May 7, 1947.

MEMORANDUM TO THE CONFERENCE:

I have had presented to me petitions for leave to appeal a judgment of the Supreme Court of Michigan. It is the practice of that court to refuse all such applications for leave to appeal a case here.

Petitioners are Jehovah's Witnesses. Upon complaint of the police they were arrested and tried before the Recorder's Court of Detroit on the charge of allowing their minor children to accompany and assist them in selling Watchtower magazines on the streets of the city, in violation of a city ordinance which makes it a misdemeanor for a parent to "suffer, permit, allow, or induce" a minor to engage in a "street trade," which includes, so far as is relevant here, "distributing, selling or offering for sale . . . any . . . printed or written material . . . ." Upon conviction and fine they applied for certiorari to the Circuit Court, which granted and affirmed. The Supreme Court allowed an application for an appeal and affirmed the Circuit Court. Petitioners challenged the ordinance as in violation of the constitutional guaranty of freedom of religion, but the Supreme Court gave the contention short shrift, saying that Prince v. Massachusetts, 321 U. S. 158, governed.

There is no doubt that the Prince case is squarely in point, and I do not think the question is substantial enough to warrant an appeal unless the Conference desires to reexamine the issue. The Prince case was decided 5-4 January 31, 1944, and since then there have been changes on the Court. Mr. Covington explicitly calls for a reexamination of the question, arguing that personnel of the Court has changed and that the decision in Prince was "egregiously erroneous and has worked evil results."

I desire to call up the question of appeal at the next Conference and am circulating this memorandum that the members may have the question in mind.

STANLEY REED.

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

October 2, 1947.

Dear Chief:

No. 144, Seifing v. Barclay White Co., is on the special list.

I think that a federal question was raised though the decision below probably correct as depending on state law. However, it is so close to an interpretation of a federal law and results in such divergencies of unemployment benefits of the several states that it should be discussed.

May we discuss this at Conference?

Yours,

Stanley Reed

The Chief Justice.

[1947]

#54

Blumenthal v U. S.

Francisco case - Rutledge

#61 U.S. v Di Re - Jackson

If you need adjustment in your assignments for these, let me know.

SR

File

October 16, 1947

MEMORANDUM FOR THE CONFERENCE.

RE: No. 217, Bracey v. Luray.

In this case the petitioners recovered judgments for overtime and liquidated damages against the respondent. After the recovery of the judgments, the respondent made representations to petitioners that it was insolvent and unable to pay the damages in full. Thereupon a compromise was made under which the respondent agreed to pay the overtime, attorneys' fees, and a nominal amount of liquidated damages in settlement of the judgments.

A question arose as to whether or not a provision of the compromise that failure to make further payments on time invalidated the entire contract. The lower courts held that the action of the petitioners in accepting the delayed payments constituted a waiver of the failure to pay on time. This, I think, was sound and I shall not consider it further.

After the payment of the compromise sums, the petitioners had executions and attachments issued to secure the difference between the compromise sums and the original judgment on the theory that the agreement to compromise was invalid under O'Neil, 324 U. S. 697, and Schulte, 328 U. S. 108. This present proceeding developed from a motion of respondent to quash the attachments and to mark the original judgments satisfied because of the compromise agreement. No question is raised as to the actual insolvency of the respondent at the time that the compromise agreement was made. Therefore, it was not necessary to make such a showing.

Neither O'Neil nor Schulte dealt with this problem. O'Neil dealt with the problem of a compromise of liquidated damages and Schulte dealt with a compromise of a bona fide dispute over the scope of coverage of the Wage-Hour Act. Neither case dealt with the problem of a compromise of a judgment on account of the debtor's insolvency or on other grounds. Despite Fort Smith v. Mills, 253 U. S. 206, if the Portal to Portal Act had not been passed, I would think we should take cert to inquire whether or not a compromise of a judgment was ineffective to release the employer under the O'Neil and Schulte cases, whether or not the right to overtime and liquidated damages was a unitary or divided claim.

The question of the compromise is no longer important. The Portal to Portal Act, U.S.C.A., July 1947, p. 289, Tit. 29, §253, permits compromise. Sec. 3(b) provides that an employee may hereafter waive his right under the FLSA to liquidated damages in whole or in part with respect to activities engaged in prior to the enactment of the amendment, and §3(d) provides that the terms of the section "shall also be applicable to any compromise or waiver heretofore so made or given." Sec. 3(c) states that a compromise, in the absence of fraud or duress, shall be "a complete bar to any action based on such cause of action."

The subsequent enactment of the Portal to Portal sections does not bar its retroactive application. Carpenter v. Wabash RR., 309 U. S. 23, 26; Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538.

Therefore to take this case to decide whether the judgment was correct before the Portal to Portal Act is not important for the future. It is hardly necessary to send the case back for consideration of the applicability of these sections of the Portal to Portal Act to the past as they seem clearly applicable and the C.C.A. would make the same decision as it has in its present ruling.

STANLEY REED

379

March 6, 1948

MEMORANDUM FOR THE CONFERENCE:

Upon examination of the petition for rehearing in No. 379, Grand River Dam Authority v. Grand-Hydro, I am inclined to believe that we should reconsider our denial of certiorari. I should appreciate hearing the views of the Conference on the matter.

The effect of the decision below is to require a licensee of the Federal Power Commission to pay a landowner a greatly increased sum based on the value of the land for use for power purposes. In United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, we held that in condemnation proceedings instituted by the United States such elements of value should be disregarded. If in establishing a rate base and in setting the recapture price of a power project after 50 years the Federal Power Commission allows the extra cost to the licensee for water power value to be included, the rule in Chandler-Dunbar is avoided; if the Commission disallows such items of value the solvency of licensees may be seriously threatened. For the reasons elaborated in First Iowa Hydro-electric Cooperative v. Federal Power Commission, I think that federal law, not state law, should control.

The court below apparently considered the question of valuation in condemnation proceedings as determined solely by state law. Petitioner made timely exception to the introduction of evidence relating to the value of the land for dam purposes (R. 321, 345, 361, 387) and by its requested charges to the jury, refused by the trial court, continued to urge that such elements of value should be disregarded (R. 604, 607-13). The same issue was properly raised in the petition for certiorari and the argument here outlined is developed in the government's amicus brief. I believe an expression by this Court would be helpful in establishing a rule of law which could be invoked in future cases of acquisition of lands by Federal Power Commission licensees for power purposes.

STANLEY REED.

McCulloch

March 22, 1948.

MEMORANDUM TO THE CONFERENCE:

Judge McColloch of the District Court for the District of Oregon has raised the question of the propriety of our disposition of United States v. Palletz, No. 1100; United States v. Kromer, No. 1101; United States v. Wheelbarger, No. 1334; United States v. Rambeau, No. 1335; United States v. Lewin, No. 1336; United States v. Sagner, No. 1341: all of the 1946 Term. In all of these cases a prosecution for violation of the Emergency Price Control Act was brought after the expiration of that Act on June 30, 1946. The indictments were dismissed by the trial judges. In Nos. 1100 and 1101, the opinion of the district judge indicates that his action was based upon the conclusion that, in the absence of an applicable saving clause, the prosecutions collapsed after the expiration of the statute upon which they were based. Judge McColloch was the district judge in Nos. 1334-36 and 1341. His opinion dismissing the indictments indicates a strong dislike of the OPA in general and the rule in Yakus' case in particular. He fails, however, to present any legal arguments to explain his action. The Government, taking advantage of the Criminal Appeals Act, brought direct appeals to this Court. Nos. 1100 and 1101 arrived first and were summarily reversed in a per curiam:

> . . . Appeals from the District Court of the United States for the Eastern District of Pennsylvania. April 7, 1947. Per Curiam: The judgments are reversed. 56 Stat. 23, 24, §1(b) as amended, 50 U.S.C. App. (Supp. V, 1946) §901(b);[1] R. S. §13, as amended, 58 Stat. 118;[2] Great Northern R. Co. v. United States, 208 U. S. 452; United States v. Reisinger, 128 U. S. 398. . . .

