiscal year ending during the calendar year 1917, the excess profits tax assessed upon the taxpayer under the revenue act of 1917 for the fiscal year 1917 should be credited against the net income apportioned to the part of the fiscal year falling within the calendar year 1917 in determining the amount of income subject to the 4 per cent tax imposed by section 4, supra.

All rulings and regulations inconsistent herewith are hereby revoked.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved February 23, 1927:
A. W. MELLON,
Secretary of the Treasury.

(T. D. 3982)

Income tax—Revenue acts of 1916, 1917, and 1918—Decision of court

INCOME—PARTNERSHIP—ASSIGNMENT OF INTEREST.

Under section 1204 (1) of the revenue act of 1917, amending section 8 (e) of the revenue act of 1916, and section 218 (a) of the revenue act of 1918 the total profits on the interest of a firm partner are taxable as income to him irrespective of an agreement with his wife under which she was entitled to one-half of the partner's share of the profits and was liable for one-half of the losses, such an agreement not making the wife a member of the partnership.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The following decision of the United States Circuit Court of Appeals for the Second Circuit in the case of Ormsby McKnight Mitchel *v.* Frank K. Bowers, collector, is published for the information of internal-revenue officers and others concerned.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved February 24, 1927:
A. W. MELLON,
Secretary of the Treasury.

whole of a law, to give judgment or advice, upon a view of any one clause of it.

Incivile est, nisi tota sententia inspecta, de aliqua parte judicare /insívəliy èst, náysay tówtə sənténsh(iy)ə inspéktə, diy ǽləkwə pártiy jùwdəkériy/. It is irregular, or legally improper, to pass an opinion upon any part of a sentence, without examining the whole.

In civilibus ministerium excusat, in criminalibus non item /ìn səvíləbəs mìnəstíriyəm əkskyúwzət, ìn krìmənéyləbəs nòn áytəm/. In civil matters agency (or service) excuses, but not so in criminal matters.

Incivism /ínsəvìzəm/. Unfriendliness to the state or government of which one is a citizen.

In claris non est locus conjecturis /ìn klérəs nón èst lówkəs kònjəkt(y)úrəs/. In things obvious there is no room for conjecture.

Inclausa /inklózə/. In old records, a home close or inclosure near the house.

Inclose. To surround; to encompass; to bound; fence, or hem in, on all sides. To shut up.

Inclosed lands. Lands which are actually inclosed and surrounded with fences.

Inclosure. In old English law, act of freeing land from rights of common, commonable rights, and generally all rights which obstruct cultivation and the productive employment of labor on the soil.

Land surrounded by some visible obstruction. An artificial fence around one's estate. *See* Close.

Include. (Lat. *Inclaudere*, to shut in, keep within.) To confine within, hold as in an inclosure, take in, attain, shut up, contain, inclose, comprise, comprehend, embrace, involve. Term may, according to context, express an enlargement and have the meaning of *and* or *in addition to*, or merely specify a particular thing already included within general words theretofore used. "Including" within statute is interpreted as a word of enlargement or of illustrative application as well as a word of limitation. Premier Products Co. v. Cameron, 240 Or. 123, 400 P.2d 227, 228.

Included offense. In criminal law, a crime which is part of another crime; *e.g.* included in every murder is assault and battery. One which is established by proof of the same or less than all of the facts, or a less culpable mental state, or both, than that which is required to establish commission of offense charged. People v. Lyons, 26 Ill.App.3d 193, 324 N.E.2d 677, 680. To be an "included offense", all elements of the lesser offense must be contained in the greater offense, the greater containing certain elements not contained in the lesser. Gaskin v. State, 244 Ark. 541, 426 S.W.2d 407, 409. It is impossible to commit a greater offense without necessarily committing included offense. State v. Muise, App., 103 N.M. 382, 707 P.2d 1192, 1202. The defendant may be found guilty of an offense necessarily included in the offense charged. Fed.R.Crim.P. 31.

Inclusionary approach. Under the "inclusionary approach", evidence of prior crimes, wrongs, or acts is admissible for any purpose other than to show defendant's criminal propensity, as long as it is relevant to some disputed issue in trial, and satisfies probative-prejudice balancing test. U.S. v. Brennan, C.A.N.Y., 798 F.2d 581, 589.

Inclusio unius est exclusio alterius /inklúwzh(iy)ow yənáyəs èst əksklúwzh(iy)ow òltəráyəs/. The inclusion of one is the exclusion of another. The certain designation of one person is an absolute exclusion of all others. Burgin v. Forbes, 293 Ky. 456, 169 S.W.2d 321, 325. This doctrine decrees that where law expressly describes particular situation to which it shall apply, an irrefutable inference must be drawn that what is omitted or excluded was intended to be omitted or excluded. Kevin McC v. Mary A, 123 Misc.2d 148, 473 N.Y.S.2d 116, 118.

Inclusive. Embraced; comprehended; comprehending the stated limits or extremes. Opposed to "exclusive."

Inclusive survey. In land law, one which includes within its boundaries prior claims excepted from the computation of the area within such boundaries and excepted in the grant.

Incognito. Status of person who appears or travels without disclosing his true identity.

Incola /íŋkələ/. Lat. In the civil law, an inhabitant; a dweller or resident. Properly, one who has transferred his domicile to any country.

Incolas domicilium facit /íŋkələs dòməsíl(i)yəm féysət/. Residence creates domicile.

Income. The return in money from one's business, labor, or capital invested; gains, profits, salary, wages, etc.

The gain derived from capital, from labor or effort, or both combined, including profit or gain through sale or conversion of capital. Income is not a gain accruing to capital or a growth in the value of the investment, but is a gain, a profit, something of exchangeable value, proceeding from the property, severed from the capital, however invested or employed, and coming in, being derived, that is, received or drawn by the recipient for his separate use, benefit, and disposal. Goodrich v. Edwards, 255 U.S. 527, 41 S.Ct. 390, 65 L.Ed. 758. The true increase in amount of wealth which comes to a person during a stated period of time. That which comes in or is received from any business, or investment of capital, without references to outgoing expenditures. City of Fitzgerald v. Newcomer, 162 Ga.App. 646, 291 S.E.2d 766, 768.

See also Allocation of income; Blocked income; Clear reflection of income; Constructive receipt of income; Deferred income; Earned income; Earnings; Fixed income; Gross income; Income averaging; Income basis; Income in respect of decedent; Income tax; Net income; Net operating income; Personal income; Profit; Real income; Split income; Taxable income; and *Unearned income, below.*

Accrued income. Income earned during a certain accounting period but not received.

Adjusted gross income. The difference between the taxpayers' gross income and allowable adjustments. Adjustments include but are not limited to; contributions to an individual retirement account, alimony payments

§ 110. Same; definitions

Release date: 2006-03-20

As used in sections 105–109 of this title—

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

Sec. 7701. - Definitions

(a)

When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof -

(1) Person

The term ''person'' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

(2) Partnership and partner

The term ''partnership'' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term ''partner'' includes a member in such a syndicate, group, pool, joint venture, or organization.

(3) Corporation

The term ''corporation'' includes associations, joint-stock companies, and insurance companies.

(4) Domestic

The term ''domestic'' when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State unless, in the case of a partnership, the Secretary provides otherwise by regulations.

(5) Foreign

The term ''foreign'' when applied to a corporation or partnership means a corporation or partnership which is

not domestic.

(6) Fiduciary

The term ''fiduciary'' means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

(7) Stock

The term ''stock'' includes shares in an association, joint-stock company, or insurance company.

(8) Shareholder

The term ''shareholder'' includes a member in an association, joint-stock company, or insurance company.

(9) United States

The term ''United States'' when used in a geographical sense includes only the States and the District of Columbia.

(10) State

The term ''State'' shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title.

(11) Secretary of the Treasury and Secretary

(A) Secretary of the Treasury

The term ''Secretary of the Treasury'' means the Secretary of the Treasury, personally, and shall not include any delegate of his.

(B) Secretary

The term ''Secretary'' means the Secretary of the Treasury or his delegate.

(12) Delegate

(A) In general

The term ''or his delegate'' -

(i)

when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the

Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context; and

(ii)

when used with reference to any other official of the United States, shall be similarly construed.

(B) Performance of certain functions in Guam or American Samoa

The term ''delegate,'' in relation to the performance of functions in Guam or American Samoa with respect to the taxes imposed by chapters 1, 2, and 21, also includes any officer or employee of any other department or agency of the United States, or of any possession thereof, duly authorized by the Secretary (directly, or indirectly by one or more redelegations of authority) to perform such functions.

(13) Commissioner

The term ''Commissioner'' means the Commissioner of Internal Revenue.

(14) Taxpayer

The term ''taxpayer'' means any person subject to any internal revenue tax.

(15) Military or naval forces and armed forces of the United States

The term ''military or naval forces of the United States'' and the term ''Armed Forces of the United States'' each includes all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, and each term also includes the Coast Guard. The members of such forces include commissioned officers and personnel below the grade of commissioned officers in such forces.

(16) Withholding agent

The term ''withholding agent'' means any person required to deduct and withhold any tax under the provisions of section 1441, 1442, 1443, or 1461.

(17) Husband and wife

As used in sections 152(b)(4), 682, and 2516, if the husband and wife therein referred to are divorced, wherever appropriate to the meaning of such sections, the term ''wife'' shall be read ''former wife'' and the term ''husband'' shall be read ''former husband''; and, if the payments described in such sections are made by or on behalf of the wife or former wife to the husband or former husband instead of vice versa, wherever appropriate to the meaning of such sections, the term ''husband'' shall be read ''wife'' and the term ''wife'' shall be read ''husband.''

(18) International organization

The term ''international organization'' means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288-288f).

(19) Domestic building and loan association

The term ''domestic building and loan association'' means a domestic building and loan association, a domestic savings and loan association, and a Federal savings and loan association -

(A)

which either

(i)

is an insured institution within the meaning of section 401(a) [1] of the National Housing Act (12 U.S.C., sec. 1724(a)), or

(ii)

is subject by law to supervision and examination by State or Federal authority having supervision over such associations;

(B)

the business of which consists principally of acquiring the savings of the public and investing in loans; and

(C)

at least 60 percent of the amount of the total assets of which (at the close of the taxable year) consists of -

(i)

cash,

(ii)

obligations of the United States or of a State or political subdivision thereof, and stock or obligations of a corporation which is an instrumentality of the United States or of a State or political subdivision thereof, but not including obligations the interest on which is excludable from gross income under section 103,

(iii)

certificates of deposit in, or obligations of, a corporation organized under a State law which specifically authorizes such corporation to insure the deposits or share accounts of member associations,

(iv)

loans secured by a deposit or share of a member,

(v)

loans (including redeemable ground rents, as defined in section 1055) secured by an interest in real property which is (or, from the proceeds of the loan, will become) residential real property or real property used primarily for church purposes, loans made for the improvement of residential real property or real property used primarily for church purposes, provided that for purposes of this clause, residential real property shall include single or multifamily dwellings, facilities in residential developments dedicated to public use or property used on a nonprofit basis for residents, and mobile homes not used on a transient basis,

(vi)

loans secured by an interest in real property located within an urban renewal area to be developed for predominantly residential use under an urban renewal plan approved by the Secretary of Housing and Urban Development under part A or part B of title I of the Housing Act of 1949, as amended, or located within any area covered by a program eligible for assistance under section 103 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended, and loans

made for the improvement of any such real property,

(vii)

loans secured by an interest in educational, health, or welfare institutions or facilities, including structures designed or used primarily for residential purposes for students, residents, and persons under care, employees, or members of the staff of such institutions or facilities,

(viii)

property acquired through the liquidation of defaulted loans described in clause (v), (vi), or (vii),

(ix)

loans made for the payment of expenses of college or university education or vocational training, in accordance with such regulations as may be prescribed by the Secretary,

(x)

property used by the association in the conduct of the business described in subparagraph (B), and

(xi)

any regular or residual interest in a REMIC, and any regular interest in a FASIT, but only in the proportion which the assets of such REMIC or FASIT consist of property described in any of the preceding clauses of this subparagraph; except that if 95 percent or more of the assets of such REMIC or FASIT are assets described in clauses (i) through (x), the entire interest in the REMIC or FASIT shall qualify.

At the election of the taxpayer, the percentage specified in this subparagraph shall be applied on the basis of the average assets outstanding during the taxable year, in lieu of the close of the taxable year, computed under regulations prescribed by the Secretary. For purposes of clause (v), if a multifamily structure securing a loan is used in part for nonresidential purposes, the entire loan is deemed a residential real property loan if the planned residential use exceeds 80 percent of the property's planned use (determined as of the time the loan is made). For purposes of clause (v), loans made to finance the

acquisition or development of land shall be deemed to be loans secured by an interest in residential real property if, under regulations prescribed by the Secretary, there is reasonable assurance that the property will become residential real property within a period of 3 years from the date of acquisition of such land; but this sentence shall not apply for any taxable year unless, within such 3-year period, such land becomes residential real property. For purposes of determining whether any interest in a REMIC qualifies under clause (xi), any regular interest in another REMIC held by such REMIC shall be treated as a loan described in a preceding clause under principles similar to the principles of clause (xi); except that, if such REMIC's are part of a tiered structure, they shall be treated as 1 REMIC for purposes of clause (xi).

(20) Employee

For the purpose of applying the provisions of section 79 with respect to group-term life insurance purchased for employees, for the purpose of applying the provisions of sections 104, 105, and 106 with respect to accident and health insurance or accident and health plans, and for the purpose of applying the provisions of subtitle A with respect to contributions to or under a stock bonus, pension, profit-sharing, or annuity plan, and with respect to distributions under such a plan, or by a trust forming part of such a plan, and for purposes of applying section 125 with respect to cafeteria plans, the term ''employee'' shall include a full-time life insurance salesman who is considered an employee for the purpose of chapter 21, or in the case of services performed before January 1, 1951, who would be considered an employee if his services were performed during 1951.

(21) Levy

The term ''levy'' includes the power of distraint and seizure by any means.

(22) Attorney General

The term ''Attorney General'' means the Attorney General of the United States.

(23) Taxable year

The term ''taxable year'' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the taxable income is computed under subtitle A. ''Taxable year'' means, in the case of a return

made for a fractional part of a year under the provisions of subtitle A or under regulations prescribed by the Secretary, the period for which such return is made.

(24) Fiscal year

The term ''fiscal year'' means an accounting period of 12 months ending on the last day of any month other than December.

(25) Paid or incurred, paid or accrued

The terms ''paid or incurred'' and ''paid or accrued'' shall be construed according to the method of accounting upon the basis of which the taxable income is computed under subtitle A.

(26) Trade or business

The term ''trade or business'' includes the performance of the functions of a public office.

(27) Tax Court

The term ''Tax Court'' means the United States Tax Court.

(28) Other terms

Any term used in this subtitle with respect to the application of, or in connection with, the provisions of any other subtitle of this title shall have the same meaning as in such provisions.

(29) Internal Revenue Code

The term ''Internal Revenue Code of 1986'' means this title, and the term ''Internal Revenue Code of 1939'' means the Internal Revenue Code enacted February 10, 1939, as amended.

(30) United States person

The term ''United States person'' means -

(A)

a citizen or resident of the United States,

(B)

a domestic partnership,

(C)

a domestic corporation,

(D)

any estate (other than a foreign estate, within the meaning of paragraph (31)), and

(E)

any trust if -

(i)

a court within the United States is able to exercise primary supervision over the administration of the trust, and

(ii)

one or more United States persons have the authority to control all substantial decisions of the trust.

(31) Foreign estate or trust

(A) Foreign estate

The term ''foreign estate'' means an estate the income of which, from sources without the United States which is not effectively connected with the conduct of a trade or business within the United States, is not includible in gross income under subtitle A.

(B) Foreign trust

The term ''foreign trust'' means any trust other than a trust described in subparagraph (E) of paragraph (30).