Our per curiam indicates that we held that the saving clause of the Emergency Price Control Act and the general saving clause of 58 Stat. 118 extended the vitality of the indictments beyond the life of the Act upon which they had been based. Nos. 1334-36 and 1341 were also summarily reversed in a per curiam:

> . . . Appeals from the District Court of the United States for the District of Oregon. June 2, 1947. Per Curiam: The judgments are reversed. United States v. Palletz, 330 U. S. 812, and authorities cited. . . .

Judge McColloch argues that our disposition of the above cases deprived the criminal defendants of their constitutional rights.

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1 "The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1946, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability or offense."

2 "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall

In a petition for rehearing filed May 2, 1947, counsel in Palletz' case argued the same point that McColloch raises.

> "3. Inasmuch as the judgment of the District Court was rendered in a criminal proceeding against appellee and the judgment dismissed the criminal information against appellee, the reversal of that judgment without hearing, to the great prejudice of appellee, constitutes a denial of due process."

That we were unimpressed by the argument then is indicated by our denial of the petition.

At the time that we acted in the above cases there were no precedents to support summary reversal of an appeal brought by the Government in a criminal case. The only argument to support our action is that reversal was so clearly indicated that argument would have been useless. I do not believe that the Constitution requires us to impose the financial burden of argument before this Court upon the Government and criminal defendants when the Conference is unanimous in holding that a judgment should be reversed and is of the opinion that argument is unnecessary.

One can understand, however, the feeling of an accused who has been successful in securing the dismissal of an indictment that he should have an opportunity to be heard on the controlling issue before reversal.

An appeal differs from a petition for certiorari in that no answer to the merits is required or expected to the Statement as to Jurisdiction where jurisdiction is clear.

STANLEY REED

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so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

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

File

March 22, 1948.

Dear Chief:

Judge McColloch sent letters also to Frankfurter, J., and Rutledge, J. It seems to me that before we answer him the question is worth a Conference discussion. If you agree, will you put it on the agenda.

Yours,

Stanley Reed

Put on list

The Chief Justice.


Chesterfield N.H.

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CORRESPONDENCE ADDRESS

Dear Ted—
Ok at this place.
Hope I do not have as hard
work as this next week
Regards Hank, Red

[Dec, 1948]

Justice Reed telephone Conversation

Mr Koontz Law Clerk 5 to 7 pm
Dec 29, 1948 denies the
petition —

Koontz to Kelly 5" pm Dec 29
1948 advising of Mr Justice
Reed's position, Kelly to
BJ - Kelly to Willy.

In Re. No 290 Misc. (Oct Term 1948)
(McLaffey v. California)

[No date]

Realistically Speaking

Hermoine was rich Herbert's nurse

But Lillian's hooks were in his

purse,

Reno gave Herman

Brown & says not by a good goldarn

Supreme Court of the United States

Memorandum

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

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

January 12, 1949

Dear Fred:

In connection with the argument of No. 336, American Communications Association v. Douds, I have just seen the petition for certiorari and the memorandum of the National Labor Relations Board in No. 431, United Steelworkers of America v. NLRB. Both cases involve the issue of the validity of the Taft-Hartley Act's requirement of filing of affidavits by union officers to the effect that they are not members of the Communist Party, etc. It may be too late to shift the argument of No. 336, but if it is not it seems to me that it would be worth while to postpone it until consideration could be given to the petition in No. 431 and, if that petition should be granted, to set the two cases for argument together. I am inclined to think that the issue is important enough to have all the light we can get on it and that the situation presented in No. 431 may be sufficiently different to justify hearing that case independently and preferably in conjunction with the argument in No. 336.

Sincerely,

WOR

The Chief Justice

November 12, 1949.

MEMORANDUM TO THE CONFERENCE:

The following notes add to the information on the Eisler case.

1. The subsequent history of Smith v. U.S., 94 U.S. 97, is as represented in the motion to dismiss, the order apparently differing from the opinion.

2. In the Bohanan case, however, the order corresponded to the opinion:

   a. Minutes for Monday, Oct. 17, 1887:

      > . . . It is ordered that the submission of the cause be set aside and that unless the plaintiff in error be brought or comes within the jurisdiction and under the control of the court below on or before the last day of this term the cause be thereafter left off the docket until directions to the contrary . . . ."

   b. On May 14, 1888, the last day of the term, in correspondence with the order of Oct. 17, 1887, the case was stricken from the docket.

   c. The Bohanan case is square authority for the Eisler order.

3. The four state cases cited in the Smith case throw no light on this Court's intention in that case. They are obviously cited for the proposition--which was the real holding of the case--that the court would not hear the case if the defendant were absent. The context and orders in the state cases vary sharply, and were not being relied upon for learning with regard to the proper mandate.

4. There is one fact which may be of some significance. Referring to the order of Nov. 27, 1876, ordering the Smith cause "dismissed" (quoted in the present Motion, p. 4), the clerk entered on the docket (1876 Dock. #2) that the case was "to be stricken from the docket after" the date set. And again, when the case was carried over as #1 on the 1877 Docket, the entry by the clerk referring to the so-called "dismissal" order reads: "Ordered that unless Plaintiff in Error submit himself to jurisdiction on or before the first day of next term the case to be stricken from docket after that time."

It seems to me that no particular significance was attached to the different terms used in the opinion, the order, and the clerk's entry. It may be argued that in any case the terms were being used synonymously, but it seems to me to be equally true that no one was thinking particularly about the exact way in which the case should be handled. There had never been a U. S. decision before that the case should not be heard if the defendant had fled custody and was not before the court, and all attention seems to have been directed to that one essential issue. The secondary issue of the precise mandate was apparently more explicitly considered in the Bohanan case, and there the court decided and ordered exactly as in Eisler.

STANLEY REED

#262 Misc.
Reed memo.

SUPREME COURT OF THE UNITED STATES

No. 262, MISC.—OCTOBER TERM, 1949.

Frank Hynes, Regional Director, Etc., Petitioner, *v.* The Hon. Harry E. Pratt, Judge, Etc.	Motion for Leave to File Petition for Writ of Mandamus.

[January —, 1950.]

Memorandum of MR. JUSTICE REED.

The Government in No. 262 Misc., *Hynes* v. *Pratt, District Judge, Alaska, et al.*, has filed a motion for leave to file a petition for writ of mandamus, petition for writ of mandamus, and brief in support thereof. Inasmuch as the case that gave rise to this motion, *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, was written by me, I thought a statement as to my consideration of the requested mandamus might be useful.

It will be recalled that we decided two questions in the *Hynes* case: (1) That an Indian reservation had been properly created by the Secretary of the Interior and included not only land on Kodiak Island, but also a described area of water, extremely valuable as a fishery; and (2) that a particular regulation of the Secretary of the Interior under the White Act was invalid. This regulation marked the water area of the reservation as a preserve and prohibited commercial fishing in the waters. We held that it violated a provision of the White Act because it excepted from the prohibition a particular class, the natives and their licensees, and we determined that the entire regulation fell with the exception.