(32) Cooperative bank

The term ''cooperative bank'' means an institution without capital stock organized and operated for mutual purposes and without profit, which -

(A)

either -

(i)

is an insured institution within the meaning of section 401(a) [2] of the National Housing Act (12

U.S.C., sec. 1724(a)), or

(ii)

is subject by law to supervision and examination by State or Federal authority having supervision over such institutions, and

(B)

meets the requirements of subparagraphs (B) and (C) of paragraph (19) of this subsection (relating to definition of domestic building and loan association).

In determining whether an institution meets the requirements referred to in subparagraph (B) of this paragraph, any reference to an association or to a domestic building and loan association contained in paragraph (19) shall be deemed to be a reference to such institution.

(33) Regulated public utility

The term ''regulated public utility'' means -

(A)

A corporation engaged in the furnishing or sale of -

(i)

electric energy, gas, water, or sewerage disposal services, or

(ii)

transportation (not included in subparagraph (C)) on an intrastate, suburban, municipal, or interurban electric railroad, on an intrastate, municipal, or suburban trackless trolley system, or on a municipal or suburban bus system, or

(iii)

transportation (not included in clause (ii)) by motor vehicle - if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof, by an agency or instrumentality of the United States, by a public service or public utility commission or other similar body of the District of Columbia or of any State or political subdivision thereof, or by a foreign country or an agency or instrumentality or political subdivision thereof.

(B)

A corporation engaged as a common carrier in the furnishing or sale of transportation of gas by pipe line, if subject to the jurisdiction of the Federal Energy Regulatory Commission.

(C)

A corporation engaged as a common carrier

(i)

in the furnishing or sale of transportation by railroad, if subject to the jurisdiction of the Surface Transportation Board, or

(ii)

in the furnishing or sale of transportation of oil or other petroleum products (including shale oil) by pipe line, if subject to the jurisdiction of the Federal Energy Regulatory Commission or if the rates for such furnishing or sale are subject to the jurisdiction of a public service or public utility commission or other similar body of the District of Columbia or of any State.

(D)

A corporation engaged in the furnishing or sale of telephone or telegraph service, if the rates for such furnishing or sale meet the requirements of subparagraph (A).

(E)

A corporation engaged in the furnishing or sale of transportation as a common carrier by air, subject to the jurisdiction of the Secretary of Transportation.

(F)

A corporation engaged in the furnishing or sale of transportation by a water carrier subject to jurisdiction under subchapter II of chapter 135 of title 49.

(G)

A rail carrier subject to part A of subtitle IV of title 49, if

(i)

substantially all of its railroad properties have been

leased to another such railroad corporation or corporations by an agreement or agreements entered into before January 1, 1954,

(ii)

each lease is for a term of more than 20 years, and

(iii)

at least 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from such leases and from sources described in subparagraphs (A) through (F), inclusive. For purposes of the preceding sentence, an agreement for lease of railroad properties entered into before January 1, 1954, shall be considered to be a lease including such term as the total number of years of such agreement may, unless sooner terminated, be renewed or continued under the terms of the agreement, and any such renewal or continuance under such agreement shall be considered part of the lease entered into before January 1, 1954.

(H)

A common parent corporation which is a common carrier by railroad subject to part A of subtitle IV of title 49 if at least 80 percent of its gross income (computed without regard to capital gains or losses) is derived directly or indirectly from sources described in subparagraphs (A) through (F), inclusive. For purposes of the preceding sentence, dividends and interest, and income from leases described in subparagraph (G), received from a regulated public utility shall be considered as derived from sources described in subparagraphs (A) through (F), inclusive, if the regulated public utility is a member of an affiliated group (as defined in section 1504) which includes the common parent corporation.

The term ''regulated public utility'' does not (except as provided in subparagraphs (G) and (H)) include a corporation described in subparagraphs (A) through (F), inclusive, unless 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from sources described in subparagraphs (A) through (F), inclusive. If the taxpayer establishes to the satisfaction of the Secretary that

(i)

its revenue from regulated rates described in subparagraph (A) or (D) and its revenue derived from unregulated rates are derived from the operation of a single interconnected and coordinated system or from the operation of more than one such system, and

(ii)

the unregulated rates have been and are substantially as favorable to users and consumers as are the regulated rates, then such revenue from such unregulated rates shall be considered, for purposes of the preceding sentence, as income derived from sources described in subparagraph (A) or (D).

(34)

Repealed. Pub. L. 98-369, div. A, title IV, Sec. 4112 (b)(11), July 18, 1984, 98 Stat. 792)

(35) Enrolled actuary

The term ''enrolled actuary'' means a person who is enrolled by the Joint Board for the Enrollment of Actuaries established under subtitle C of the title III of the Employee Retirement Income Security Act of 1974.

(36) Income tax return preparer

(A) In general

The term ''income tax return preparer'' means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by subtitle A or any claim for refund of tax imposed by subtitle A. For purposes of the preceding sentence, the preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund.

(B) Exceptions

A person shall not be an ''income tax return preparer'' merely because such person -

(i)

furnishes typing, reproducing, or other mechanical assistance,

(ii)

prepares a return or claim for refund of the employer (or of an officer or employee of the employer) by whom he is regularly and continuously employed,

(iii)

prepares as a fiduciary a return or claim for refund for any person, or

(iv)

prepares a claim for refund for a taxpayer in response to any notice of deficiency issued to such taxpayer or in response to any waiver of restriction after the commencement of an audit of such taxpayer or another taxpayer if a determination in such audit of such other taxpayer directly or indirectly affects the tax liability of such taxpayer.

(37) Individual retirement plan

The term ''individual retirement plan'' means -

(A)

an individual retirement account described in section 408(a), and

(B)

an individual retirement annuity described in section 408(b).

(38) Joint return

The term ''joint return'' means a single return made jointly under section 6013 by a husband and wife.

(39) Persons residing outside United States

If any citizen or resident of the United States does not reside in (and is not found in) any United States judicial district, such citizen or resident shall be treated as residing in the District of Columbia for purposes of any provision of this title relating to -

(A)

jurisdiction of courts, or

(B)

enforcement of summons.

(40) Indian tribal government

(A) In general

The term ''Indian tribal government'' means the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary, after consultation with the Secretary of the Interior, to exercise governmental functions.

(B) Special rule for Alaska Natives

No determination under subparagraph (A) with respect to Alaska Natives shall grant or defer any status or powers other than those enumerated in section 7871. Nothing in the Indian Tribal Governmental Tax Status Act of 1982, or in the amendments made thereby, shall validate or invalidate any claim by Alaska Natives of sovereign authority over lands or people.

(41) TIN

The term ''TIN'' means the identifying number assigned to a person under section 6109.

(42) Substituted basis property

The term ''substituted basis property'' means property which is -

(A)

transferred basis property, or

(B)

exchanged basis property.

(43) Transferred basis property

The term ''transferred basis property'' means property having a basis determined under any provision of subtitle A (or under any corresponding provision of prior income tax law) providing that the basis shall be determined in whole or in part by reference to the basis in the hands of the donor, grantor, or other transferor.

(44) Exchanged basis property

The term ''exchanged basis property'' means property

having a basis determined under any provision of subtitle A (or under any corresponding provision of prior income tax law) providing that the basis shall be determined in whole or in part by reference to other property held at any time by the person for whom the basis is to be determined.

(45) Nonrecognition transaction

The term ''nonrecognition transaction'' means any disposition of property in a transaction in which gain or loss is not recognized in whole or in part for purposes of subtitle A.

(46) Determination of whether there is a collective bargaining agreement

In determining whether there is a collective bargaining agreement between employee representatives and 1 or more employers, the term ''employee representatives'' shall not include any organization more than one-half of the members of which are employees who are owners, officers, or executives of the employer. An agreement shall not be treated as a collective bargaining agreement unless it is a bona fide agreement between bona fide employee representatives and 1 or more employers.

(b) Definition of resident alien and nonresident alien

(1) In general

For purposes of this title (other than subtitle B) -

(A) Resident alien

An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):

(i) Lawfully admitted for permanent residence

Such individual is a lawful permanent resident of the United States at any time during such calendar year.

(ii) Substantial presence test

Such individual meets the substantial presence test of paragraph (3).

(iii) First year election

Such individual makes the election provided in paragraph (4).

(B) Nonresident alien

An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A)).

(2) Special rules for first and last year of residency

(A) First year of residency

(i) In general

If an alien individual is a resident of the United States under paragraph (1)(A) with respect to any calendar year, but was not a resident of the United States at any time during the preceding calendar year, such alien individual shall be treated as a resident of the United States only for the portion of such calendar year which begins on the residency starting date.

(ii) Residency starting date for individuals lawfully admitted for permanent residence

In the case of an individual who is a lawfully permanent resident of the United States at any time during the calendar year, but does not meet the substantial presence test of paragraph (3), the residency starting date shall be the first day in such calendar year on which he was present in the United States while a lawful permanent resident of the United States.

(iii) Residency starting date for individuals meeting substantial presence test

In the case of an individual who meets the substantial presence test of paragraph (3) with respect to any calendar year, the residency starting date shall be the first day during such calendar year on which the individual is present in the United States.

(iv) Residency starting date for individuals making first year election

In the case of an individual who makes the election provided by paragraph (4) with respect to any calendar year, the residency starting date shall be

the 1st day during such calendar year on which the individual is treated as a resident of the United States under that paragraph.

(B) Last year of residency

An alien individual shall not be treated as a resident of the United States during a portion of any calendar year if -

(i)

such portion is after the last day in such calendar year on which the individual was present in the United States (or, in the case of an individual described in paragraph (1)(A)(i), the last day on which he was so described),

(ii)

during such portion the individual has a closer connection to a foreign country than to the United States, and

(iii)

the individual is not a resident of the United States at any time during the next calendar year.

(C) Certain nominal presence disregarded

(i) In general

For purposes of subparagraphs (A)(iii) and (B), an individual shall not be treated as present in the United States during any period for which the individual establishes that he has a closer connection to a foreign country than to the United States.

(ii) Not more than 10 days disregarded

Clause (i) shall not apply to more than 10 days on which the individual is present in the United States.

(3) Substantial presence test

(A) In general

Except as otherwise provided in this paragraph, an individual meets the substantial presence test of this paragraph with respect to any calendar year (hereinafter in this subsection referred to as the ''current year'') if -

(i)

such individual was present in the United States on at least 31 days during the calendar year, and

(ii)

the sum of the number of days on which such individual was present in the United States during the current year and the 2 preceding calendar years (when multiplied by the applicable multiplier determined under the following table) equals or exceeds 183 days: The applicable In the case of days in: multiplier is: Current year 1 1st preceding year 1/3 2nd preceding year 1/6

(B) Exception where individual is present in the United States during less than one-half of current year and closer connection to foreign country is established

An individual shall not be treated as meeting the substantial presence test of this paragraph with respect to any current year if -

(i)

such individual is present in the United States on fewer than 183 days during the current year, and

(ii)

it is established that for the current year such individual has a tax home (as defined in section 911(d)(3) without regard to the second sentence thereof) in a foreign country and has a closer connection to such foreign country than to the United States.

(C) Subparagraph (B) not to apply in certain cases

Subparagraph (B) shall not apply to any individual with respect to any current year if at any time during such year -

(i)

such individual had an application for adjustment of status pending, or

(ii)

such individual took other steps to apply for status as a lawful permanent resident of the United States.

(D) Exception for exempt individuals or for certain medical conditions

An individual shall not be treated as being present in the United States on any day if -

(i)

such individual is an exempt individual for such day, or

(ii)

such individual was unable to leave the United States on such day because of a medical condition which arose while such individual was present in the United States.

(4) First -year election

(A)

An alien individual shall be deemed to meet the requirements of this subparagraph if such individual -

(i)

is not a resident of the United States under clause (i) or (ii) of paragraph (1)(A) with respect to a calendar year (hereinafter referred to as the ''election year''),

(ii)

was not a resident of the United States under paragraph (1)(A) with respect to the calendar year immediately preceding the election year,

(iii)

is a resident of the United States under clause (ii) of paragraph (1)(A) with respect to the calendar year immediately following the election year, and

(iv)

is both -

(I)

present in the United States for a period of at least 31 consecutive days in the election year, and

(II)

present in the United States during the period beginning with the first day of such 31-day period and ending with the last day of the election year (hereinafter referred to as the ''testing period'') for a number of days equal to or exceeding 75 percent of the number of days in the testing period (provided that an individual shall be treated for purposes of this subclause as present in the United States for a number of days during the testing period not exceeding 5 days in the aggregate, notwithstanding his absence from the United States on such days).

(B)

An alien individual who meets the requirements of subparagraph (A) shall, if he so elects, be treated as a resident of the United States with respect to the election year.

(C)

An alien individual who makes the election provided by subparagraph (B) shall be treated as a resident of the United States for the portion of the election year which begins on the 1st day of the earliest testing period during such year with respect to which the individual meets the requirements of clause (iv) of subparagraph (A).

(D)

The rules of subparagraph (D)(i) of paragraph (3) shall apply for purposes of determining an individual's presence in the United States under this paragraph.

(E)

An election under subparagraph (B) shall be made on the individual's tax return for the election year, provided that such election may not be made before the individual has met the substantial presence test of paragraph (3) with respect to the calendar year immediately following the election year.

(F)

An election once made under subparagraph (B) remains in effect for the election year, unless revoked with the consent of the Secretary.

(5) Exempt individual defined

For purposes of this subsection -

(A) In general

An individual is an exempt individual for any day if, for such day, such individual is -

(i)

a foreign government-related individual,

(ii)

a teacher or trainee,

(iii)

a student, or

(iv)

a professional athlete who is temporarily in the United States to compete in a charitable sports event described in section 274(l)(1)(B).

(B) Foreign government-related individual

The term ''foreign government-related individual'' means any individual temporarily present in the United States by reason of -

(i)

diplomatic status, or a visa which the Secretary (after consultation with the Secretary of State) determines represents full-time diplomatic or consular status for purposes of this subsection,

(ii)

being a full-time employee of an international organization, or

(iii)

being a member of the immediate family of an individual described in clause (i) or (ii).

(C) Teacher or trainee

The term ''teacher or trainee'' means any individual -

(i)

who is temporarily present in the United States under subparagraph (J) or (Q) of section 101(15) of the Immigration and Nationality Act (other than as a student), and

(ii)

who substantially complies with the requirements for being so present.

(D) Student

The term ''student'' means any individual -

(i)

who is temporarily present in the United States -

(I)

under subparagraph (F) or (M) of section 101 (15) of the Immigration and Nationality Act, or

(II)

as a student under subparagraph (J) or (Q) of such section 101(15), and (ii) who substantially complies with the requirements for being so present.

(E) Special rules for teachers, trainees, and students

(i) Limitation on teachers and trainees

An individual shall not be treated as an exempt individual by reason of clause (ii) of subparagraph (A) for the current year if, for any 2 calendar years during the preceding 6 calendar years, such person was an exempt person under clause (ii) or (iii) of subparagraph (A). In the case of an individual all of whose compensation is described in section 872(b) (3), the preceding sentence shall be applied by substituting ''4 calendar years'' for ''2 calendar years''.

(ii) Limitation on students

For any calendar year after the 5th calendar year for which an individual was an exempt individual under clause (ii) or (iii) of subparagraph (A), such individual shall not be treated as an exempt individual by reason of clause (iii) of subparagraph (A), unless such individual establishes to the satisfaction of the Secretary that such individual

does not intend to permanently reside in the United States and that such individual meets the requirements of subparagraph (D)(ii).

(6) Lawful permanent resident

For purposes of this subsection, an individual is a lawful permanent resident of the United States at any time if -

(A)

such individual has the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, and

(B)

such status has not been revoked (and has not been administratively or judicially determined to have been abandoned).