Our opinion concluded as follows (p. 126):

"This is an equitable proceeding in which the respondents seek protection against unlawful action by petitioner, the Regional Director of the Fish and Wildlife Service of the Department of the Interior. The interests of respondents, the Indians of Karluk Reservation, and the efforts of the Department of the Interior to administer its responsibilities fairly to fishermen and Indians are involved. These are questions of public policy which equity is alert to protect. This Court is far removed from the locality and cannot have the understanding of the practical difficulties involved in the conflicts of interest that is possessed by the District Court. Therefore we think it appropriate for us to refrain from now entering a final order disposing definitely of the controversy. With our conclusion on the law as to the establishment of the reservation and the invalidity of the regulation before them, the Department and the parties should have a reasonable time, subject to the action of the District Court on the new proposals, to adjust their affairs so as to comply with our determinations.

"We therefore vacate the decrees of the District Court and the Court of Appeals and remand this proceeding to the District Court with directions to allow thirty days from the issuance of our mandate for the Secretary of the Interior to give consideration to the effect of our decision. Unless steps are taken in this proceeding the District Court, on the expiration of thirty days, shall enter a decree enjoining the defendant Hynes and all acting in concert with him, substantially as ordered in the permanent injunction entered November 6, 1946. If timely steps are taken, the District Court will, of course, be free to enter such orders as it may deem proper and not in-

> consistent with the present decision. Pending the entry of further orders by the District Court, the preliminary injunction entered July 18, 1946, shall apply to protect the rights of the respondents."

On the first day of July, 1949, the mandate in *Hynes* v. *Grimes Packing Co.* issued from this Court. It vacated the judgments of the District Court and the Court of Appeals, and it concluded:

> "And it is further ordered, That this cause be, and the same is hereby, remanded to the District Court for the Territory of Alaska with directions and for proceedings in conformity with the opinion of this Court [of May 31, 1949].
>
> "You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding."

After our decision the Secretary deleted the offending regulation. (Motion, p. 5.) He also attempted to make an arrangement with the packing companies providing for fishing rights in the reservation waters. This attempt failed. Within the thirty days allowed by our opinion, the council of the Native Village of Karluk issued an amended ordinance (Motion, p. 29) which in substance put the right to fish in the reservation waters on a license basis. The fees were designed purportedly to pay no more than the costs of policing the area to prevent the abuse of fishing rights. Any resident of Alaska could get a license if he paid a fee of $2; any nonresident if he paid $5. See *Haavik* v. *Alaska Packers Assn.*, 263 U. S. 510. The proposed permit contained a provision that it was revocable in the discretion of the council

(Motion, p. 28). It was provided that anyone violating the ordinance, *e. g.,* fishing without a permit, could be treated as a trespasser and removed from the reservation. Anyone whose permit was revoked would be "ineligible in the future to obtain a permit." (Motion, p. 29.)

Prior to the expiration of the thirty days specified in the last paragraph of our opinion, the Government moved in the District Court for an order dismissing the action on the ground that the deletion of the regulation made unnecessary the injunctive relief that had been sought. In its amended form, the motion also asked for a dissolution of the temporary and permanent injunctions entered by the trial court in the first stages of the case (p. 38). The packers then countered with a motion for a decree enjoining Hynes "in accordance with the terms of the permanent injunction." So far as appears no one directed the attention of the District Court to the ordinance of the Village of Karluk which had been passed subsequent to our decision and prior to the motion of the United States.

The district judge on September 19 entered a judgment declaring "that no steps were taken; in this proceeding in accordance with the decision of the Supreme Court and the mandate entered thereon and that the only action taken by the defendant above named was to file a motion for an order of dismissal, which said motion has heretofore on this date been denied." (Motion, p. 39.) He then ordered

> "that a permanent injunction . . . is hereby granted enjoining the defendant Frank Hynes, Regional Director of the Fish and Wildlife Service, Department of the Interior, his agents, servants, employees, attorneys, and all other persons in active concert and participation with him from enforcing or attempting to enforce, or seizing any boats, . . . by way of enforcing, the restrictive provisions of Section

> 208.23 (r) of the . . . Fisheries . . . Regulations or any other regulations of like or substantially like import which may hereafter be promulgated or attempted to be promulgated by the Department of the Interior of the United States of America through its Fish and Wildlife Service or otherwise." (Motion, pp. 39–40.)

Two questions arise on this motion for mandamus: (I) Did the judgment of the District Court, including the injunctions set forth above, comply with our mandate? (II) Is mandamus a proper method for deciding that question, or should the Government have to proceed by appeal?

I.

It is clear that on a mandate carrying reversal in some particular, the court receiving the mandate cannot "vary it or examine it for any other purpose than execution or give any other or further relief or review it even for apparent error upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded." *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 255; *In re Louisville*, 231 U. S. 639, 643, 645; *Philadelphia Co.* v. *St. Louis*, 249 U. S. 134, 143, 144; see *Dunlop* v. *Hepburn*, 3 Wheat. 231. Our mandate of vacation restored to the District Court power to act "if timely steps are taken." 337 U. S. 127. It necessarily permitted the District Court to determine whether steps were taken. As to matters upon which the trial court was left free to act, it might act in its own discretion. *In re Sanford, supra*, 256; *United States* v. *Terminal R. Co.*, 236 U. S. 194, 201, 203; *United States* v. *Atchison, T. & S. F. R. Co.*, 154 U. S. 637.

(A) The Meaning of the Original Permanent Injunction.

In our opinion we said that unless steps were taken in thirty days the District Court was to enter a decree

enjoining Hynes and those acting on concert with him "substantially as ordered in the permanent injunction entered November 6, 1946." To determine whether the most recent action of the District Court complied with our mandate, we must examine what we thought the permanent injunction ordered.

The pertinent portion of the injunction reads:

> "It Is Hereby Ordered That a permanent injunction be, and the same is hereby, granted, enjoining the defendant, Frank Hynes, Regional Director of the Fish and Wild Life Service, Department of the Interior, his agents, servants, employees, attorneys, and all other persons in active concert and participation with him from enforcing or attempting to enforce the restrictive provisions of Section 208.23 (r) of the Alaska Fisheries General Regulations and from seizing any boats, seines, nets, or other gear and appliance used or employed in fishing by the plaintiffs in the waters in and adjacent to the Karluk Indian Reservation situated on Kodiak Island, Alaska, three thousand feet seaward from the shore at mean low tide or any fish taken therewith, or from arresting any of plaintiff's fishermen who carry on fishing operations in said waters."

The addition of the words "under that Regulation" at the end of the quoted section would have made its meaning less equivocal, but the allegations and the findings would indicate that the injunction properly is to be read as a prohibition of seizure and arrest under the White Act rather than a prohibition of sanctions which might be imposed under some other power to protect the reservation.

The packers asked in their original petition for orders decreeing void not only § 208.23 (r) of the Alaska Fisheries General Regulations, but also Public Land Order

No. 128, which made the water of the Karluk Fishery part of a reservation. In their prayer for an injunction, however, the packers asked only that Hynes be enjoined from doing anything to carry out the provisions of the regulation. (P. 14, Orig. Record.) They did not ask that Hynes be enjoined from attempting to stop packer fishing through the exercise of any authority he might have apart from the White Act to protect a validly created reservation which included the fishery.

To justify the requested injunction the packers alleged threats by Hynes to seize the catch and the boats "included within the purported Karluk Indian Reservation by Public Land Order No. 128." The reservation and the regulation covered the same waters. All the threats that appear, however, are threats to enforce the White Act regulation with White Act sanctions—as expressed in phrases like "defendant's threatened action in utilizing the enforcement powers, particularly the seizure powers, under said White Act." (Orig. R. p. 12.) There was no allegation of a threat by Hynes to interfere with packer fishing in any way other than under the regulation.

The statement in our opinion (337 U. S. at 96) that the packers sought an injunction "on the ground that neither regulation § 208.23 (r) nor Public Land Order No. 128 legally closed the fishery of the coastal waters" to the packers is correct. The immediate attack of the packers was two-fold: they wanted both the regulations and the land order held invalid. The Department of the Interior had relied in part on what it asserted to be a validly created reservation to sustain its power to make a regulation containing an exception for the Indians and their licensees. Thus, even if the regulation could not be invalidated directly, the packers thought they might upset it by pulling out from beneath it the prop of the land order. The District Court agreed with the packers on both counts, when it held both the regulations and the

land order invalid. But just as there had been no allegation of a threat by Hynes to do anything other than under the regulation, the District Court made no finding of any other threat. The injunction must have meant to restrain only the enforcement of a White Act regulation. Without an allegation of a threat by Hynes to interfere by virtue of power over reservation waters, the trial court could not have properly enjoined Hynes from such action.

(B) The Meaning of our Mandate.

We would not have authorized the entry of an injunction containing terms "substantially as ordered in the permanent injunction" if we had construed the permanent injunction to do more than enjoin enforcement under a White Act regulation. When the case came to us we decided that the District Court was right when it held that this kind of regulation could not be promulgated under the White Act, but we also held that the District Court was wrong when it said that a valid reservation, including surrounding waters, had not been created. We said that "no injunction therefore may be obtained because of the invalidity of Order No. 128." 337 U. S. at 116.

Strictly speaking we might have simply affirmed the permanent injunction. But our holdings on the regulation and the land order had changed the situation of the parties considerably. Our opinion established that the Government could do nothing under a White Act regulation of this kind. It made important the question whether the Government might be able to do something in some other way to protect a validly created reservation.

Theretofore, the Government had acted solely under the regulation. We contemplated that some new step might be taken to provide for protection of the reservation, but we did not know what would be attempted. Moreover, we were uncertain about the power of either the Depart-

ment of the Interior or the natives to regulate the activities of outsiders in the waters of the reservation, and we were particularly uncertain of what could be done under the Alaska law of trespass. 337 U. S. at 122, n. 52. We thought it might be desirable for these questions to be considered as a part of the same proceeding by a District Court familiar with the general situation and close to the geographic area involved. We said, therefore, that the matter might be left open for 30 days to permit timely steps to be taken in the case. If timely steps were taken, the District Court would be free to pass such orders as might be required by the new situation. The mandate carried these conclusions to the District Court for its direction.

(C) Did the Judgment Comply with the Mandate?

I agree with the District Court that neither the motion for dismissal nor the deletion of the regulation on which the motion was based was the kind of step contemplated by our mandate. If we had been sure that the Government would do precisely what it did, there would have been no need to vacate the permanent injunction; we could simply have affirmed it. No change was made by the deletion of the regulation, for it had already been frustrated by our determination that it was invalid.

Although there was an important change made in the circumstances surrounding this case in the passage by the Village of Karluk of an amended ordinance which regulated fishing (Motion, p. 29), apparently neither the ordinance nor the proposed license was called to the attention of the District Court. No effort was made by Hynes to defeat the application for injunction on the ground that he should be allowed to participate in the enforcement of the ordinance. We had raised this question in n. 52 of the opinion referred to above, and had specifically called attention to the ordinance and its possibilities at 337 U. S. 123 *et seq.*, particularly n. 54.

Thus the District Court was free to enter a decree "substantially in accordance with the permanent injunction." It is the Government's contention that the language of the decree entered is not "substantially in accordance with the permanent injunction." (Motion, p. 38, *et seq.*) The decree enjoined Hynes, those directed by him, "and all other persons in active concert and participation with him from enforcing . . . the restrictive provisions of Section 208.23 (r) of the 1946 Alaska Fisheries General Regulations or *any other regulations of like or substantially like import which may hereafter be promulgated or attempted to be promulgated by the Department of the Interior of the United States of America through its Fish and Wildlife Service or otherwise.*"

The objection of the Government is that the portion I have italicized takes the injunction beyond what is permissible under our mandate. It asserts that the question of future regulations by Fish and Wildlife Service was not in the record and was not reviewed by this Court. Even more remote, it adds, are future regulations by other authority. The Government says that it is now uncertain whether the Secretary of the Interior may promulgate and enforce regulations under any authority he may have to prevent trespass and interference with the Indians on the waters of the legally established Karluk Reservation. It points out that there have been no threats to enforce such regulations and no averment to that effect.

The Government's interpretation of the effect of the judgment seems to me somewhat strained. It is not unusual for permanent injunctions to bar not only the action which formed the basis of the complaint but also similar action. For instance, in the hard-fought *St. Louis Terminal* case, 224 U. S. 383, this Court suggested a form of decree which included an injunction against exercise of a certain type of control over a terminal system

and then added "or from any future combination of the said systems in evasion of such decree or any part thereof." In other Sherman Act cases we have been similarly liberal in allowing broad decrees to stand. See *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707. While of course the question is one of particular circumstances, I think it was within the discretion of the District Court here to forbid enforcement of regulations of substantially like import to a regulation which had been held invalid.

Thus our mandate was complied with if the challenged judgment means that under the situation that now exists Hynes and those in concert with him are prohibited from enforcing any regulations issued under the White Act by the Fish and Wildlife Service, or by anyone else in the Department of the Interior, which would allow the application of the White Act sanctions to the packers.

I think this is a proper reading. I do not see how it could be said that this injunction would be violated if later there was legislation that changed the provision in the White Act that no one could get special rights to fish in a White Act preserve. Congress might very well pass an act authorizing natives to fish in White Act preserves under regulations of the Secretary of the Interior.

Nor do I see why this judgment should be interpreted as restraining any steps that the Secretary of the Interior might wish to take to protect the reservation waters from trespass or the Indians from interference. Such questions were not involved in the litigation and our opinion had nothing to do with them. It is quite clear that our mandates are to be interpreted in the light of the questions that were before the Court. There is a very good discussion of this in *Gaines* v. *Rugg,* 148 U. S. 228, at 238.

Indeed, the Government has not asserted that the injunction clearly bars all attempts to protect the reser-

vation. Its contention is that it is not sure of what it can do under the injunction. Yet nowhere in its allegations does the Government show that it made any effort in the District Court to have the judge correct any uncertainty in the judgment or to strike out any portion of the judgment deemed by it to affect its actions in situations not covered by the original complaint. Under these circumstances, I cannot see how we can say that the District Court has violated our mandate.

II.

In its motion, the Government makes this unusual request:

> "In the event that the foregoing motion is denied or the petition for a writ of mandamus is denied without a determination of the merits, it is respectfully prayed that the Court will indicate its grounds therefor in order that such action may not prejudice petitioner on appeal to the Court of Appeals for the Ninth Circuit, if, contrary to the reasons advanced in Point II of the attached brief, an appeal to that court is deemed to be an adequate remedy in this case."

There is no doubt that we have the power to issue mandamus to a court which has failed to carry out our mandate. *In re Potts,* 166 U. S. 263; *Gaines* v. *Rugg,* 148 U. S. 228. Although we are less reluctant to issue the writ to a federal court than to a state court, it is, after all, an extraordinary writ which should go out only when there is extraordinary need. *Ex parte Fahey,* 332 U. S. 258, 260.

As I have indicated, the only real question that exists here is not the meaning of our opinion, but the meaning of the most recent injunction issued by the District Court.