(7) Presence in the United States

For purposes of this subsection -

(A) In general

Except as provided in subparagraph (B), (C), or (D), an individual shall be treated as present in the United States on any day if such individual is physically present in the United States at any time during such day.

(B) Commuters from Canada or Mexico

If an individual regularly commutes to employment (or self-employment) in the United States from a place of residence in Canada or Mexico, such individual shall not be treated as present in the United States on any day during which he so commutes.

(C) Transit between 2 foreign points

If an individual, who is in transit between 2 points outside the United States, is physically present in the United States for less than 24 hours, such individual shall not be treated as present in the United States on any day during such transit.

(D) Crew members temporarily present

An individual who is temporarily present in the

United States on any day as a regular member of the crew of a foreign vessel engaged in transportation between the United States and a foreign country or a possession of the United States shall not be treated as present in the United States on such day unless such individual otherwise engages in any trade or business in the United States on such day.

(8) Annual statements

The Secretary may prescribe regulations under which an individual who (but for subparagraph (B) or (D) of paragraph (3)) would meet the substantial presence test of paragraph (3) is required to submit an annual statement setting forth the basis on which such individual claims the benefits of subparagraph (B) or (D) of paragraph (3), as the case may be.

(9) Taxable year

(A) In general

For purposes of this title, an alien individual who has not established a taxable year for any prior period shall be treated as having a taxable year which is the calendar year.

(B) Fiscal year taxpayer

If -

(i)

an individual is treated under paragraph (1) as a resident of the United States for any calendar year, and

(ii)

after the application of subparagraph (A), such individual has a taxable year other than a calendar year,

he shall be treated as a resident of the United States with respect to any portion of a taxable year which is within such calendar year.

(10) Coordination with section 877

If -

(A)

an alien individual was treated as a resident of the United States during any period which includes at least 3 consecutive calendar years (hereinafter referred to as the ''initial residency period''), and

(B)

such individual ceases to be treated as a resident of the United States but subsequently becomes a resident of the United States before the close of the 3rd calendar year beginning after the close of the initial residency period,

such individual shall be taxable for the period after the close of the initial residency period and before the day on which he subsequently became a resident of the United States in the manner provided in section 877(b). The preceding sentence shall apply only if the tax imposed pursuant to section 877(b) exceeds the tax which, without regard to this paragraph, is imposed pursuant to section 871.

(11) Regulations

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection.

(c) Includes and including

The terms ''includes'' and ''including'' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.

(d) Commonwealth of Puerto Rico

Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, references in this title to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.

(e) Treatment of certain contracts for providing services, etc.

For purposes of chapter 1 -

(1) In general

A contract which purports to be a service contract shall be treated as a lease of property if such contract is properly treated as a lease of property, taking into account all relevant factors including whether or not -

(A)

the service recipient is in physical possession of the property,

(B)

the service recipient controls the property,

(C)

the service recipient has a significant economic or possessory interest in the property,

(D)

the service provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract,

(E)

the service provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient, and

(F)

the total contract price does not substantially exceed the rental value of the property for the contract period.

(2) Other arrangements

An arrangement (including a partnership or other pass-thru entity) which is not described in paragraph (1) shall be treated as a lease if such arrangement is properly treated as a lease, taking into account all relevant factors including factors similar to those set forth in paragraph (1).

(3) Special rules for contracts or arrangements involving solid waste disposal, energy, and clean water facilities

(A) In general

Notwithstanding paragraphs (1) and (2), and except as provided in paragraph (4), any contract or arrangement between a service provider and a service recipient -

(i)

with respect to -

(I)

the operation of a qualified solid waste disposal facility,

(II)

the sale to the service recipient of electrical or thermal energy produced at a cogeneration or alternative energy facility, or

(III)

the operation of a water treatment works facility, and

(ii)

which purports to be a service contract,

shall be treated as a service contract.

(B) Qualified solid waste disposal facility

For purposes of subparagraph (A), the term ''qualified solid waste disposal facility'' means any facility if such facility provides solid waste disposal services for residents of part or all of 1 or more governmental units and substantially all of the solid waste processed at such facility is collected from the general public.

(C) Cogeneration facility

For purposes of subparagraph (A), the term ''cogeneration facility'' means a facility which uses the same energy source for the sequential generation of electrical or mechanical power in combination with steam, heat, or other forms of useful energy.

(D) Alternative energy facility

For purposes of subparagraph (A), the term ''alternative energy facility'' means a facility for producing electrical or thermal energy if the primary energy source for the facility is not oil, natural gas, coal, or nuclear power.

(E) Water treatment works facility

For purposes of subparagraph (A), the term ''water treatment works facility'' means any treatment works within the meaning of section 212(2) of the Federal Water Pollution Control Act.

(4) Paragraph (3) not to apply in certain cases

(A) In general

Paragraph (3) shall not apply to any qualified solid waste disposal facility, cogeneration facility, alternative energy facility, or water treatment works facility used under a contract or arrangement if -

(i)

the service recipient (or a related entity) operates such facility,

(ii)

the service recipient (or a related entity) bears any significant financial burden if there is nonperformance under the contract or arrangement (other than for reasons beyond the control of the service provider),

(iii)

the service recipient (or a related entity) receives any significant financial benefit if the operating costs of such facility are less than the standards of performance or operation under the contract or arrangement, or

(iv)

the service recipient (or a related entity) has an option to purchase, or may be required to purchase, all or a part of such facility at a fixed and determinable price (other than for fair market value).

For purposes of this paragraph, the term ''related entity'' has the same meaning as when used in section 168(h).

(B) Special rules for application of subparagraph (A) with respect to certain rights and allocations under the contract

For purposes of subparagraph (A), there shall not be taken into account -

(i)

any right of a service recipient to inspect any facility, to exercise any sovereign power the service recipient may possess, or to act in the event of a breach of contract by the service provider, or

(ii)

any allocation of any financial burden or benefits in the event of any change in any law.

(C) Special rules for application of subparagraph (A) in the case of certain events

(i) Temporary shut-downs, etc.

For purposes of clause (ii) of subparagraph (A), there shall not be taken into account any temporary shut-down of the facility for repairs, maintenance, or capital improvements, or any financial burden caused by the bankruptcy or similar financial difficulty of the service provider.

(ii) Reduced costs

For purposes of clause (iii) of subparagraph (A), there shall not be taken into account any significant financial benefit merely because payments by the service recipient under the contract or arrangement are decreased by reason of increased production or efficiency or the recovery of energy or other products.

(5) Exception for certain low-income housing

This subsection shall not apply to any property described in clause (i), (ii), (iii), or (iv) of section 1250(a)(1)(B) (relating to low-income housing) if -

(A)

such property is operated by or for an organization described in paragraph (3) or (4) of section 501(c), and

(B)

at least 80 percent of the units in such property are leased to low-income tenants (within the meaning of section 167(k)(3)(B)) (as in effect on the day before the date of the enactment of the Revenue Reconcilation [3] Act of 1990). ''Reconciliation''.

(6) Regulations

The Secretary may prescribe such regulations as may be necessary or appropriate to carry out the provisions of this subsection.

(f) Use of related persons or pass-thru entities

The Secretary shall prescribe such regulations as may be necessary or appropriate to prevent the avoidance of those provisions of this title which deal with -

(1)

the linking of borrowing to investment, or

(2)

diminishing risks,

through the use of related persons, pass-thru entities, or other intermediaries.

(g) Clarification of fair market value in the case of nonrecourse indebtedness

For purposes of subtitle A, in determining the amount of gain or loss (or deemed gain or loss) with respect to any property, the fair market value of such property shall be treated as being not less than the amount of any nonrecourse indebtedness to which such property is subject.

(h) Motor vehicle operating leases

(1) In general

For purposes of this title, in the case of a qualified motor vehicle operating agreement which contains a terminal rental adjustment clause -

(A)

such agreement shall be treated as a lease if (but for such terminal rental adjustment clause) such agreement would be treated as a lease under this title, and

(B)

the lessee shall not be treated as the owner of the property subject to an agreement during any period such agreement is in effect.

(2) Qualified motor vehicle operating agreement defined

For purposes of this subsection -

(A) In general

The term ''qualified motor vehicle operating agreement'' means any agreement with respect to a motor vehicle (including a trailer) which meets the

requirements of subparagraphs (B), (C), and (D) of this paragraph.

(B) Minimum liability of lessor

An agreement meets the requirements of this subparagraph if under such agreement the sum of -

(i)

the amount the lessor is personally liable to repay, and

(ii)

the net fair market value of the lessor's interest in any property pledged as security for property subject to the agreement,

equals or exceeds all amounts borrowed to finance the acquisition of property subject to the agreement. There shall not be taken into account under clause (ii) any property pledged which is property subject to the agreement or property directly or indirectly financed by indebtedness secured by property subject to the agreement.

(C) Certification by lessee; notice of tax ownership

An agreement meets the requirements of this subparagraph if such agreement contains a separate written statement separately signed by the lessee -

(i)

under which the lessee certifies, under penalty of perjury, that it intends that more than 50 percent of the use of the property subject to such agreement is to be in a trade or business of the lessee, and

(ii)

which clearly and legibly states that the lessee has been advised that it will not be treated as the owner of the property subject to the agreement for Federal income tax purposes.

(D) Lessor must have no knowledge that certification is false

An agreement meets the requirements of this subparagraph if the lessor does not know that the certification described in subparagraph (C)(i) is false.

(3) Terminal rental adjustment clause defined

(A) In general

For purposes of this subsection, the term ''terminal rental adjustment clause'' means a provision of an agreement which permits or requires the rental price to be adjusted upward or downward by reference to the amount realized by the lessor under the agreement upon sale or other disposition of such property.

(B) Special rule for lessee dealers

The term ''terminal rental adjustment clause'' also includes a provision of an agreement which requires a lessee who is a dealer in motor vehicles to purchase the motor vehicle for a predetermined price and then resell such vehicle where such provision achieves substantially the same results as a provision described in subparagraph (A).

(i) Taxable mortgage pools

(1) Treated as separate corporations

A taxable mortgage pool shall be treated as a separate corporation which may not be treated as an includible corporation with any other corporation for purposes of section 1501.

(2) Taxable mortgage pool defined

For purposes of this title -

(A) In general

Except as otherwise provided in this paragraph, a taxable mortgage pool is any entity (other than a REMIC or a FASIT) if -

(i)

substantially all of the assets of such entity consists of debt obligations (or interests therein) and more than 50 percent of such debt obligations (or interests) consists of real estate mortgages (or interests therein),

(ii)

such entity is the obligor under debt obligations with 2 or more maturities, and

(iii)

under the terms of the debt obligations referred to in clause (ii) (or underlying arrangement), payments on such debt obligations bear a relationship to payments on the debt obligations (or interests) referred to in clause (i).

(B) Portion of entities treated as pools

Any portion of an entity which meets the definition of subparagraph (A) shall be treated as a taxable mortgage pool.

(C) Exception for domestic building and loan

Nothing in this subsection shall be construed to treat any domestic building and loan association (or portion thereof) as a taxable mortgage pool.

(D) Treatment of certain equity interests

To the extent provided in regulations, equity interest of varying classes which correspond to maturity classes of debt shall be treated as debt for purposes of this subsection.

(3) Treatment of certain REIT's

If -

(A)

a real estate investment trust is a taxable mortgage pool, or

(B)

a qualified REIT subsidiary (as defined in section 856(i)(2)) of a real estate investment trust is a taxable mortgage pool,

under regulations prescribed by the Secretary, adjustments similar to the adjustments provided in section 860E(d) shall apply to the shareholders of such real estate investment trust.

(j) Tax treatment of Federal Thrift Savings Fund

(1) In general

For purposes of this title -

(A)

the Thrift Savings Fund shall be treated as a trust described in section 401(a) which is exempt from taxation under section 501(a);

(B)

any contribution to, or distribution from, the Thrift Savings Fund shall be treated in the same manner as contributions to or distributions from such a trust; and

(C)

subject to section 401(k)(4)(B) and any dollar limitation on the application of section 402(e)(3), contributions to the Thrift Savings Fund shall not be treated as distributed or made available to an employee or Member nor as a contribution made to the Fund by an employee or Member merely because the employee or Member has, under the provisions of subchapter III of chapter 84 of title 5, United States Code, and section 8351 of such title 5, an election whether the contribution will be made to the Thrift Savings Fund or received by the employee or Member in cash.

(2) Nondiscrimination requirements

Notwithstanding any other provision of law, the Thrift Savings Fund is not subject to the nondiscrimination requirements applicable to arrangements described in section 401(k) or to matching contributions (as described in section 401(m)), so long as it meets the requirements of this section.

(3) Coordination with Social Security Act

Paragraph (1) shall not be construed to provide that any amount of the employee's or Member's basic pay which is contributed to the Thrift Savings Fund shall not be included in the term ''wages'' for the purposes of section 209 of the Social Security Act or section 3121(a) of this title.

(4) Definitions

For purposes of this subsection, the terms ''Member'', ''employee'', and ''Thrift Savings Fund'' shall have the same respective meanings as when used in subchapter III of chapter 84 of title 5, United States Code.

(5) Coordination with other provisions of law

No provision of law not contained in this title shall apply for purposes of determining the treatment under

this title of the Thrift Savings Fund or any contribution to, or distribution from, such Fund.

(k) Treatment of certain amounts paid to charity

In the case of any payment which, except for section 501 (b) of the Ethics in Government Act of 1978, might be made to any officer or employee of the Federal Government but which is made instead on behalf of such officer or employee to an organization described in section 170(c) -

(1)

such payment shall not be treated as received by such officer or employee for all purposes of this title and for all purposes of any tax law of a State or political subdivision thereof, and

(2)

no deduction shall be allowed under any provision of this title (or of any tax law of a State or political subdivision thereof) to such officer or employee by reason of having such payment made to such organization.

For purposes of this subsection, a Senator, a Representative in, or a Delegate or Resident Commissioner to, the Congress shall be treated as an officer or employee of the Federal Government.

(l) Regulations relating to conduit arrangements

The Secretary may prescribe regulations recharacterizing any multiple-party financing transaction as a transaction directly among any 2 or more of such parties where the Secretary determines that such recharacterization is appropriate to prevent avoidance of any tax imposed by this title.

(m) Designation of contract markets

Any designation by the Commodity Futures Trading Commission of a contract market which could not have been made under the law in effect on the day before the date of the enactment of the Commodity Futures Modernization Act of 2000 shall apply for purposes of this title except to the extent provided in regulations prescribed by the Secretary.

(n) Cross references

(1) Other definitions For other definitions, see the following sections of Title 1

For other definitions, see the following sections of

Title 1 of the United States Code:

(1)

Singular as including plural, section 1.

(2)

Plural as including singular, section 1.

(3)

Masculine as including feminine, section 1.

(4)

Officer, section 1.

(5)

Oath as including affirmation, section 1.

(6)

County as including parish, section 2.

(7)

Vessel as including all means of water transportation, section 3.

(8)

Vehicle as including all means of land transportation, section 4.

(9)

Company or association as including successors and assigns, section 5.

(2) Effect of cross references For effect of cross references in this title, see section

For effect of cross references in this title, see section 7806(a)

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[1] See References in Text note below.

[2] See References in Text note below.