There is, under the circumstances, little need for mandamus. If the injunction of the District Court does not seem clear to the Government, it can proceed in any of several ways: (1) It might still attempt to get clarification by the District Court; (2) it might appeal the injunction to the Court of Appeals under 28 U. S. C. § 1292 (1); (3) acting on the assumption that the District Court conformed to our mandate, it might promulgate non-White Act regulations and enforcement procedures to protect the reservation. It is most unlikely that any court would interpret this injunction so broadly that it would cite Hynes for contempt of it if he enforced non-White Act regulations. If it did, Hynes could appeal, and this Court would have the power to decide the meaning of the injunction. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 140. Any court which interpreted the injunction would have to read it in the light of our opinion and our mandate in *Hynes* v. *Grimes*.

A final question arises in my mind as to proper practice where a motion is filed to permit the filing of a petition for mandamus. We have set down such motions for argument. See *Ex parte Fahey*, 332 U. S. 258; *Roberts* v. *United States*, No. 2 Misc., 1949 Term, which case is to be argued by Professor Radin. At other times we have simply denied the motion.

There is no reason why we should not look at a motion and all its allegations and see that it does not raise a substantial question. That is the situation in this case. I suggest therefore that we deny the motion and, in view of the Government's request, cite *Ex parte Fahey*, 332 U. S. 258. Unfortunately *Fahey* is not a case on a mandate; and as the real controversy here is over the meaning of the District Court's final injunction, perhaps we should say a little more. *E. g.*—"We interpret the

order of the District Court to enjoin interference under the authority of § 208.23 (r) of the Alaska Fisheries General Regulations or any of like import under the White Act. So construed it is within the terms of our mandate and any objection to the terms of the order should be by appeal. *In re Sandford Fork & Tool Co.*, 160 U. S. 247, 256; see *Ex parte Fahey*, 332 U. S. 258."

7/1/50

For letter to Justice Reed in re holding special session of the Court while ABA is meeting in Washington - see

Personal - Invitat ions - ABA Conv.

Mr. Justice Reed 'phoned to ascertain whether or not you planned to attend the ceremonies with respect to the Flag Presentation, Society of the Cincinnati which is scheduled for tomorrow at 12:00 Noon. He wanted you to know that he expected to attend and that he would, in the event you found it inconvenient or impossible to attend, because of your Judicial Conference, be glad to explan to them the necessity for your being absent.....

k.-

3/19/51.-

Phoned Miss Gaylord - C. J. would not be able to attend. Reed will extend explanations and regrets.

Rud [1951]

I see no reason for the Kefauver Committee to be ~~———~~ traveling the Country exposing Criminals when, ~~for~~ there or make it exceedingly easy for them to escape the penalties of the laws.

It is important as the Court seems to indicate ~~Judge~~ that respondent is now a good boy & has a nice family it may be important to note that resp has been in repeated Conflict with the laws of this Country since he came here from Palermo Italy & doubtless his good behavior for the past nine

year, a notable record for him, because he has already been in a legal Contest to prevent his deportation.

[1951]

File

C. J. —

If I have assignment
of Schwegmann
assign to WOD
unless there is need to
contrary.

H.R.

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

CHAMBERS OF
MR. JUSTICE REED

May 31, 1951

Dear Chief:

Here is a personal memorandum of my own. I send it to you thinking only that it might be of some use in your consideration of the California land problem.

Yours,

Reed

The Chief Justice.

[Dec 1949]

C.J. Will you please autograph this for me high enough up - to close to the print - so it can be framed a 1/2 inch deep

Thanks - J K

autographed & Returned - 12/20/49.

No. 11 Orig., 1950 Term
United States v. State of California
Report of Special Master filed 5/22/51

In the 1948 Term the Special Master asked direction as to

> "(a) By what criteria is 'the ordinary low-water mark on the Coast of California' to be ascertained;
>
> "(b) Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn;
>
> "(c) What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined."

This Court gave that direction to proceed, with respect to seven coastal segments enumerated in Groups I and II of the Master's Report, to consider:

"(1) a simplification of the issues; (2) statements of the issues and amendments thereto in the nature of pleadings; (3) the nature and form of evidence proposed to be submitted, including admission of facts and of documents which will avoid unnecessary proof; and report thereon to the Court." J. 261

The Master now reports on that simplification, showing the nature and form of the evidence proposed to be offered. It is chiefly historical in character and involves a consideration of the law of nations on the questions of how one determines the oceanic low-water mark, i.e., whether it is from the main shore or from the seaward side of outlying islands and rocks. The conclusion is suggested by Professor Hudson that probably each nation determines those matters for itself.

California contends that the channels and passages embraced within the outside boundaries of the islets are part of California. Furthermore, California contends that the determination of those boundaries are purely legislative in character and beyond the power of this Court. Its view is that the United States may fix its boundaries where it pleases. This certainly seems to be the determination of

this Court in the California, Texas and Louisiana cases. Such a determination follows the old rule that three leagues are a cannon shot.

However, if we are to determine the boundary line that separates California from other sovereignty of the United States, the Master says that the former questions are still before us. That is:

> "Question 1. What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?"

And "Question 2. Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn?"

These must be answered before evidence can be taken as to the line.

Assuming that there is a difference between Calif. land and U. S. sovereignty, shall we determine Questions 1 and 2 abstractly in a factual vacuum as matters of law somewhat like the Restatement of Law, or shall we refer the legal questions to the Master for him to have hearings and make recommendations to us, or shall we (as the Master once recommended) establish a three- or five-judge court to pass on such questions as Joint Masters?

Admitting that the U. S. might make its boundaries where it pleases, I don't see that this (the question of the present line) is a legislative question. The extension of U. S. boundaries or sovereignty or ownership does not extend the states'. Calif.'s line is below-water mark of Calif.'s land. Whether Calif. owns the islands and rocks off its shore is a legal question and now subject to determination.

It would seem to me that since the abstract legal questions must eventually come to us the thing to do now is to set them down for a hearing next year so that we might give instructions to the Master for a subsequent

hearing to fix the Calif. line. Further, this will not involve the determination of where we should go in running the lines but only establishing the criteria. Thereafter we can submit to the Master the question of the location of those lines on the charts and maps, and limit him to those locations in which there is conflict over the oil. This, I understand, is all in Area No. 1.

SR

August 3, 1951

Dear Stanley:

I want to thank you again for the burden of attending the Vinson Day Ceremonies. It was most gracious of Winifred and you. I thought your address was an outstanding one.

After I came back from Kentucky, I went up to the mountains in New York for about 10 days, and it was certainly enjoyable.

Thanks for everything.

Your friend,

[Signed] Fred

Honorable Stanley F. Reed,
c/o Mr. J. L. Morehead,
503 Morehead Avenue,
Durham, North Carolina.

FMV:McH

Doves of Peace
have a hand too

Stanley

4/20/51

FF

He coos like a dove

Stanley

5/21/51

Supreme Court of the United States

Memorandum

_____, 194__

SUPREME COURT OF THE UNITED STATES

Frederick Vanderbilt Field, W. Alphaeus Hunton and Dashiel Hammett, Movants, *v.* The United States of America. } On Application for Bail.

[July 25, 1951.]

Opinion by MR. JUSTICE REED, as Acting Circuit Justice for the Second Circuit.

An application by the three above-named movants has been presented to me, Acting Circuit Justice of the United States Court of Appeals for the Second Circuit by designation of the Chief Justice of the United States. The application is for the enlargement of movants on bail pending their appeal to the Court of Appeals for the Second Circuit from judgments of conviction against each of them for contempt of court by the United States District Court for the Southern District of New York. Movant Field on July 5, 1951, was sentenced to ninety days. Movants Hunton and Hammett on July 9 were sentenced to six months. Each was given the privilege to purge himself of his contempt. Application is made under Rule 46 (a) (2) of the Rules of Criminal Procedure for the District Courts of the United States. Bail has been refused in the respective cases by the trial judge and by a circuit judge. A single application was filed with me by the three movants and the three motions can be conveniently considered together as no differences between the parties affecting the conclusion on the application appear.

A single informal and incomplete record is before me consisting of the application for bail and an uncertified copy of the stenographer's minutes at the hearings of

July 2, 3, 5 and 6, 1951, resulting in the convictions for contempt, an attested copy of the judgment and commitment of Frederick V. Field, copies of the opinions of Chief Judge Swan and Circuit Judge Hand, copies of the required certificates under Rule 42 (a), Rules of Criminal Procedure, and memoranda of argument by counsel. None of the exhibits concerning the hearing were offered by movants. The same counsel advised all three movants at the hearing, by permission of the trial judge, though the counsel were not permitted to object to the questions asked the three movants as witnesses. Counsel advised the witnesses and urged grounds against their conviction for contempt. Such a record, neither party objecting, seems adequate to dispose of the application for bail.

The convictions for contempt followed from these happenings. The three movants were trustees of the Bail Fund of the Civil Rights Congress of New York, together with two other parties, not before me. The Bail Fund was a formalized trust; a copy of the trust agreement was on file in the District Court as a part of the record in *United States* v. *Dennis, et als.*, affirmed sub. nom., *Dennis* v. *United States,* 341 U. S. 494. The agreement was used in this hearing. It had officers authorized to act in a fiscal capacity—a treasurer, a secretary and an assistant treasurer. The Bail Fund received loans from several hundred or thousand individuals, according to Mr. Field's testimony, since 1946, and on December 31, 1950, had investments of "$712,000 in securities of the United States." For these loans or contributions, certificates of deposit were issued. A record of these was kept among the records of the Bail Fund. A witness, Mr. Abner Green, a trustee, and a movant, Mr. Field, testified to the recent existence of trust records, as well as an accountant.

In the absence of a full record with exhibits, I shall accept the statement of an attorney for movants appearing in movants' transcript "that the trustees of the Bail

Fund . . . have got complete authorization and power to post bonds in cases involving civil rights with funds which are given to them expressly for the purpose of posting such bonds; that the authority to post such bonds is vested solely in the trustees and that persons who lend money to the trustees have no authority or no control or no interest in the determination of that party for whom the bonds are posted." The record clearly supports this statement.

Pursuant to the purposes of the trust, the Bail Fund posted $260,000 bail in the *Dennis* case. On arrival of the mandate of the Supreme Court of the United States affirming the convictions of Dennis et als., the District Court undertook to commit the defendants to serve their sentences. Four did not appear and have not been found. Bench warrants issued for them have not been served. Their bonds of $80,000 have been forfeited.

The District Court requested the presence of the movants, trustees of the Bail Fund. Although subpoenas were issued for their appearance, they appeared in court without service and were sworn as witnesses in a hearing in the case of *United States* v. *Dennis,* to assist the court in effecting service of its process to commit the four non-appearing defendants. Their apprehension was sought to complete the judgment by confinement for the term imposed. The court stated that the non-appearance impeded "the orderly administration of justice"; that it wished to know if anyone was assisting in their evasion of process. The movants, the trustees, appeared as witnesses, not parties. During the course of their examination as witnesses in the endeavor to locate the absent defendants, the movants refused to answer certain questions and to produce the records of the Bail Fund of which they were trustees. Thereupon the court proceeded summarily to adjudge them in criminal contempt under Rule 42 (a), Rules of Criminal Procedure, and certified he saw and heard the contumacious conduct.

The judgments for contempt involved in this appeal have nothing to do with any charge against movants of unlawfully harboring or concealing the four defendants in the *Dennis* case. These movants are charged with no unlawful act except contempt of court in their refusal to answer questions and submit books of the Bail Fund within their control.

Without setting out at length the testimony of the movants, I think it sufficient to say that the court sought to have brought before it by the witnesses the records of the Bail Fund, particularly the certificates of deposit issued to those who furnished money or bonds for the Fund, so that the names of the contributors would be available to the court. For example, the interrogation of the witness and movant, Mr. Field, shows the testimony set out in the margin.[1] Mr. Field also testified that the records of the Bail Fund were exclusively in the custody of the trustees. He declined to produce the list under a claim of privilege against self-incrimination.

The testimony of Mr. Field is explicit upon the issue as to whether the records of the Bail Fund were personal property of the individuals who were trustees or of the Fund. The records, he said, were held only by them as trustees and if the trustees were to change, the books and records would be surrendered. Another witness, Mr.

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[1] "Q. Does this bail fund, of which you have been trustee, issue certificates of deposit?

"A. Yes, your Honor.

"Q. To those who have deposited bonds?

"A. Yes.

"Q. And is a record kept of those certificates, to whom they are issued, and the date?

"A. That's right, your Honor.

"Q. Where is such record?

"A. In view of the fact, your Honor, that that question pertains to the identity of individual lenders, I decline to answer on the ground that the reply might tend to incriminate me, and I do so under the Fifth Amendment."

Green, testified on examination as to control of the records of the Fund. Q. "And you likewise maintain absolute control and domination over the affairs of the fund in respect to maintenance of its books and records and the files, do you not?" A. "As a board of trustees we do, yes."

There was no denial of such custody of the records by any witness. Mr. Hunton declined to comply with the court's direction to produce the records on the ground that "I do not have custody or possession of any of the documents you have enumerated." That is, the records. He was not pressed further. Mr. Hammett, in reply to a direction to produce the records, answered: "Without conceding that I have the ability to or can produce such documents, I must decline to produce them."

The movants answered questions as to some matters in regard to the absent defendants in the *Dennis* case but refused many on the ground of possible self-incrimination. As the existence, character, and production of the Bail Fund records and whether the books sought were maintained under the trustees' control in their representative capacity as trustees of the Bail Fund were the principal issues, it seems unnecessary further to specify the testimony of these movants.

Two procedural objections to the convictions may first be noted and passed upon. In the conviction of Mr. Field, it is argued the order was not made in conformity with Rule 42 (a) of the Rules of Criminal Procedure. The rule requires that the order of contempt "recite the facts and shall be signed by the judge and entered of record." On July 5, 1951, this certificate was not available and the appeal was taken before the certificate was signed. It is argued that the subsequent entry and certification of the certificate could not cure the defect. The Chief Judge looked upon this as a non-prejudicial error at most, as it would merely require a remand and resentence. I agree. Furthermore, counsel for Mr. Field on July 9 moved to set aside Mr. Field's commitment

for failure to file the certificate. The trial judge offered to resentence Mr. Field and the motion was withdrawn. This removes this technicality from the need of further consideration.

A second procedural objection is basic to all the convictions. It is movants' contention that the entire hearing is a nullity because beyond the judicial power, the jurisdiction, of the trial court. The point made by movants is that the execution of the bench warrants of the trial court on the four defendants in the *Dennis* case is an executive function of the marshal or the Federal Bureau of Investigation, that any inquiry as to the reasons for failure to execute the warrants must be by the grand jury, the investigatory body in the judicial branch of our government.

District Courts of the United States have jurisdiction of all offenses against the laws of the United States. 18 U. S. C. § 3231. They "may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law." 28 U. S. C. § 1651. "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment is satisfied." *Wayman* v. *Southard,* 10 Wheat. 1, 23. Under ancient practice bench warrants are issued on indictments to bring defendants before the court for trial, and after violation of bail, either before or after conviction, warrants issue in order that a judgment may be executed. There can be no doubt of the power of the court to direct the bench warrant for the arrest of the four fugitives from justice in the case of Dennis et als.