[3] So in original. Probably should be

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§ 3401. Definitions

(a) Wages

For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include remuneration paid—

(1) for active service performed in a month for which such employee is entitled to the benefits of section 112 (relating to certain combat zone compensation of members of the Armed Forces of the United States) to the extent remuneration for such service is excludable from gross income under such section; or

(2) for agricultural labor (as defined in section 3121 (g)) unless the remuneration paid for such labor is wages (as defined in section 3121 (a)); or

(3) for domestic service in a private home, local college club, or local chapter of a college fraternity or sorority; or

(4) for service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is $50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if—

(A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business; or

(B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter; or

(5) for services by a citizen or resident of the United States for a foreign government or an international organization; or

(6) for such services, performed by a nonresident alien individual, as may be designated by regulations prescribed by the Secretary; or

[(7) Repealed. Pub. L. 89–809, title I, § 103(k), Nov. 13, 1966, 80 Stat. 1554]

(8)

(A) for services for an employer (other than the United States or any agency thereof)—

(i) performed by a citizen of the United States if, at the time of the payment of such remuneration, it is reasonable to believe that such remuneration will be excluded from gross income under section 911; or

(ii) performed in a foreign country or in a possession of the United States by such a citizen if, at the time of the payment of such remuneration, the employer is required by the law of any foreign country or possession of the United States to withhold income tax upon such remuneration; or

(B) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the United States (other than Puerto Rico), if it is reasonable to believe that at least 80 percent of the remuneration to be paid to the employee by such employer during the calendar year will be for such services; or

(C) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within Puerto Rico, if it is reasonable to believe that during the entire calendar year the employee will be a bona fide resident of Puerto Rico; or

(D) for services for the United States (or any agency thereof) performed by a citizen of the United States within a possession of the United States to the extent the United States (or such agency) withholds taxes on such remuneration pursuant to an agreement with such possession; or

(9) for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(10)

(A) for services performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution; or

(B) for services performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such services, or is entitled to

be credited with the unsold newspapers or magazines turned back; or

(11) for services not in the course of the employer's trade or business, to the extent paid in any medium other than cash; or

(12) to, or on behalf of, an employee or his beneficiary—

(A) from or to a trust described in section 401 (a) which is exempt from tax under section 501 (a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust; or

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403 (a); or

(C) for a payment described in section 402 (h)(1) and (2) if, at the time of such payment, it is reasonable to believe that the employee will be entitled to an exclusion under such section for payment; or

(D) under an arrangement to which section 408 (p) applies; or

(E) under or to an eligible deferred compensation plan which, at the time of such payment, is a plan described in section 457 (b) which is maintained by an eligible employer described in section 457 (e)(1)(A), [1] or

(13) pursuant to any provision of law other than section 5(c) or 6(1) of the Peace Corps Act, for service performed as a volunteer or volunteer leader within the meaning of such Act; or

(14) in the form of group-term life insurance on the life of an employee; or

(15) to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274 (n)); or

(16)

(A) as tips in any medium other than cash;

(B) as cash tips to an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is $20 or more; [2]

(17) for service described in section 3121 (b)(20); [2]

(18) for any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134 (b)(4), or 134 (b)(5); [2](19) for any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74 (c), 108 (f)(4), 117, or 132; [2]

(20) for any medical care reimbursement made to or for the benefit of an employee under a self-insured medical reimbursement plan (within the meaning of section 105 (h)(6)); [2]

(21) for any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106 (b); or

(22) any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106 (d).

The term "wages" includes any amount includible in gross income of an employee under section 409A and payment of such amount shall be treated as having been made in the taxable year in which the amount is so includible.

(b) Payroll period

For purposes of this chapter, the term "payroll period" means a period for which a payment of wages is ordinarily made to the employee by his employer, and the term "miscellaneous payroll period" means a payroll period other than a daily, weekly, biweekly, semimonthly, monthly, quarterly, semiannual or annual payroll period.

(c) Employee

For purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation.

(d) Employer

For purposes of this chapter, the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that—

(1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term "employer" (except for purposes of subsection (a)) means the person having control of the payment of such wages, and

(2) in the case of a person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, the term "employer" (except for purposes of subsection (a)) means such person.

(e) Number of withholding exemptions claimed

For purposes of this chapter, the term "number of withholding exemptions claimed" means the number of withholding exemptions claimed in a withholding exemption certificate in effect under section 3402 (f), or in effect under the corresponding section of prior law, except that if no such certificate is in effect, the number of withholding exemptions claimed shall be considered to be zero.

(f) Tips

For purposes of subsection (a), the term "wages" includes tips received by an employee in the course of his employment. Such wages shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053 (a) or (if no statement including such tips is so furnished) at the time received.

[(g) Repealed. Pub. L. 101–140, title II, §●203(a)(2), Nov. 8, 1989, 103 Stat. 830]

(h) Crew leader rules to apply

Rules similar to the rules of section 3121 (o) shall apply for purposes of this chapter.

[1] So in original. The comma probably should be a semicolon.

[2] So in original. Probably should be followed by "or".

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Sec. 3401. - Definitions

(a) Wages

For purposes of this chapter, the term ''wages'' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include remuneration paid -

(1)

for active service performed in a month for which such employee is entitled to the benefits of section 112 (relating to certain combat zone compensation of members of the Armed Forces of the United States) to the extent remuneration for such service is excludable from gross income under such section; or

(2)

for agricultural labor (as defined in section 3121(g)) unless the remuneration paid for such labor is wages (as defined in section 3121(a)); or

(3)

for domestic service in a private home, local college club, or local chapter of a college fraternity or sorority; or

(4)

for service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is $50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if -

(A)

on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business; or

(B)

such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter; or

(5)

for services by a citizen or resident of the United States for a foreign government or an international organization; or

(6)

for such services, performed by a nonresident alien individual, as may be designated by regulations prescribed by the Secretary; or

(7)

Repealed. Pub. L. 89-809, title I, Sec. 103(k), Nov. 13, 1966, 80 Stat. 1554)

(8)

(A)

for services for an employer (other than the United States or any agency thereof) -

(i)

performed by a citizen of the United States if, at the time of the payment of such remuneration, it is reasonable to believe that such remuneration will be excluded from gross income under section 911; or

(ii)

performed in a foreign country or in a possession of the United States by such a citizen if, at the time of the payment of such remuneration, the employer is required by the law of any foreign country or possession of the United States to withhold income tax upon such remuneration; or

(B)

for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the United States (other than Puerto Rico), if it is reasonable to believe that at least 80 percent of the remuneration to be paid to the employee by such employer during the calendar year will be for such services; or

(C)

for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within Puerto Rico, if it is reasonable to believe that during the entire calendar year the employee will be a bona fide resident of Puerto Rico; or

(D)

for services for the United States (or any agency thereof) performed by a citizen of the United States within a possession of the United States to the extent the United States (or such agency) withholds taxes on such remuneration pursuant to an agreement with such possession; or

(9)

for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(10)

(A)

for services performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution; or

(B)

for services performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the

amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such services, or is entitled to be credited with the unsold newspapers or magazines turned back; or

(11)

for services not in the course of the employer's trade or business, to the extent paid in any medium other than cash; or

(12)

to, or on behalf of, an employee or his beneficiary -

(A)

from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust; or

(B)

under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a); or

(C)

for a payment described in section 402(h)(1) and (2) if, at the time of such payment, it is reasonable to believe that the employee will be entitled to an exclusion under such section for payment; or

(D)

under an arrangement to which section 408(p) applies; or

(13)

pursuant to any provision of law other than section 5 (c) or 6(1) of the Peace Corps Act, for service performed as a volunteer or volunteer leader within the meaning of such Act; or

(14)

in the form of group-term life insurance on the life of an employee; or

(15)

to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n)); or

(16)

(A)

as tips in any medium other than cash;

(B)

as cash tips to an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is $20 or more; [1] ''or''.

(17)

for service described in section 3121(b)(20); [1]

(18)

for any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127 or 129; [1]

(19)

for any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 117, or 132; [1]

(20)

for any medical care reimbursement made to or for the benefit of an employee under a self-insured medical reimbursement plan (within the meaning of section 105 (h)(6)); or

(21)

for any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b).

(b) Payroll period

For purposes of this chapter, the term ''payroll period'' means a period for which a payment of wages is ordinarily made to the employee by his employer, and the term ''miscellaneous payroll period'' means a payroll period other than a daily, weekly, biweekly, semimonthly, monthly, quarterly, semiannual or annual payroll period.

(c) Employee

For purposes of this chapter, the term ''employee'' includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term ''employee'' also includes an officer of a corporation.

(d) Employer

For purposes of this chapter, the term ''employer'' means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that -

(1)

if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term ''employer'' (except for purposes of subsection (a)) means the person having control of the payment of such wages, and

(2)

in the case of a person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, the term ''employer'' (except for purposes of subsection (a)) means such person.

(e) Number of withholding exemptions claimed

For purposes of this chapter, the term ''number of withholding exemptions claimed'' means the number of withholding exemptions claimed in a withholding exemption certificate in effect under section 3402(f), or in effect under the corresponding section of prior law, except that if no such certificate is in effect, the number of withholding exemptions claimed shall be considered to be zero.

(f) Tips

For purposes of subsection (a), the term ''wages'' includes tips received by an employee in the course of his employment. Such wages shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) or (if no statement including such tips is so furnished) at the time received.

(g)

Repealed. Pub. L. 101-140, title II, Sec. 203(a)(2), Nov. 8, 1989, 103 Stat. 830)

(h) Crew leader rules to apply

Rules similar to the rules of section 3121(o) shall apply for purposes of this chapter

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[1] So in original. Probably should be followed by

Next

Code **Sec. 31.3401(c)-1 Employee.**

(a) The term EMPLOYEE includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee. The term includes officers and employees, whether elected or appointed, of the United States, a State, Territory, Puerto Rico, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing.

(b) Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.

(c) Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are not employees.

(d) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(e) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(f) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is not considered to

be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(g) The term EMPLOYEE includes every individual who receives a supplemental unemployment compensation benefit which is treated under paragraph (b)(14) of Section 31.3401(a)-1 as if it were wages.

(h) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, that the remuneration paid for such services does not constitute wages within the meaning of section 3401(a).

[T.D. 6516, 25 FR 13096, Dec. 20, 1960, as amended by T.D. 7068, 35 FR 17329, Nov. 11, 1970]

Code

Sec. 301.6671-1 Rules for application of assessable penalties.

(a) Penalty assessed as tax. The penalties and liabilities provided by subchapter B, chapter 68, of the Code (sections 6671 to 6675, inclusive) shall be paid upon notice and demand by the district director or the director of the regional service center and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in the Code to 'tax' imposed thereunder shall also be deemed to refer to the penalties and liabilities provided by subchapter B of chapter 68.

(b) Person defined. For purposes of subchapter B of chapter 68, the term 'person' includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Definite. Fixed, determined, defined, bounded.

Definite sentence. Sentence calling for imprisonment for specified number of years as contrasted with indeterminate sentence which leaves duration to prison authorities (*e.g.* parole boards) and good behavior of prisoner. Also called "determinate sentence".

Definitio /dèfənísh(iy)ow/. Lat. Definition, or more strictly, limiting or bounding; as in the maxim of the civil law: *Omnis definitio periculosa est, parum est enim ut non subverti possit, i.e.,* the attempt to bring the law within the boundaries of precise definitions is hazardous, as there are but few cases in which such a limitation cannot be subverted.

Definition. A description of a thing by its properties; an explanation of the meaning of a word or term. The process of stating the exact meaning of a word by means of other words. Such a description of the thing defined, including all essential elements and excluding all nonessential, as to distinguish it from all other things and classes. *See also* Define.

Definitive. That which finally and completely ends and settles a controversy. For example, a definitive sentence or judgment as opposed to an interlocutory judgment. *See* Definite sentence.

Definitive sentence. *See* Definite sentence.

Deflation. Decline in price of goods and services. *Compare* Disinflation.

Deflect. To turn aside, to deviate from a straight or horizontal line or from a proper position, to swerve.

Defloration /diyfləréyshən/. Seduction or debauching. The act by which a woman is deprived of her virginity.

Deforce. In old English law, to withhold wrongfully; to withhold the possession of lands from one who is lawfully entitled to them. 3 Bl.Comm. 172.

Deforcement. Deforcement is where a man wrongfully holds lands to which another person is entitled. It therefore includes disseisin, abatement, discontinuance, and intrusion. But it is applied especially to cases, not falling under those heads, where the person entitled to the freehold has never had possession. 3 Bl.Comm. 172. Also, to detain dower from widow.

Deforciant /diyfórshənt/. One who wrongfully keeps the owner of lands and tenements out of the possession of them. 2 Bl.Comm. 350.

Deforciare /dəfòrs(h)iyériy/. L. Lat. To withhold lands or tenements from the rightful owner. This is a word of art which cannot be supplied by any other word.

Deforciatio /dəfòrs(h)iyéysh(iy)ow/. L. Lat. In old English law, a distress, distraint, or seizure of goods for satisfaction of a lawful debt.

De forisfactura maritagii /diy fòrəsfækchúrə mærətéyjiyay/. Writ of forfeiture of marriage.

Deformity. A deformed or misshapen condition; an unnatural growth, or a distorted or misshapen part or member; disfigurement, as a bodily deformity.

Defossion /dəfóshən/. The punishment of being buried alive.

De frangentibus prisonam /diy frænjéntəbəs prízənəm/. Concerning those that break prison. The title of the English statute 1 Edw. II, ordaining that none from thenceforth who broke prison should have judgment of life or limb for breaking prison only, unless the cause for which he was taken and imprisoned required such a judgment if he was lawfully convicted thereof.

Defraud. To make a misrepresentation of an existing material fact, knowing it to be false or making it recklessly without regard to whether it is true or false, intending one to rely and under circumstances in which such person does rely to his damage. To practice fraud; to cheat or trick. To deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice. *See also* Collusion; Deceit; Fraud; Material fact; Misrepresentation.

Intent to defraud means an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property.

Defraudation. Privation by fraud.

Defunct. Having ceased to exist; no longer operative. Deceased; a deceased person. A business which has ceased to function.

Defunctus /dəfə́ŋ(k)təs/. Lat. Dead. "Defunctus sine prole," dead without (leaving) issue.

De furto /diy fə́rtow/. Of theft. One of the kinds of criminal appeal formerly in use in England.

Degaster /dèygæstéy/. L. Fr. To waste.

De gestu et fama /diy jéstyuw ət féymə/. Of behavior and reputation. An old writ which lay in cases where a person's conduct and reputation were impeached.

Degradation. A deprivation of dignity; dismissal from rank or office; act or process of degrading. Moral or intellectual decadence; degeneration; deterioration.

An ecclesiastical censure, whereby a clergyman is divested of his holy orders. There are two sorts by the canon law,—one *summary,* by word only; the other *solemn,* by stripping the party degraded of those ornaments and rights which are the ensigns of his degree. Degradation is otherwise called "deposition," but the canonists have distinguished between these two terms, deeming the former as the greater punishment of the two. There was likewise a degradation of a lord or knight at common law, and also by act of parliament.

Dégradations /dègrədéyshənz/. A term for waste in the French law.

Degrade. *See* Degradation.

Degrading. Reviling; holding one up to public obloquy; lowering a person in the estimation of the public; exposing to disgrace, dishonor, or contempt.

De gratia /diy gréysh(iy)ə/. Of grace or favor, by favor. *De speciali gratia,* of special grace or favor.

U.S. Supreme Court

HASSETT v. WELCH, 303 U.S. 303 (1938)

303 U.S. 303

HASSETT
v.
WELCH et al.

HELVERING, Commissioner of Internal Revenue,
v.
MARSHALL.

Nos. 375, 484.
Argued Feb. 1, 1938.
Decided Feb. 28, 1938.

[303 U.S. 303, 304] Messrs. Homer S. Cummings, Atty. Gen., and James W. Morris, Asst. Atty. Gen., for petitioners.

Messrs. Claude R. Branch and John L. Hall, both of Boston, Mass., for respondents Welch and others.

Mr. Wm. D. Mitchell, of New York City, for respondent Marshall.

Mr. Justice ROBERTS delivered the opinion of the Court.

The petitioners ask us to hold that section 302(c) of the Revenue Act of 19261 as amended by the Joint Resolution of Congress of March 3, 1931,2 and section 803(a) of the [303 U.S. 303, 305] Revenue Act of 1932,3 includes in the gross estate of decedent, for estate tax, property which, before the adoption of the

amendments, was irrevocably transferred with reservation of a life estate to the transferor; and that, so applied, the statute does not offend the due process clause of the Fifth Amendment of the Constitution. The numerous cases pending in the courts and the Board of Tax Appeals involving these questions, and the claim that decisions of this court have not settled the matter, moved us to grant certiorari.