In the endeavor to execute the judgment of conviction, the District Court could bring before it as witnesses the trustees of the Bail Fund. They were, in truth, the jailers of the fugitives, responsible for their appearance.[2] As

[2] *Reese* v. *United States,* 9 Wall. 13; *Taylor* v. *Tainter,* 16 Wall. 366; *Cosgrove* v. *Winney,* 174 U. S. 64; *United States* v. *Lee,* 170 F. 613; *United States* v. *Ryder,* 110 U. S. 729.

such they had a relation to the court that justified the court's requirement that they give evidence as witnesses in the proceedings to carry out the imprisonment of the Dennis defendants.[3] Those defendants came under control of the court at their original surrender. Although on bail they were under court control. The condition of the bond is the appearance of the principal in the court on demand. The bail may arrest the principal at any time. 18 U. S. C. § 3142.

The District Court's power to protect the execution of its business from obstruction by a witness' refual to answer inquiries is established. There is, of course, no doubt that the hearing was by the court. The witness may not take exception to the materiality of the questions (*Nelson* v. *United States,* 201 U. S. 92, 114) or as to whether the court has jurisdiction over the subject matter of the inquiry or the constitutionality of the statute under consideration. Objections as to the proceedings are for the parties thereto. It is enough if the court has a *de facto* existence and organization.[4] The interference with carrying on the court's business in the presence of the court furnishes the reason for the use of the contempt power.[5] These witnesses, movants now, were summonsed or appeared in the final proceedings of the *Dennis* case and

[3] Cases cited by movants to support their theory that the sureties on bail have no responsibility beyond their bond are not contrary to the foregoing authorities. In *Leary* v. *United States,* 224 U. S. 567, the issue was the right of a bondsman to intervene to secure adjudication of his rights as bondsman in a fund claimed by the United States. Nothing was said as to the relation of bondsman as jailer of the fugitive. Even the fact that a man may post cash bail, asserted by movants, 6 U. S. C. § 15, is not an argument against a bailsman's powers and duties.

[4] *Blair* v. *United States,* 250 U. S. 273. See *United States* v. *Shipp,* 203 U. S. 563, 573; *United States* v. *United Mine Workers,* 330 U. S. 258, 293.

[5] *Ex parte Hudgings,* 249 U. S. 378; *United States* v. *Appel,* 211 F. 495; *Clark* v. *United States,* 289 U. S. 1, 11, *et seq.* Cf. *Leman* v. *Krentler-Arnold Hinge Last Co.,* 284 U. S. 448.

were asked to testify to assist the court in carrying out its judicial duty of commiting the defendants to imprisonment. The court had not resolved itself into a court of inquiry to determine whether a crime had been committed or to get evidence to initiate a prosecution, such as was true in *In re Pacific T. & T. Co.,* 38 F. 2d 833, or *Ketcham* v. *Com.,* 204 Ky. 168. This was a proceeding to complete the *Dennis* case. Subject to their privileges as witnesses, they were compellable to attend and testify. None are exempt. Rule 17, Rules of Criminal Procedure. Distance or occupation does not excuse witnesses in criminal cases. A witness cannot trifle with the court or make its "processes a mockery." *Clark* v. *United States,* 289 U. S. 1, 12.

We need not analyze the privilege claimed by Hunton or Hammett concerning their relations with the absent defendants. Whether Field or Hunton waived privilege by some of their testimony does not affect the principal issue in these convictions—the right of the trustees of the Bail Fund to refuse to produce its records. As shown by the testimony of Field and Green, *supra,* these records were held by the Board of Trustees as the property of the Board, not as the records of the appellants in their individual capacity. In such circumstances the fact that title to the property and records of the trust is in the trustees is immaterial. We have recently held as much in *United States* v. *White,* 322 U. S. 694, 699, where the books of a labor union were refused to the court by their custodian on the ground of self-incrimination. On the custodian's conviction for contempt, we upheld the conviction saying, as to representatives of a collective group, "And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." This is a fixed rule. See *Wilson* v. *United States,* 221 U. S. 361.

Here the recalcitrant trustees, when on the stand, although the evidence was clear as to their control of the records, declined to produce the records on a claim of privilege, a claim of lack of power or, in the case of Mr. Hammett, by a simple refusal.

I have no doubt that such refusal was contemptuous and that their conviction was proper. Consequently I must deny their applications for bail pending appeal.

STANLEY REED,
Acting Circuit Justice for the Second Circuit.

SUPREME COURT OF THE UNITED STATES

Frederick Vanderbilt Field, W. Alphaeus Hunton and Dashiel Hammett, Movants, *v.* The United States of America. } On Application for Bail.

[July 25, 1951.]

Opinion by MR. JUSTICE REED, as Acting Circuit Justice for the Second Circuit.

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The District Court requested the presence of the movants, trustees of the Bail Fund. Although subpoenas were issued for their appearance, they appeared in court without service and were sworn as witnesses in a hearing in the case of *United States* v. *Dennis,* to assist the court in effecting service of its process to commit the four non-appearing defendants. Their apprehension was sought to complete the judgment by confinement for the term imposed. The court stated that the non-appearance impeded "the orderly administration of justice"; that it wished to know if anyone was assisting in their evasion of process. The movants, the trustees, appeared as witnesses, not parties. During the course of their examination as witnesses in the endeavor to locate the absent defendants, the movants refused to answer certain questions and to produce the records of the Bail Fund of which they were trustees. Thereupon the court proceeded summarily to adjudge them in criminal contempt under Rule 42 (a), Rules of Criminal Procedure, and certified he saw and heard the contumacious conduct.

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"Q. To those who have deposited bonds?

"A. Yes.

"Q. And is a record kept of those certificates, to whom they are issued, and the date?

"A. That's right, your Honor.

"Q. Where is such record?

"A. In view of the fact, your Honor, that that question pertains to the identity of individual lenders, I decline to answer on the ground that the reply might tend to incriminate me, and I do so under the Fifth Amendment."

Green, testified on examination as to control of the records of the Fund. Q. "And you likewise maintain absolute control and domination over the affairs of the fund in respect to maintenance of its books and records and the files, do you not?" A. "As a board of trustees we do, yes."

There was no denial of such custody of the records by any witness. Mr. Hunton declined to comply with the court's direction to produce the records on the ground that "I do not have custody or possession of any of the documents you have enumerated." That is, the records. He was not pressed further. Mr. Hammett, in reply to a direction to produce the records, answered: "Without conceding that I have the ability to or can produce such documents, I must decline to produce them."

The movants answered questions as to some matters in regard to the absent defendants in the *Dennis* case but refused many on the ground of possible self-incrimination. As the existence, character, and production of the Bail Fund records and whether the books sought were maintained under the trustees' control in their representative capacity as trustees of the Bail Fund were the principal issues, it seems unnecessary further to specify the testimony of these movants.

Two procedural objections to the convictions may first be noted and passed upon. In the conviction of Mr. Field, it is argued the order was not made in conformity with Rule 42 (a) of the Rules of Criminal Procedure. The rule requires that the order of contempt "recite the facts and shall be signed by the judge and entered of record." On July 5, 1951, this certificate was not available and the appeal was taken before the certificate was signed. It is argued that the subsequent entry and certification of the certificate could not cure the defect. The Chief Judge looked upon this as a non-prejudicial error at most, as it would merely require a remand and resentence. I agree. Furthermore, counsel for Mr. Field on July 9 moved to set aside Mr. Field's commitment

for failure to file the certificate. The trial judge offered to resentence Mr. Field and the motion was withdrawn. This removes this technicality from the need of further consideration.