The respondents in No. 375 are executors under the will of a decedent who died November 20, 1932. On February 13, 1924, voluntarily and without valuable consideration, he transferred to a trustee property which he expected to receive under the will of his brother, reserving to himself the income for life, directing division of the income after his death between nephews and nieces and distribution of the corpus, upon the death of the survivor of them, amongst their then living issue. After his brother's death, and on October 22, 1926, he duly ratified and confirmed the original trust instrument. The Commissioner ruled that the value of the trust assets should be included in the decedent's gross estate, in the view that the transfer was testamentary, because made in contemplation of death, or intended to take effect in possession or enjoyment at or after death, within the meaning of section 302(c) of the Revenue Act of 1926. The respondents paid the resulting tax and sued for refund in the District Court of Massachusetts. Judgment went for the Collector. 4 The Circuit Court of Appeals held that the District Court erred in concluding that the transfer was made in contemplation of death or was intended to take effect in possession or enjoyment after death. The petitioner nevertheless insisted upon the legality of the [303 U.S. 303, 306] exaction as the decedent died after the 1931 and 1932 amendments of section 302 (c), which declared the property transferred a part of the gross estate for computation of estate tax, in virtue of the reservation to the transferor of the income for his life. The court overruled the contention, holding that, if so retroactively enforced, the legislation violated the Fifth Amendment of the Constitution, and reversed the judgment. 5 In his application for certiorari the petitioner did not assign error to the Circuit Court's ruling as to the nontestamentary character of the transfer, but confined his attack to the decision that the amendments of section 302(c) could not constitutionally be invoked to sustain the tax.

In No. 484 it appears that the decedent died intestate June 4, 1933. The respondent, her son, is her administrator. November 15, 1920, she transferred to him certain cash and securities. On the same day they entered into an agreement reciting an understanding that, in case of his death during her life, the securities and cash should be reconveyed to her and, in the meantime, he should pay her such portions of the income therefrom as she might from time to time request in writing; that while he held the securities he might invest and reinvest; that he should bequeath her all the assets constituting the fund, in case she survived him; that she would reimburse him for any increased income taxes payable by him in virtue of his ownership of the fund and that, if she should survive him and take the property under his will, she would reimburse his estate for state and federal inheritance taxes due by reason of the bequest. The agreement contained other provisions for the safeguarding and separate cutody of the fund during the mother's life. The respondent paid the decedent portions of the income upon her request. He executed a will bequeath- [303 U.S. 303, 307] ing the property to her on the terms mentioned in the agreement, but, upon her death, he revoked the bequest. The Commissioner included the value of the fund in the decedent's gross estate, holding that she had made a transfer within the terms of section 302 (c) of the Revenue Act of 1926, as amended in 1931 and 1932. The Board of Tax Appeals reversed the Commissioner's determination and the Court of Appeals affirmed its action6 upon the authority of the decision of the Circuit Court of Appeals of the First Circuit in No. 375 and that of the Seventh Circuit in No. 349, decided this day, Helvering v. Bullard, 303 U.S. 297 , 58 S.Ct. 565.

Counsel for the government argue that the Joint Resolution of 1931 and section 803(a) of the Revenue Act of 1932 were intended to impose an estate tax measured by transfers of the sort therein described which had been irrevocably made prior to the passage of the legislation and that, so construed, they are not arbitrarily or unreasonably retroactive and do not offend the due process clause of the Fifth Amendment. Counsel for respondents answer that the enactments were intended to operate only upon

transfers subsequently consummated and, if construed to reach the past transfers here involved, violate the amendment. We hold that the statutes are prospective in their operation and do not impose a tax in respect of past irrevocable transfers with reservation of a life interest.

Ascertainment of the intended application of the Joint Resolution of March 3, 1931, and section 803(a) of the Revenue Act of 1932, involves a reading of them in the light of cases construing similar phraseology of earlier acts, their legislative history and administrative interpretation. There is agreement and section 803(a) re-enacted the substance of the Joint Resolution with but slight verbal differences. It will, therefore, be necessary to quote only [303 U.S. 303, 308] the Resolution. By it section 302(c) of the Revenue Act of 1926, supra, was amended to provide:

> 'The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated ...
>
> '(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.' 46 Stat. 1516

The matter in ordinary type is section 302(c) as it was prior to amendment; the additions are in italics.

The Government relies on the words 'at any time' as demonstrating that the legislation was intended to apply to transfers made before its adoption and is so unequivocal as to leave no room for construction. This phrase, appearing in an earlier revenue act, had, however, been held not to render the statute effective upon transfers antedating the passage of the act7 and Congress apparently realized that the expression did not carry the statute back so as to embrace transactions consummated before its passage; for, in subsection (h) of section 302 of the Revenue Act of 1926,8 in referring to transactions and interests [303 U.S. 303, 309] giving rise to a tax by virtue of preceding subsections, it directed that they should be taxable 'whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act (February 26, 1926).'9 We conclude that the meaning of the section is not so free from doubt as to preclude inquiry concerning the legislative purpose.

The history of the Resolution is of material aid in its construction. Section 302(c) of the Act of 1926, like earlier acts, measured the tax by the inclusion in the gross estate of property of which the decedent had made a voluntary transfer in contemplation of, or intended to take effect in possession or enjoyment at or after his death. Notwithstanding the Treasury had ruled that a transfer of assets with a reservation of income for the donor's life came within the definition, this court held otherwise. 10 Dissatisfied with the decision, the Government sought a reversal of it but, in three judgments, announced on March 2, 1931, the ruling was reaffirmed. 11 In the opinions in these cases, which led to the preparation and adoption of the Resolution, the court said there was 'no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved.' There then remained one day of the current session of Congress. The Treasury drafted an amendment of section 302(c) to bring trusts of this type within its sweep, in the form of the Joint Resolution of March 3, 1931, which was sent to Congress on the day of our decisions and was passed, [303 U.S. 303, 310] under a suspension of the rules, on the next day, the last of the session. 12

Because its passage was considered exigent, the Resolution was adopted without having been printed

and in reliance on statements made from the floor. The Congressional Record discloses the understanding of the Congress with respect to its scope. Mr. Garner, of the House Ways and Means Committee, stated: 'The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason that we were afraid that the Senate would not agree to it.' 13

Mr. Hawley, of the same committee, in charge of the Resolution, stated, in answer to a question, 'It provides that hereafter no such method shall be used to evade the tax' and, referring to the situation created by the decisions of this court, he said: 'It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed.'

This language, we think, scarcely bears the interpretation put upon it by Government counsel-that the tax was meant to be laid on estates of all who died after the adoption of the Resolution.

Bearing in mind that the Resolution was prepared and its passage recommended by the Treasury, the adminis- [303 U.S. 303, 311] trative interpretation supports in uncommon measure the view that it was not intended to operate upon completed prior to its passage. Promptly upon its passage the Department issued T.D. 4314,14 approved by the Secretary of the Treasury May 22, 1931, which was in the form of a letter to collectors of internal revenue and others concerned. It quoted the language of the Resolution, and stated:

> 'In view of the decisions of the Supreme Court of the United States in Nichols v. Coolidge, 274 U.S. 531, 47 S.Ct. 710, 52 A.L. R. 1081 (T.D. 4072, C.B. Vi-2, 351), May v. Heiner, 281 U.S. 238, 50 S.Ct. 286, 67 A.L.R. 1244 (Ct.D. 186, C.B. IX-1, 382), Coolidge v. Long, 282 U.S. 582, 51 S.Ct. 306; Burnet v. Northern Trust Co., 283 U.S. 782, 51 S.Ct. 342; Edgar M. Morsman, Jr. v. Burnet, 283 U.S. 783, 51 S.Ct. 343; and Cyrus H. McCormick v. Burnet, 283 U.S. 784, 51 S.Ct. 343, 75 L.E.d 1413, the portion added 343, the portion added Revenue Act of 1926, as set forth above in italic, will notwithstanding the provisions of section 302(h) of that Act, be applied prospectively only, i.e., to such transfers coming within the amendment as were made after 10.30 p.m., Washington, D.C., time, March 3, 1931.
>
> 'Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302(c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.' (Italics in the original.)

April 11, 1932, Regulations 70 were amended by T.D. 4336 and, in part, read: 'Art. 18. Retention of possession, enjoyment, or income.-Any transfer which was made by the decedent after 10.30 p.m., Washington, D.C., time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the [303 U.S. 303, 312] right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth.'

Not only is the legislative history of section 803[a] of the Act of 1932 bare of indication of any purpose that it should affect past transfers, but what appears tends to disprove any such thought. 15 Moreover, the re-enactment of the Resolution of 1931 in the light of the administrative rulings requires the

conclusion that Congress approved and adopted the administrative construction of the provision it re-enacted. 16

Regulations 80, approved November 7, 1934, after paraphrasing section 803(a), concluded: 'The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p.m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p.m. eastern standard time, June 6, 1932 (The date of passage of the Revenue Act of 1932). See section 506 of the Revenue Act of 1934 (26 U.S.C.A. 1691(b)).' This regulation was retained as Article 18 in the 1937 edition of Regulations 80 issued October 26, [303 U.S. 303, 313] 1937. Thus while the regulations have been altered to treat section 803(a) of the 1932 act as retroactively affecting transfers made after March 3, 1931, the Department has consistently ruled that the Resolution of 1931 has no application to transfers made prior to its adoption. The position thus recently taken in inconsistent in its treatment of the two like enactments and is difficult to understand in view of the consistent interpretation of the Joint Resolution, but it fails to weaken the force of that consistent interpretation with knowledge of which Congress re- enacted the same provision in 1932.

The Government urges that all of these circumstances which are persuasive that the enactments were intended to operate for the future are overborne by section 302(h) of the Revenue Act of 1926, which is: 'Except as otherwise specifically provided therein, subsections (b), (c), (d), (e), (f), and (g) (of this section) shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or reinquished before or after the enactment of this Act (February 26, 1926).' (Italics supplied.)

It will be remembered that the Joint Resolution of 1931 amended section 302(c) of the Act of 1926 to cover transfers such as are here involved. It made no reference to any other portion of that act. Since section 302(c) in its original form was, by section 302(h), made applicable to transfers whether made before or after the Act of 1926, the contention is that it has like operation and effect as respects the provision added to it by the amendment. And the same argument is advanced with respect to the amendment of subsection (c) by the Act of 1932.

Resort is had to canons of constructions as an aid in ascertaining the intent of the Legislature. It may occur that the intent is so clear that no such resort should be indulged, and the Government claims this is such a case. [303 U.S. 303, 314] The matter is, we think, involved in sufficient ambiguity to warrant our seeking such aid. A wellsettled canon tends to support the position of respondents: 'Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute . ... Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent.' 17 The weight of authority holds this rule respecting two separate acts applicable where, as here, one section of a statute refers to another section which alone is amended. 18

In view of other settled rules of statutory construction, which teach that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively;19 that, if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer, 20 we feel bound to hold that the Joint Resolution of 1931 and section 803(a) of the Act of 1932 apply only to transfers with reservation of life income made subsequent to the dates of their adoption respectively. [303 U.S. 303, 315] Holding this view, we need not consider the contention that the statutes as applied to the transfers under consideration deprive the respondents of their property without due process in violation of the Fifth Amendment.

The judgments are affirmed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of these cases.

Footnotes

[Footnote 1] Chapter 27, 44 Stat. 9, 70; U.S.C., tit. 26, 411(c).

[Footnote 2] Chapter 454, 46 Stat. 1516; U.S.C. tit. 26, 411(c).

[Footnote 3] Chapter 209, 47 Stat. 169, 279; U.S.C., tit. 26, 411(c), 26 U.S.C. A. 411(c).

[Footnote 4] D.C., 15 F.Supp. 692.

[Footnote 5] 1 Cir., 90 F.2d 833.

[Footnote 6] 2 Cir., 91 F.2d 1010.

[Footnote 7] Shwab v. Doyle, 258 U.S. 529 , 42 S.Ct. 391, 26 A.L.R. 1454; Union Trust Co. v. Wardell, 258 U.S. 537 , 42 S.Ct. 393; construing section 202 of the Act of Sept. 8, 1916, 39 Stat. 777.

[Footnote 8] 44 Stat. 71, U.S.C., tit. 26, 411(h), 26 U.S.C.A. 411(h).

[Footnote 9] Compare Shwab v. Doyle, supra, 258 U.S. 529 , at page 536, 42 S.Ct. 391, 393, 26 A.L.R. 1454; Lewellyn v. Frick, 268 U.S. 238, 252 , 45 S.Ct. 487, 488.

[Footnote 10] May v. Heiner, 281 U.S. 238 , 50 S.Ct. 286, 67 A.L.R. 1244, construing section 402(c) of the Revenue Act of 1918, 40 Stat. 1057, 1097.

[Footnote 11] Burnet v. Northern Trust Co., 283 U.S. 782 , 51 S.Ct. 342; Morsman v. Burnet, 283 U.S. 783 , 51 S.Ct. 343; McCormick v. Burnet, 283 U.S. 784 , 51 S.Ct. 343, construing section 402(c) of the Revenue Act of 1921, 42 Stat. 278, and section 302(c) of the Revenue Act of 1924, 43 Stat. 304, 26 U.S.C.A. 411 note.

[Footnote 12] Cong. Rec., 71st Cong., 3rd Sess., Vol. 74, Part 7, p. 7198.

[Footnote 13] Cong. Rec., 71st Cong., 3rd Sess., Vol. 74, Part 7, pp. 7198-7199.

[Footnote 14] C.B. X-1, 450.

[Footnote 15] The reports of the Committees of both House and Senate contain this statement: 'The purpose of this amendment to section 302(c) of the revenue act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect' (House Committee Report No. 708, 72nd Cong., 1st Sess.; Senate Committee Report No. 665, same session).

[Footnote 16] Brewster v. Gage, 280 U.S. 327, 337 , 50 S.Ct. 115, 117; United States v. Dakota-Montana Oil Co., 288 U.S. 459, 466 , 53 S.Ct. 435, 438; McFeely v. Commissioner, 296 U.S. 102, 108 , 56 S. Ct. 54, 57, 101 A.L.R. 304; United States v. Safety Car Heating Co., 297 U.S. 88, 95 , 56 S.Ct. 353, 356.

[Footnote 17] Lewis' Sutherland on Statutory Construction, 2d Ed., Vol. II, pp. 787-8.

[Footnote 18] Calumet Foundry & Machine Co. v. Mroz, 79 Ind.App. 305, 137 N.E. 627; State v. Beckner, 197 Iowa 1252, 198 N.W. 643; Crohn v. Telephone Co., 131 Mo.App. 313, 109 S.W. 1068; Gustafson v. Hammond Irrigation Dist., 87 Mont. 217, 287 P. 640; Flanders v. Merrimack, 48 Wis. 567, 4 N.W. 741; contra, American Bank v. Goss, 236 N.Y. 488, 142 N.E. 156.

[Footnote 19] United States v. Heth, 3 Cranch 399, 413; Reynolds v. McArthur, 2 Pet. 417, 434; Shwab v. Doyle, 258 U.S. 529 , 42 S. Ct. 391, 26 A.L.R. 1454; United States v. Magnolia Petroleum Co., 276 U.S. 160, 162 , 48 S.Ct. 236, 237.

[Footnote 20] Gould v. Gould, 245 U.S. 151 , 38 S.Ct. 53; Shwab v. Doyle, supra; Reinecke v. Northern Trust Co., 278 U.S. 339, 348 , 49 S.Ct. 123, 126, 66 A.L.R. 397; White v. Aronson, 302 U.S. 16 , 58 S. Ct. 95.

F.2d 780, 783. As regards sufficient consideration in contract law, *see* Consideration.

Due course holder. *See* Holder in due course.

Due course of law. This phrase is synonymous with "due process of law," or "the law of the land," and the general definition thereof is "law in its regular course of administration through courts of justice". *See* Due process of law.

Due date. In general, the particular day on or before which something must be done to comply with law or contractual obligation.

Due diligence. *See* Diligence.

Due influence. Influence obtained by persuasion and argument or by appeals to the affections. In re Chamberlain's Estate, Cal.App., 109 P.2d 449, 452. *See also* Coercion; Duress.

Duel. A duel is any combat with deadly weapons fought between two or more persons, by previous agreement or upon a previous quarrel.

Dueling. The fighting of two persons, one against the other, at an appointed time and place, upon a precedent quarrel. If death results, the crime is murder. It differs from an affray in this, that the latter occurs on a sudden quarrel, while the former is always the result of design.

Duellum /d(y)uwéləm/. The trial by battel or judicial combat. *See* Battel.

Due negotiation. Transferring a negotiable document of title under such conditions that the transferee takes the document and the goods free of certain claims enforceable against the transferor. See U.C.C. §§ 7–501(4) & 7–502(1). Due negotiation is the good faith purchase exception to the doctrine of derivative title as applied to documents.

Due notice. Sufficient, legally prescribed notice. Notice reasonably intended, and with the likelihood of, reaching the particular person or public. No fixed rule can be established as to what shall constitute "due notice." "Due" is a relative term, and must be applied to each case in the exercise of the discretion of the court in view of the particular circumstances. *See* Notice.

Due-on-encumbrance clause. Mortgage language that gives the mortgagee the option to accelerate the mortgage debt in the event the mortgagor further encumbers or mortgages the real estate without mortgagee's consent.

Due-on-sale clause. A provision usually found in a note or mortgage whereby the entire debt becomes immediately due and payable at mortgagee's option upon sale of mortgaged property. Such clauses are generally used to prevent subsequent purchasers from assuming existing loans at lower than current market rates. The validity of such provisions has been upheld by the Supreme Court.

Due posting. Stamping and placing letter in United States mail.

Due process clause. Two such clauses are found in the U.S. Constitution, one in the 5th Amendment pertaining to the federal government, the other in the 14th Amendment which protects persons from state actions. There are two aspects: procedural, in which a person is guaranteed fair procedures and substantive which protects a person's property from unfair governmental interference or taking. Similar clauses are in most state constitutions. *See* Due process of law.

Due process of law. Law in its regular course of administration through courts of justice. Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. A course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance. Pennoyer v. Neff, 95 U.S. 733, 24 L.Ed. 565. Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

An orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the case. Kazubowski v. Kazubowski, 45 Ill.2d 405, 259 N.E.2d 282, 290. Phrase means that no person shall be deprived of life, liberty, property or of any right granted him by statute, unless matter involved first shall have been adjudicated against him upon trial conducted according to established rules regulating judicial proceedings, and it forbids condemnation without a hearing. Pettit v. Penn, La.App., 180 So.2d 66, 69. The concept of "due process of law" as it is embodied in Fifth Amendment demands that a law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a reasonable and substantial relation to the object being sought. U. S. v. Smith, D.C.Iowa, 249 F.Supp. 515, 516. Fundamental requisite of "due process" is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision-making body the reasons for such choice. Trinity Episcopal Corp. v. Romney, D.C.N.Y., 387 F.Supp. 1044, 1084. Aside from all else, "due process"

means fundamental fairness and substantial justice. Vaughn v. State, 3 Tenn.Crim.App. 54, 456 S.W.2d 879, 883.

Embodied in the due process concept are the basic rights of a defendant in criminal proceedings and the requisites for a fair trial. These rights and requirements have been expanded by Supreme Court decisions and include, timely notice of a hearing or trial which informs the accused of the charges against him or her; the opportunity to confront accusers and to present evidence on one's own behalf before an impartial jury or judge; the presumption of innocence under which guilt must be proven by legally obtained evidence and the verdict must be supported by the evidence presented; the right of an accused to be warned of constitutional rights at the earliest stage of the criminal process; protection against self-incrimination; assistance of counsel at every critical stage of the criminal process; and the guarantee that an individual will not be tried more than once for the same offense (double jeopardy).

See also Procedural due process; Substantive due process.

Due process rights. All rights which are of such fundamental importance as to require compliance with due process standards of fairness and justice. Procedural and substantive rights of citizens against government actions that threaten the denial of life, liberty, or property. *See* Due process of law.

Due proof. Within insurance policy requirements, term means such a statement of facts, reasonably verified, as, if established in court, would prima facie require payment of the claim, and does not mean some particular form of proof which the insurer arbitrarily demands. National Life Ins. Co. v. White, D.C.Mun.App., 38 A.2d 663, 666. Sufficient evidence to support or produce a conclusion; adequate evidence. *See* Burden of proof; Proof.

Due regard. Consideration in a degree appropriate to demands of the particular case.

Dues. Certain payments, rates or taxes. As applied to clubs and other membership organizations, refers to sums paid toward support and maintenance of same and as a requisite to retain membership.

Due to. Expressions "sustained by," "caused by," "due to," "resulting from," "sustained by means of," "sustained in consequence of," and "sustained through" have been held to be synonymous.

D.U.I. The crime of driving under the influence of alcohol or drugs. *See* Driving while intoxicated.

Duke. In English law, is a title of nobility, ranking immediately next to the Prince of Wales. It is only a title of dignity. Conferring it does not give any domain, territory, or jurisdiction over the place whence the title is taken. *Duchess,* the consort of a duke.

Duke of Exeter's Daughter. The name of a rack in the Tower, so called after a minister of Henry VI, who sought to introduce it into England.

Duke of York's Laws. A body of laws compiled in 1665 for the government of the colony of New York.

Dulocracy /d(y)ùwlókrəsiy/. A government where servants and slaves have so much license and privilege that they domineer.

Duly. In due or proper form or manner; according to legal requirements. Regularly; properly; suitable; upon a proper foundation, as distinguished from mere form; according to law in both form and substance. *See* Due process of law.

Duly ordained minister of religion. Person who has been ordained in accordance with the ceremonial, ritual, or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies and public worship, and who customarily performs those duties.

Duly qualified. Being "duly qualified" to fill an office, in the constitutional sense and in the ordinary acceptation of the words, means that the officer shall possess every qualification; that he shall in all respects comply with every requisite before entering on duties of the office; and that he shall be bound by oath or affirmation to support the Constitution, and to perform the duties of the office with fidelity.

Dum /dəm/. Lat. While; as long as; until; upon condition that; provided that.

Dumb-bidding. In sales at auction, when the minimum amount which the owner will take for the article is written on a piece of paper, and placed by the owner under an object, and it is agreed that no bidding shall avail unless equal to that, this is called "dumb-bidding."

Dum bene se gesserit /dəm bíyniy siy jésərət/. While he shall conduct himself well; during good behavior. Expressive of a tenure of office not dependent upon the pleasure of the appointing power, nor for a limited period, but terminable only upon the death or misconduct of the incumbent.

Dum fervet opus /dəm fərvət ówpəs/. While the work glows; in the heat of action.

Dum fuit infra ætatem /dəm fyúwət ínfrə iytéytəm/. (While he was within age.) In old English practice, a writ of entry which formerly lay for an infant after he had attained his full age, to recover lands which he had aliened in fee, in tail, or for life, during his infancy; and, after his death, his heir had the same remedy.

Dum fuit in prisona /dəm fyúwət in prízənə/. In old English law, a writ which lay for a man who had aliened lands under duress by imprisonment, to restore to him his proper estates. Abolished by St. 3 & 4 Wm. IV, c. 27.

Dummodo /dəmówdow/. Provided; provided that. A word of limitation in the Latin forms of conveyances, of frequent use in introducing a reservation; as in reserving a rent.

Dummy, *n.* One who purchases property and holds legal title for another, usually to conceal the identity of the

U.S. Constitution: Fifth Amendment

Fifth Amendment - Rights of Persons

Amendment Text | Annotations

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, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Annotations

CITES BY TOPIC: due process

Black's Law Dictionary, Sixth Edition, page 500:

Due process of law. Law in its regular course of administration through courts of justice. Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. **A course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of private rights.** To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of the creation —to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, **he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance**. Pennoyer v. Neff, 96 U.S. 733, 24 L.Ed. 565. Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. **If any question of fact or liability be conclusively be presumed [rather than proven] against him, this is not due process of law.**

An orderly proceeding wherein a person with notice, actual or constructive, and has an opportunity to be heard and to enforce and protect his rights before a court having the power to hear and determine the case. Kazubowski v. Kazubowski, 45 Ill.2d 405, 259 N.E.2d 282, 290. Phrase means that no person shall be deprived of life, liberty, property or of any right granted him by statute, unless matter involved first shall have been adjudicated against him upon trial conducted according to established rules regulating judicial proceedings, and it forbids condemnation without a hearing. Pettit v. Penn, LaApp., 180 So.2d 66, 69. The concept of "due process of law" as it is embodied in the Fifth Amendment demands that a law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a reasonable and substantial relation to the object being sought. U.S. v. Smith, D.C.Iowa, 249 F.Supp. 515, 516. Fundamental requisite of "due process of law" is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision-making body the reasons for such choice. Trinity Episcopal Corp. v. Romney, D.C.N.Y., 387 F.Supp. 1044, 1084. Aside from all else, "due process" means fundamental fairness and substantial justice. Vaughn v. State, 3 Tenn.Crim.App. 54, 456 S.W.2d 879, 883.

Embodied in the due process concept are the basic rights of a defendant in criminal proceedings and the requisites for a fair trial. These rights and requirements have been expanded by Supreme Court decisions and include, timely notice of a hearing or trial which informs the accused of the charges against him or her; the opportunity to confront accusers and to present evidence on one's own behalf before an impartial jury or judge; the presumption of innocence under which **guilt must be proven by legally obtained evidence** and the verdict must be supported by the evidence presented; rights at the earliest stage of the criminal process; and the guarantee that an individual will not be tried more than once for the same offence (double jeopardy).

IRS Deposition Questions and evidence (derived from We The People Questions) related to Due Process of Law:

- Fourth Amendment (seizure)
- Fifth Amendment (due process)

Annotated Constitution, Fifth Amendment: DUE PROCESS

- Due Process
- Confessions: Police Interrogation, Due Process, and Self-Incrimination
- **Procedural Due Process**
  - Generally
  - Administrative Proceedings: A Fair Hearing
  - Aliens: Entry and Deportation
  - Judicial Review of Administrative Proceedings
- **Substantive Due Process**
  - Discrimination
  - Congressional Police Measures
  - Congressional Regulation of Public Utilities
  - Congressional Regulation of Railroads
  - Taxation
  - Retroactive Taxes
  - Deprivation of Property: Retroactive Legislation
  - Bankruptcy Legislation
  - Right to Sue the Government
  - Congressional Power to Abolish Common Law Judicial Actions
  - Deprivation of Liberty: Economic Legislation

Annotated Constitution, Fourteenth Amendment: DUE PROCESS

- **Due Process of Law**
  - The Development of Substantive Due Process
    - "Persons" Defined
    - Police Power Defined and Limited
    - "Liberty"
  - Liberty of Contract
    - Regulatory Labor Laws Generally
    - Laws Regulating Hours of Labor
    - Laws Regulating Labor in Mines
    - Laws Prohibiting Employment of Children in Hazardous Occupations
    - Laws Regulating Payment of Wages
    - Minimum Wage Laws
    - Workers' Compensation Laws
    - Collective Bargaining
  - Regulation of Business Enterprises: Rates, Charges, and Conditions of Service
    - "Business Affected With a Public Interest"
    - Nebbia v. New York
  - Judicial Review of Publicly Determined Rates and Charges
    - Development

United States v. Goodwin, 457 U.S. 368 (1982)

To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort." Bordenkircher v. Hayes, 434 U.S. 357, 363 . In a series of cases beginning with North Carolina v. Pearce and culminating in Bordenkircher v. Hayes, the Court has recognized this basic - and itself uncontroversial - principle. For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right. 4

The imposition of punishment is the very purpose of virtually all criminal proceedings. The presence of a punitive [457 U. S. 368, 373] motivation, therefore, does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity. Motives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to "presume" an improper vindictive motive. Given the severity of such a presumption, however -

which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to criminal conduct - the Court has done so only in cases in which a reasonable likelihood of vindictiveness exists.

In North Carolina v. Pearce, the Court held that neither the Double Jeopardy Clause nor the Equal Protection Clause prohibits a trial judge from imposing a harsher sentence on retrial after a criminal defendant successfully attacks an initial conviction on appeal. The Court stated, however, that "[i]t can hardly be doubted that it would be a flagrant violation [of the Due Process Clause] of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." 395 U.S., at 723 -724. The Court continued:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory [457 U.S. 368, 374] motivation on the part of the sentencing judge."Id., at 725.

In order to assure the absence of such a motivation, the Court concluded:

> "[W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."Id., at 726.

In sum, the Court applied a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence. 5 [457 U.S. 368, 375]

In Blackledge v. Perry, 417 U.S. 21 , the Court confronted the problem of increased punishment upon retrial after appeal in a setting different from that considered in Pearce. Perry was convicted of assault in an inferior court having exclusive jurisdiction for the trial of misdemeanors. The court imposed a 6-month sentence. Under North Carolina law, Perry had an absolute right to a trial de novo in the Superior Court, which possessed felony jurisdiction. After Perry filed his notice of appeal, the prosecutor obtained a felony indictment charging him with assault with a deadly weapon. Perry pleaded guilty to the felony and was sentenced to a term of five to seven years in prison.

In reviewing Perry's felony conviction and increased sentence, 6 this Court first stated the essence of the holdings in Pearce and the cases that had followed it:

> "The lesson that emerges from Pearce, Colten, and Chaffin is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of `vindictiveness.'" 417 U.S., at 27 .

The Court held that the opportunities for vindictiveness in the situation before it were such "as to impel the conclusion that due process of law requires a rule analogous to that of the Pearce case." Ibid. It explained: [457 U.S. 368, 376]

> "A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going

> free. And, if the prosecutor has the means readily at hand to discourage such appeals - by `upping the ante' through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy - the State can insure that only the most hardy defendants will brave the hazards of a de novo trial."Id., at 27-28.

The Court emphasized in Blackledge that it did not matter that no evidence was present that the prosecutor had acted in bad faith or with malice in seeking the felony indictment. 7 As in Pearce, the Court held that the likelihood of vindictiveness justified a presumption that would free defendants of apprehension of such a retaliatory motivation on the part of the prosecutor. 8

Both Pearce and Blackledge involved the defendant's exercise of a procedural right that caused a complete retrial after he had been once tried and convicted. The decisions in these cases reflect a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided. The doctrines of stare decisis, res judicata, the law of the case, and double jeopardy all are based, at least in part, on that deep-seated bias. [457 U. S. 368, 377] While none of these doctrines barred the retrials in Pearce and Blackledge, the same institutional pressure that supports them might also subconsciously motivate a vindictive prosecutorial or judicial response to a defendant's exercise of his right to obtain a retrial of a decided question.

In Bordenkircher v. Hayes, 434 U.S. 357 , the Court for the first time considered an allegation of vindictiveness that arose in a pretrial setting. In that case the Court held that the Due Process Clause of the Fourteenth Amendment did not prohibit a prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against an accused who refused to plead guilty to the offense with which he was originally charged. The prosecutor in that case had explicitly told the defendant that if he did not plead guilty and "save the court the inconvenience and necessity of a trial" he would return to the grand jury to obtain an additional charge that would significantly increase the defendant's potential punishment. 9 The defendant refused to plead guilty and the prosecutor obtained the indictment. It was not disputed that the additional charge was justified by the evidence, that the prosecutor was in possession of this evidence at the time the original indictment was obtained, and that the prosecutor sought the additional charge because of the accused's refusal to plead guilty to the original charge.

In finding no due process violation, the Court in Bordenkircher considered the decisions in Pearce and Blackledge, and stated:

> "In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction - a situation `very different from the give-and-take [457 U.S. 368, 378] negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.' Parker v. North Carolina, 397 U.S. 790, 809 (opinion of BRENNAN, J.)." 434 U.S., at 362 .

The Court stated that the due process violation in Pearce and Blackledge "lay not in the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." 434 U.S., at 363 .

The Court held, however, that there was no such element of punishment in the "give-and-take" of plea negotiation, so long as the accused "is free to accept or reject the prosecution's offer." Ibid. The Court noted that, by tolerating and encouraging the negotiation of pleas, this Court had accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his constitutional right to stand trial. The Court concluded:

> "We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment."Id., at 365.

The outcome in Bordenkircher was mandated by this Court's acceptance of plea negotiation as a legitimate process. 10 In declining to apply a presumption of vindictiveness, [457 U.S. 368, 379] the Court recognized that "additional" charges obtained by a prosecutor could not necessarily be characterized as an impermissible "penalty." Since charges brought in an original indictment may be abandoned by the prosecutor in the course of plea negotiation - in often what is clearly a "benefit" to the defendant - changes in the charging decision that occur in the [457 U.S. 368, 380] context of plea negotiation are an inaccurate measure of improper prosecutorial "vindictiveness." 11 An initial indictment - from which the prosecutor embarks on a course of plea negotiation - does not necessarily define the extent of the legitimate interest in prosecution. For just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded. 12

Wolff v. McDonnell, 418 U.S. 539; 94 S.Ct. 2963; 41 L.Ed.2d 935 (1974):

"This analysis as to liberty parallels the accepted due process analysis as to property. ***The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property*** *[418 U.S. 539, 558]* ***interests.*** *Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The requirement for some kind of a hearing applies to the taking of private property, Grannis v. Ordean, 234 U.S. 385 (1914), the revocation of licenses, In re Ruffalo, 390 U.S. 544 (1968), the operation of state dispute-settlement mechanisms, when one person seeks to take property from another, or to government-created jobs held, absent "cause" for termination, Board of Regents v. Roth, 408 U.S. 564 (1972); Arnett v. Kennedy, 416 U.S. 134, 164 (1974) (POWELL, J., concurring); id., at 171 (WHITE, J., concurring in part and dissenting in part); id., at 206 (MARSHALL, J., dissenting). Cf. Stanley v. Illinois, 405 U.S. 645, 652 -654 (1972); Bell v. Burson, 402 U.S. 535 (1971)." [**Wolff v. McDonnell, 418 U.S. 539; 94 S.Ct. 2963; 41 L.Ed.2d 935 (1974)**]*

Merriam Webster's Dictionary of Law, 1996

1: a course of formal proceedings (as judicial proceedings) carried out regularly, fairly, and in accordance with established rules and principles
(*called also* procedural due process)

2: a requirement that laws and regulations must be related to a legitimate government interest (as crime prevention) and may not contain provisions that result in the unfair or arbitrary treatment of an individual
(*called also* substantive due process)
Note: The guarantee of due process is found in the Fifth Amendment to the Constitution, which states ``no person shall . . . be deprived of life, liberty, or property, without due process of law,'' and in the Fourteenth Amendment, which states ``nor shall any state deprive any person of life, liberty, or property without due process of law.'' The boundaries of due process are not fixed and are the subject of endless judicial interpretation and decision-making. Fundamental to procedural due process is adequate notice prior to the government's deprivation of one's life, liberty, or property, and an opportunity to be heard and defend one's rights to life, liberty, or property. Substantive due process is a limit on the government's power to enact laws or regulations that affect one's life, liberty, or property rights. It is a safeguard from governmental action that is not related to any legitimate government interest or that is unfair, irrational, or arbitrary in its furtherance of a government interest. The requirement of due process applies to agency actions.

3: the right to due process
Example: acts that violated *due process*

Fifth Amendment Right to Due Process:

> *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, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Authorities on Failure of Government Agencies to follow their own internal procedures:

Failure of an administrative agency to follow its own established procedures constitutes a violation of procedural due process.

Berends v. Butz, D.C.Minn.1973, 357 F.Supp. 143. See, also, Bills v. Hendenson, C.A.6(Tenn.) 1980, 631 F.2d 1287; Government of Canal Zone v. Brooks, C.A.Canal Zone 1970, 427 F.2d 346; Associated Builders & Contractors of Texas Gulf Coast, Inc. v. U.S. Dept. of Energy, D.C.Tex.1978, 451 F.Supp. 281; Brown v. U.S., D.C.Tex.1974, 377 F. Supp. 530; U.S. v. Ginsburg, D.C.Conn.1974, 376 F.Supp. 714.

Turpin v. Lemon, 187 U.S. 51; 23 S.Ct. 20 (1902):

> *Exactly what due process of law requires in the assessment and collection of general taxes has never been decided by this court, although we have had frequent occasion to hold that, in proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential. [Cites omitted.] But laws for the assessment and collection of general taxes stand upon a somewhat different footing, and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary. Due process of law was well defined by Mr. Justice Field in Hagar v. Reclamation Dist., No. 108, 111 U.S. 701, 28 L.Ed. 569, 4 Sup.Ct.Rep. 663, in the following words: "It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursuant in the ordinary mode prescribed by the law; it must be adapted too the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."*
>
> *Under the Fourth Amendment, the legislature is bound to provide a method for the assessment and collection of taxes that shall not be inconsistent with natural justice; but it is not bound to provide that the particular steps of a procedure for the collection of such taxes shall be proved by written evidence; and it may properly impose upon the taxpayer the burden of showing that in a particular case the statutory method was not observed."*

Larson v. Domestic and Foreign Commerce Corporation, 337 U.S. 682 (1949)

Handbook for Revenue Agents, Paragraph 332:(1)

Coy v. Iowa, 487 U.S. 1012 (1988)

> *The Sixth Amendment gives a criminal defendant the right "to be confronted with the witnesses against him." This language "comes to us on faded parchment," California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring), with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the [487 U.S. 1012, 1016] charges." Acts 25:16. It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial. Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub. L. 381, 384-387 (1959).*
>
> *Most of this Court's encounters with the Confrontation Clause have involved either the admissibility of out-of-court statements, see, e. g., Ohio v. Roberts, 448 U.S. 56 (1980); Dutton v. Evans, 400 U.S. 74 (1970), or restrictions on the scope of cross-examination, Delaware v. Van Arsdall, 475 U.S. 673 (1986); Davis v. Alaska, 415 U.S. 308 (1974). Cf. Delaware v. Fensterer, 474 U.S. 15, 18 -19 (1985) (per curiam) (noting these two categories and finding neither applicable). The reason for that is not, as the State suggests, that these elements are the essence of the Clause's protection - but rather, quite to the contrary, that there is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes those elements, whereas, as Justice Harlan put it, "[s]imply as a matter of English" it confers at least "a right to meet face to face all those who appear and give evidence at trial." California v. Green, supra, at 175. Simply as a matter of Latin as well, since the word "confront" ultimately derives from the prefix "con-" (from "contra" meaning "against" or "opposed") and the noun "frons" (forehead). Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: "Then call them to our presence - face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . ." Richard II, Act 1, sc. 1.*
>
> ***We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. See Kentucky v. Stincer, 482 U.S. 730, 748 , 749-750 (1987) (MARSHALL, J., dissenting). For example, in Kirby v. United States, 174 U.S. 47, 55 (1899), which concerned the admissibility of prior convictions of codefendants to prove an element of the offense [487 U.S. 1012, 1017] of receiving stolen Government property, we described the operation of the Clause as follows: "[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." Similarly, in Dowdell v. United States, 221 U.S. 325, 330 (1911), we described a provision of the Philippine Bill of Rights as substantially the same as the Sixth Amendment, and proceeded to interpret it as intended "to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination." More recently, we have described the "literal right to `confront' the witness at the time of trial" as forming "the core of***

the values furthered by the Confrontation Clause." California v. Green, supra, at 157. Last Term, the plurality opinion in Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987), stated that "[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."

The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution." Pointer v. Texas, 380 U.S. 400, 404 (1965). What was true of old is no less true in modern times. President Eisenhower once described face-to-face confrontation as part of the code of his hometown of Abilene, Kansas. In Abilene, he said, it was necessary to "[m]eet anyone face to face with whom you [487 U. S. 1012, 1018] disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow." Press release of remarks given to the B'nai B'rith Anti-Defamation League, November 23, 1953, quoted in Pollitt, supra, at 381. The phrase still persists, "Look me in the eye and say that." Given these human feelings of what is necessary for fairness, 2 the right of confrontation [487 U.S. 1012, 1019] "contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." Lee v. Illinois, 476 U.S. 530, 540 (1986).

The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." Z. Chafee, The Blessings of Liberty 35 (1956), quoted in Jay v. Boyd, 351 U.S. 345, 375 -376 (1956), (Douglas, J., dissenting). It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss [487 U.S. 1012, 1020] - the right to cross-examine the accuser; both "ensur[e] the integrity of the factfinding process." Kentucky v. Stincer, 482 U.S., at 736 . The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980)

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. Kulko v. California Superior Court,, 436 U.S. 84, 91 (1978)." [World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980)]

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26 CFR §601.106(f)(1): Appeals Functions

(1) Rule I.
An exaction by the U.S. Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law, in violation of the Fifth Amendment to the U.S. Constitution. Accordingly, an Appeals representative in his or her conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction. It shall be his or her duty to determine the correct amount of the tax, with strict impartiality as between the taxpayer and the Government, and without favoritism or discrimination as between taxpayers.

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26 U.S.C. 7804(b): Other Personnel (seizures)

- (b) Posts of duty of employees in field service or traveling
  Unless otherwise prescribed by the Secretary -
  - (1) Designation of post of duty
    The Commissioner shall determine and designate the posts of duty of all such persons engaged in field work or traveling on official business outside of the District of Columbia.
  - (2) Detail of personnel from field service
    The Commissioner may order any such person engaged in field work to duty in the District of Columbia, for such periods as the Commissioner may prescribe, and to any designated post of duty outside the District of Columbia upon the completion of such duty.

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)

The question is not whether the Wisconsin law is a wise law or unwise law. Our concern is not what philosophy Wisconsin should or should not embrace. See Green v. Frazier, 253 U.S. 233 . We do not sit as a super-legislative body. In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment. We have dealt over and over again with the question of what constitutes "the right to be heard" (*Schroeder v. New York*, 371 U.S. 208, 212) within the meaning of procedural due process. See *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 . In the latter case we said that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether [395 U.S. 337, 340] to appear or default, acquiesce or contest." 339 U.S., at 314 . In the context of this case the question is whether the interim freezing of the wages without a chance to be heard violates procedural due process.

A procedural rule that may satisfy due process for attachments in general, see McKay v. McInnes, 279 U.S. 820 , does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. We deal here with wages - a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process.

A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support. Until a recent Act of Congress, 4 304 of which forbids discharge of employees on the ground that their wages have been garnished, garnishment often meant the loss of a job. Over and beyond that was the great drain on family income. As stated by Congressman Reuss: 5

> *"The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level."*

Recent investigations of the problem have disclosed the grave injustices made possible by prejudgment garnishment whereby the sole opportunity to be heard comes after the taking. Congressman Sullivan, Chairman of [395 U.S. 337, 341] the House Subcommittee on Consumer Affairs who held extensive hearings on this and related problems stated:

> *"What we know from our study of this problem is that in a vast number of cases the debt is a fraudulent one, saddled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides." 114 Cong. Rec. 1832.*

The leverage of the creditor on the wage earner is enormous. The creditor tenders not only the original debt but the "collection fees" incurred by his attorneys in the garnishment proceedings:

> *"The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages back. If the debt is large, he will often sign a new contract of `payment schedule' which incorporates these additional charges."* 6

Apart from those collateral consequences, it appears that in Wisconsin the statutory exemption granted the wage earner 7 is "generally insufficient to support the debtor for any one week." 8

The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning [395 U. S. 337, 342] family to the wall. 9 Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. Coe v. Armour Fertilizer Works, 237 U.S. 413, 423) this prejudgment garnishment procedure violates the fundamental principles of due process.

Maxwell v. Dow, 176 U.S. 581 (1900):

This question is, as we believe, substantially answered by the reasoning of the opinion in the Hurtado Case, 110 U.S. 516, 535 , 28 S. L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292. The distinct question was there presented whether it was due process of law to prosecute a person charged with murder by an information under the state Constitution and law. It was held that it was, and that the Fourteenth Amendment did not prohibit such a procedure. In our opinion the right to be exempt from prosecution for an infamous crime, except upon a presentment by a grand jury, is of the same nature as the right to a trial by a petit jury of the number fixed by the common law. If the state have the power to abolish the grand jury and the consequent proceeding by indictment, the same course of rea- [176 U.S. 581, 603] soning which establishes that right will and does establish the right to alter the number of the petit jury from that provided by the common law. Many cases upon the subject since the Hurtado Case was decided are to be found gathered in Hodgson v. Vermont, 168 U.S. 262 , 42 L. ed. 461, 18 Sup. Ct. Rep. 80; Holden v. Hardy, 169 U.S. 366, 384 , 42 S. L. ed. 780, 788, 13 Sup. Ct. Rep. 383; Brown v. New Jersey, 175 U.S. 172 , 20 Sup. Ct. Rep. 77, 44 L. ed. --; Bolln v. Nebraska, 176 U.S. 83 , 20 Sup. Ct. Rep. 287, 44 L. ed. --.

Trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the Hurtado Case is a trial by jury mentioned as a necessary part of such process.

In Re Converse, 137 U.S. 624 , 34 L. ed. 796, 11 Sup. Ct. Rep. 191, it was stated that the Fourteenth Amendment was not designed to interfere with the power of a state to protect the lives, liberty, and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a state in administering process provided by the law of the state.

In Caldwell v. Texas, 137 U.S. 692 , 34 L. ed. 816, 11 Sup. Ct. Rep. 224, it was held that no state can deprive particular persons or classes of persons of equal and impartial justice under the law, without violating the provisions of the Fourteenth Amendment to the Constitution, and that due process of law, within the meaning of the Constitution, is secured when the laws operate on all alike, and no one is subjected to partial or arbitrary exercise of the powers of government.

In Leeper v. Texas, 139 U.S. 462, 467 , 35 S. L. ed. 225, 226, 11 Sup. Ct. Rep. 577, it was said 'that by the Fourteenth Amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or class of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. Hurtado v. California, 110 U.S. 516, 535 , 28 S. L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292, and cases cited.' See also, for statement [176 U.S. 581, 604] as to due process of law, the cases of Davidson v. New Orleans, 96 U.S. 97 , 24 L. ed. 616; Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 707 , 28 S. L. ed. 569, 4 Sup. Ct. Rep. 663.

The clause has been held to extend to a proceeding conducted to judgment in a state court under a valid statute of the state, if such judgment resulted in the taking of private property for public use, without compensation made or secured to the owner, under the conditions mentioned in the cases herewith cited. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 , 41 L. ed. 985, 17 Sup. Ct. Rep. 581; Backus v. Fort Street Union Depot Co. 169 U.S. 557 , 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

It has also been held not to impair the police power of a state. Barbier v. Connolly, 113 U.S. 27 , 28 L. ed. 923, 5 Sup. Ct. Rep. 375.

Willner v. Committee on Character, 373 U.S. 96 (1963)

"No conflict exists between constitutional requisites and exaction of the highest moral standards from those who would practice law. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238 -239. Certainly lawyers and courts should be particularly sensitive of, and have a special obligation to respect, the demands of due process. This special awareness, however, does not alter our essential function or duty. **In reviewing state action in this area, as in all others, we look to substance, not to bare form, to determine [373 U.S. 96, 107] whether constitutional minimums have been honored.**" [Willner v. Committee on Character, 373 U.S. 96 (1963)]

United States v. Conkins, 9 F.3d 1377, 1382 (9th Cir. 1993)

Due process of law is violated when the government vindictively attempts to penalize a person for exercising a protected statutory or constitutional right.

DUE PROCESS OF LAW ARTICLE:

The article below contains the following relevant/important citations of case law pertaining to common IRS situations which Thurston Bell has excerpted.

The actual case of Goldberg v. Kelly is available at http://www.laws.findlaw.com/US/397/254.html or a copy of it locally at this site *Goldberg v. Kelly*, 397 U.S. 254 (1970) for your reference.

It is a fact that the Goldberg case was about Welfare Benefits being cut off, but the ultimate argument before the court was about the applicability of the standards of DUE PROCESS OF LAW to Administrative Actions of the Government. Importantly, this article reveals that the standards of due process of law apply to all Administrative Actions of the Government, Federal and State.

> *"The fundamental requisite of due process of law is the opportunity to be heard". Grannis v. Ordean, 234 U.S. 385,394 (1914). The hearing must be "at a meaningful time and in a meaningful manner."Armstrong v. Manzo, 380 U.S. 545, 552(1965). In the present context these principles require…timely and adequate notice detailing reasons…, and an effective opportunity to defend by confronting any adverse witnesses and by presenting arguments and evidence… These rights are important in cases...challenged…as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases."*
>
> *"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E.g., ICC v. Lousiville & N.R. Co., 227 U.S. 88, 93-94 (1913) 503 US L. Ed 2nd 391(1992), Willner v. Committee on Character and Fitness, 373 U.S. 474,496-497 (1959)" Goldberg v. Kelly, 397 U.S. 254 (1970) (emphasis added)*

> *"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While it is important in the case of documentary evidence, it is more important where the evidence consists of testimony of individuals…"*
>
> *"We have formalized these protections in the requirements of confrontation and cross-examination. This court has been zealous to protect these rights from erosion. It has spoken out…in all types of cases where administrative...actions were under scrutiny." Greene v. McElroy, 360 U.S. 474. 496-497 (1959)*

These case citations and the argument regarding the components of Administrative Due Process of Law plainly apply to "all types of cases where administrative...actions were under scrutiny." This was the principle and premise that I used to explain to an old friend of mine how it is that I connected a case on Welfare to IRS.

There is no doubt that these components of due process of law are embodied and given substance in American law by the 1st, 5th, and 6th Amendments to the Constitution. I think that it would be impossible for anyone to contend anything to the contrary. The following provision of Federal Regulation clearly reveals that the Secretary of the Treasury testifies to the fact that the 5th Amendment applies to the IRS:

> *26 CFR § 601.106(f)(1)*

Rule I. An exaction by the U.S. Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law, in violation of the Fifth Amendment to the U.S. Constitution.

So it is nakedly apparent that the Amendments to the Constitution apply to the IRS, and we know that none of the three Amendments mentioned above have been repealed or amended, therefore the only way out for the IRS is to somehow provide that the standards of due process of law, which would appear to be more important since we bear the burden of proof, apply to us and our cases before the IRS.

Below is exactly why it is that we should seek for the IRS to provide:

a.) presentment of copies of all evidence used by the government against us;
b.) meaningful hearing of all of the facts of this case;
c.) notification of procedure, forms, or opportunity to refute the evidence against us (which is also the making of contentions of factual nature);
d.) hearing before an independent and impartial hearing officer; and;
e.) opportunity to confront and cross-examine all adverse witnesses, for the creation of a complete defense and administrative record to support any subsequent appeal.

as the elements of these rights were cited in the above U.S. Supreme Court cases. Without them my question to the IRS, the District Counsel, the Secretary of the Treasury, the Commissioner and Assistant Commissioner, the President, the Congress, the District Director, and the Federal Judiciary is,

"How then are we expected to bear or shift the burden of proof?"

Without these components of due process of law applying to all branches of the Government, especially where it is that Judicial Due Process prior to the taking of property is barred by statute, the concept of the requirement for Due Process of Law as required in the 5th Amendment to the Constitution of the United States becomes arbitrary and capricious, and the Societal/Social contract Between the People and the People and their Government is null and void.

If the Contract is going to be held in tact by the Courts then this following case is very important when you face collections of the government in the face of Denial of Due Process of Law:

"If the right to notice and a hearing is to serve its full purpose, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded him for wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of due process has already occurred. This Court [the Supreme Court] has not embraced the general proposition that a wrong may be done if it can be undone." ***Stanley v. Illinois****, 405 U.S. 645, 647, 31 L.Ed.2d 551, 556,.Ct. 1208 (1972)*

There are many who will read this article in the future who believe and have long held that the Societal/Social Contract is dead. Still, these people have failed to come forward with a simplistic argument as this one which would prove that belief as a simple inescapable fact.

Here I give you the foundations for that argument. I hope that they are simple enough for the common man to understand so that they will see that we have not yet exhausted our redress of grievance against the IRS determinations as well as the apparent lawlessness of our Courts. We have not yet done so, because nobody has made it this simple, and thus the actions of such people who are just one step from becoming the next Russell Weston Jr. (the accused Capitol Hill Gun-

Man) are just as Mr. Weston's, and that is an individual's attempt to tear asunder the Societal/Social Contract that is only apparently dead, and not conclusively dead by all evidence, argument, and fact.

It is my goal to force the Courts to either uphold our Social Contract, or for them to Publicly and Nakedly declare it to be dead, by forcing them to answer the question about how it is that we are to have hope of bearing or shifting burden of proof without presentment of the evidence against us as well as the other components provided above.

If you or I dare to take action against the apparently active Social Contract at this time we will be criminals.

Yet, if the Supreme Court and Federal Courts refuse to provide remedy and redress of grievance, or even rule that due Process is not applicable to IRS matters due to the Anti-Injunction Act of 1863 and codified at 26 USC § 7421, and ignores the fact that the 1st, 5th, and 6th Amendments have not been repealed or amended to bar administrative due process of law in keeping with the standards of due process of law, then the Court, the final defender and Fiduciary of the Social and Societal Contract will be the one who will make the fact of the demise and disposition of the Contract clear, and they will be the final word. Their decision will be a legal and valid determination, from there the individual will be free and forced to choose his or her personal course of action.

The record to date shows that the IRS is not interested in providing the components of due process of law for us to make our defense and carry or shift the burden of proof, it is now time to bring this violation of the Contract to the Feet of the High Court, and make them rule not on Taxes, but on Due Process of Law, the Foundation of our Rule of Law and Nation pursuant to American Jurisprudence:

> *"The guaranty of due process of law is one of the most important to be found in the Federal Constitution or any of the Amendments; Ulman v. Mayor, etc. of Baltimore, 72 Md 587, 20 A 141, affd 165 US 719, 41 L Ed 1184, 17 S Ct 1001. It has been described as the very essence of a scheme of ordered justice, Brock v. North Carolina, 344 US 424, 97 L Ed 456, 73 S Ct 349 and it has been said that without it the right to private property could not be said to exist, in the sense in which it is known to our laws. Ochoa v. Hernandez y Morales, 230 US 139, 57 L Ed 1427, 33 S Ct 1033."*

There we have it, without due process of law, there is no private property, including the rights that come with property. There is also no right to the property of your person, your land, your home. This also means that Commerce is finished, as there is no property actual, physical, real, or intellectual that can be protected from marauders, thieves, visigoths, or vandals. So business better start getting involved, as they are next.

Without due process of law all lawyers are out of work, the foundations of the courts are undermined, they have no power, and the Law of the Jungle rules, the Societal Contract is Officially Dead, and the Courts ruling will be the Death Certificate.

It might be true already that the Law of the Jungle Rules, but we have to make the U.S. Supreme Court prove it.

When this happens we can all quote Axel Rose from the Rock Band Guns and Roses..."Welcome to the Jungle.. we've got fun and games!"

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U.S. Constitution: Article III

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Article. III. [Annotations]

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and

Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Annotations

Article III - Judicial Department

- **Clause 2. Punishment**
  - Corruption of the Blood and Forfeiture

indicates that the division was originally of a military character. Also a hundred court.

War. Hostile contention by means of armed forces, carried on between nations, states, or rulers, or between citizens in the same nation or state. Gitlow v. Kiely, D.C.N.Y., 44 F.2d 227, 233. A contest by force between two or more nations, carried on for any purpose, or armed conflict of sovereign powers or declared and open hostilities, or the state of nations among whom there is an interruption of pacific relations, and a general contention by force, authorized by the sovereign. West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E.2d 475, 477, 478. War does not exist merely because of an armed attack by the military forces of another nation until it is a condition recognized or accepted by political authority of government which is attacked, either through an actual declaration of war or other acts demonstrating such position. Savage v. Sun Life Assur. Co. of Canada, D.C.La., 57 F.Supp. 620, 621. For there to be a "war," a sovereign or quasi-sovereign must engage in hostilities. Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., C.A.N.Y., 505 F.2d 989, 1005.

Term as used in statute proscribing any claim against United States arising out of combatant activity of Military or Naval Forces or Coast Guard during time of war includes an undeclared war as well as a formally declared war. Morrison v. U. S., D.C.Ga., 316 F.Supp. 78, 79.

Articles of war. See that title.

Civil war. An internecine war. A war carried on between opposing citizens of the same country or nation.

Declaration of war. *See* War.

Imperfect war. *See Perfect war, below.*

Laws of war. This term denotes a branch of public international law, and comprises the body of rules and principles observed by civilized nations for the regulation of matters inherent in, or incidental to, the conduct of a public war; such, for example, as the relations of neutrals and belligerents, blockades, captures, prizes, truces and armistices, capitulations, prisoners, and declarations of war and peace; *e.g.* Geneva Convention.

Mixed war. A mixed war is one which is made on one side by public authority, and on the other by mere private persons.

Perfect war. Where whole nation is at war with another whole nation, but when the hostilities are limited as respects places, persons, and things, the war is termed "imperfect war." Bas v. Tingy, 4 U.S. (Dall.) 37, 40, 1 L.Ed. 731.

Private war. One between private persons, lawfully exerted by way of defense, but otherwise unknown in civil society.

Public war. Every contention by force, between two nations, in external matters, under the authority of their respective governments. Prize Cases, 2 Black 666, 17 L.Ed. 459.

Solemn war. A war made in form by public declaration; a war solemnly declared by one state against another. Bas v. Tingy, 4 U.S. (Dall.) 37, 40, 1 L.Ed. 731.

War clauses. Art. I, § 8 (Clauses 11–16) U.S.Const., provides, inter alia, that Congress shall have power to declare war, and raise and support military forces. *See* War power.

War crimes. Crimes committed by countries in violation of the international laws governing wars. At Nuremberg after World War II, crimes committed by the Nazis were so tried.

Ward. Guarding, caring, protecting.

A division of a city or town for elections, police, and other governmental purposes. A corridor, room, or other division of a prison, hospital, or similar institution.

A person, especially a child or incompetent, placed by the court under the care and supervision of a guardian or conservator. *See* Guardian; Guardianship.

See Guardian; Guardianship.

Wardage. In old English law, money paid and contributed to watch and ward.

Ward-fegh. Sax. In old English law, ward-fee; the value of a ward, or the money paid to the lord for his redemption from wardship.

Ward-horn. In old English law, the duty of keeping watch and *ward,* with a *horn* to blow upon any occasion of surprise.

Ward-in-chancery. An infant who is under the superintendence of the chancellor.

Ward-mote. In old English law, a court kept in every ward in London, commonly called the "ward-mote court," or "inquest."

Ward-penny. In old English law, money paid to the sheriff or castellains, for the duty of watching and warding a castle.

Wardship. In military tenures, the right of the lord to have custody, as guardian, of the body and lands of the infant heir, without any account of profits, until he was twenty-one or she sixteen. In socage the guardian was accountable for profits; and he was not the lord, but the nearest relative to whom the inheritance could not descend, and the wardship ceased at fourteen. In copyholds, the lord was the guardian, but was perhaps accountable for profits. See 2 Bl.Comm. 67.

Wardship in chivalry. An incident to the tenure of knight-service.

Wardship in copyholds. The lord is guardian of his infant tenant by special custom.

Wards of admiralty. Seamen are sometimes thus designated, because, in view of their general improvidence and rashness, and though they are not technically incapable of contracting, their contracts are treated like those of fiduciaries and beneficiaries, and if there is any inequality in terms or any disproportion in the bargain or any sacrifice of rights of seamen which are not

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U.S. Constitution: Fourth Amendment

Fourth Amendment - Search and Seizure

Amendment Text | Annotations

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized.

Annotations

- **Search and Seizure**
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Annotations

TITLE 18 > PART I > CHAPTER 115

CHAPTER 115—TREASON, SEDITION, AND SUBVERSIVE ACTIVITIES

How Current is This?

King James Version (KJV)
1 Timothy - Chapter 6

1Ti 6:1 ¶Let as many servants as are under the yoke count their own masters worthy of all honour, that the name of God and [his] doctrine be not blasphemed.

1Ti 6:2 And they that have believing masters, let them not despise [them], because they are brethren; but rather do [them] service, because they are faithful and beloved, partakers of the benefit. These things teach and exhort.

1Ti 6:3 ¶If any man teach otherwise, and consent not to wholesome words, [even] the words of our Lord Jesus Christ, and to the doctrine which is according to godliness;

1Ti 6:4 He is proud, knowing nothing, but doting about questions and strifes of words, whereof cometh envy, strife, railings, evil surmisings,

1Ti 6:5 Perverse disputings of men of corrupt minds, and destitute of the truth, supposing that gain is godliness: from such withdraw thyself.

1Ti 6:6 But godliness with contentment is great gain.

1Ti 6:7 For we brought nothing into [this] world, [and it is] certain we can carry nothing out.

1Ti 6:8 And having food and raiment let us be therewith content.

1Ti 6:9 But they that will be rich fall into temptation and a snare, and [into] many foolish and hurtful lusts, which drown men in destruction and perdition.

1Ti 6:10 For the love of money is the root of all evil: which while some coveted after, they have erred from the faith, and pierced themselves through with many sorrows.

1Ti 6:11 ¶But thou, O man of God, flee these things; and follow after righteousness, godliness, faith, love, patience, meekness.

1Ti 6:12 Fight the good fight of faith, lay hold on eternal life, whereunto thou art also called, and hast professed a good profession before many witnesses.

1Ti 6:13 I give thee charge in the sight of God, who quickeneth all things, and [before] Christ Jesus, who before Pontius Pilate witnessed a good confession;

1Ti 6:14 That thou keep [this] commandment without spot, unrebukeable, until the appearing of our Lord Jesus Christ:

1Ti 6:15 Which in his times he shall shew, [who is] the blessed and only Potentate, the King of kings, and Lord of lords;

1Ti 6:16 Who only hath immortality, dwelling in the light which no man can approach unto; whom no man hath seen, nor can see: to whom [be] honour and power everlasting. Amen.

1Ti 6:17 ¶Charge them that are rich in this world, that they be not highminded, nor trust in uncertain riches, but in the living God, who giveth us richly all things to enjoy;

1Ti 6:18 That they do good, that they be rich in good works, ready to distribute, willing to communicate;

1Ti 6:19 Laying up in store for themselves a good foundation against the time to come, that they may lay hold on eternal life.

1Ti 6:20 ¶O Timothy, keep that which is committed to thy trust, avoiding profane [and] vain babblings, and oppositions of science falsely so called:

1Ti 6:21 Which some professing have erred concerning the faith. Grace [be] with thee. Amen. [[[The first to Timothy was written from Laodicea, which is the chiefest city of Phrygia Pacatiana.]]]

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