A second procedural objection is basic to all the convictions. It is movants' contention that the entire hearing is a nullity because beyond the judicial power, the jurisdiction, of the trial court. The point made by movants is that the execution of the bench warrants of the trial court on the four defendants in the *Dennis* case is an executive function of the marshal or the Federal Bureau of Investigation, that any inquiry as to the reasons for failure to execute the warrants must be by the grand jury, the investigatory body in the judicial branch of our government.

District Courts of the United States have jurisdiction of all offenses against the laws of the United States. 18 U. S. C. § 3231. They "may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law." 28 U. S. C. § 1651. "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment is satisfied." *Wayman* v. *Southard,* 10 Wheat. 1, 23. Under ancient practice bench warrants are issued on indictments to bring defendants before the court for trial, and after violation of bail, either before or after conviction, warrants issue in order that a judgment may be executed. There can be no doubt of the power of the court to direct the bench warrant for the arrest of the four fugitives from justice in the case of Dennis et als.

In the endeavor to execute the judgment of conviction, the District Court could bring before it as witnesses the trustees of the Bail Fund. They were, in truth, the jailers of the fugitives, responsible for their appearance.[2] As

[2] *Reese* v. *United States,* 9 Wall. 13; *Taylor* v. *Tainter,* 16 Wall. 366; *Cosgrove* v. *Winney,* 174 U. S. 64; *United States* v. *Lee,* 170 F. 613; *United States* v. *Ryder,* 110 U. S. 729.

such they had a relation to the court that justified the court's requirement that they give evidence as witnesses in the proceedings to carry out the imprisonment of the Dennis defendants.[3] Those defendants came under control of the court at their original surrender. Although on bail they were under court control. The condition of the bond is the appearance of the principal in the court on demand. The bail may arrest the principal at any time. 18 U. S. C. § 3142.

The District Court's power to protect the execution of its business from obstruction by a witness' refual to answer inquiries is established. There is, of course, no doubt that the hearing was by the court. The witness may not take exception to the materiality of the questions (*Nelson* v. *United States,* 201 U. S. 92, 114) or as to whether the court has jurisdiction over the subject matter of the inquiry or the constitutionality of the statute under consideration. Objections as to the proceedings are for the parties thereto. It is enough if the court has a *de facto* existence and organization.[4] The interference with carrying on the court's business in the presence of the court furnishes the reason for the use of the contempt power.[5] These witnesses, movants now, were summonsed or appeared in the final proceedings of the *Dennis* case and

[3] Cases cited by movants to support their theory that the sureties on bail have no responsibility beyond their bond are not contrary to the foregoing authorities. In *Leary* v. *United States,* 224 U. S. 567, the issue was the right of a bondsman to intervene to secure adjudication of his rights as bondsman in a fund claimed by the United States. Nothing was said as to the relation of bondsman as jailer of the fugitive. Even the fact that a man may post cash bail, asserted by movants, 6 U. S. C. § 15, is not an argument against a bailsman's powers and duties.

[4] *Blair* v. *United States,* 250 U. S. 273. See *United States* v. *Shipp,* 203 U. S. 563, 573; *United States* v. *United Mine Workers,* 330 U. S. 258, 293.

[5] *Ex parte Hudgings,* 249 U. S. 378; *United States* v. *Appel,* 211 F. 495; *Clark* v. *United States,* 289 U. S. 1, 11, *et seq.* Cf. *Leman* v. *Krentler-Arnold Hinge Last Co.,* 284 U. S. 448.

were asked to testify to assist the court in carrying out its judicial duty of commiting the defendants to imprisonment. The court had not resolved itself into a court of inquiry to determine whether a crime had been committed or to get evidence to initiate a prosecution, such as was true in *In re Pacific T. & T. Co.,* 38 F. 2d 833, or *Ketcham* v. *Com.,* 204 Ky. 168. This was a proceeding to complete the *Dennis* case. Subject to their privileges as witnesses, they were compellable to attend and testify. None are exempt. Rule 17, Rules of Criminal Procedure. Distance or occupation does not excuse witnesses in criminal cases. A witness cannot trifle with the court or make its "processes a mockery." *Clark* v. *United States,* 289 U. S. 1, 12.

We need not analyze the privilege claimed by Hunton or Hammett concerning their relations with the absent defendants. Whether Field or Hunton waived privilege by some of their testimony does not affect the principal issue in these convictions—the right of the trustees of the Bail Fund to refuse to produce its records. As shown by the testimony of Field and Green, *supra,* these records were held by the Board of Trustees as the property of the Board, not as the records of the appellants in their individual capacity. In such circumstances the fact that title to the property and records of the trust is in the trustees is immaterial. We have recently held as much in *United States* v. *White,* 322 U. S. 694, 699, where the books of a labor union were refused to the court by their custodian on the ground of self-incrimination. On the custodian's conviction for contempt, we upheld the conviction saying, as to representatives of a collective group, "And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." This is a fixed rule. See *Wilson* v. *United States,* 221 U. S. 361.

Here the recalcitrant trustees, when on the stand, although the evidence was clear as to their control of the records, declined to produce the records on a claim of privilege, a claim of lack of power or, in the case of Mr. Hammett, by a simple refusal.

I have no doubt that such refusal was contemptuous and that their conviction was proper. Consequently I must deny their applications for bail pending appeal.

STANLEY REED,
Acting Circuit Justice for the Second Circuit.

[1951]

Dear Chief -

Bunjie & I would like to have a small dinner for you and Roberta Sat - Oct 27th? Are you free to come then -

/ Red

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

CHAMBERS OF
MR. JUSTICE REED

April 7, 1952

Dear Chief:

In regard to No. 570, Kawakita v. United States, would you assigned this case either to Mr. Justice Douglas or Mr. Justice Minton, whichever fits in better with your other assignments.

Yours,

S. Reed

THE CHIEF JUSTICE.

[1952]

Monday

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

Dear Chief — #247
Williams v Illinois

Will you please carry
this over for a week, I
would like to examine
further. S Reed

[1952]

I think it better to say

~~Also~~

Either party may ~~reply~~ answer to the arguments of amici orally or by brief.

I would add in order name of case

759.

Reed

C - SF - Justice ~~Black~~ Reed
~~Personnel~~ asst. Justice

Signed appt. returned to Justice Reed - 7/19/46 -

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

July 15, 1946.

My dear Mr. Chief Justice:

Your approval of the appointment of F. Aley Allan as my law clerk for the October Term 1946 is requested.

Mr. Allan is a graduate of Yale Law School, class of 1945. He has served as law clerk to Judge Learned Hand for the past year. Because of his year's work since graduation, I request that his salary be fixed at $5116.32, the present top salary for law clerks.

Very sincerely yours,

Stanley Reed

The Chief Justice.

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

April 29, 1947.

Dear Chief:

Attached are appointment blanks for Mr. John B. Spitzer whom I have selected as my law clerk for the term August 1, 1947, to August 1, 1948.

Mr. Spitzer is a graduate of Yale University (1939) and Yale Law School (1947). He had four years of military service during which time he did general military legal work for a period of two years, was president of a special court martial for over a year and had positions as trial judge advocate, investigating officer and claims officer. Because of this experience, I feel that he is entitled to receive the higher salary of $5116.32 and hope that this will meet with your approval.

Very sincerely yours,

Stanley Reed

Blanks signed and returned to Justice Reed - 5/3/47.

The Chief Justice.

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

June 12, 19 48

Helen K. Gaylord is hereby designated and appointed to serve as my secretary from the first day of July, 19 48 at a salary of $ 5,116.32, per annum.

Stanley Reed
Associate Justice of the Supreme Court of the United States.

Approved:

(Signed) Fred M. Vinson
Chief Justice of the United States.

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

May 19, 1949

RAYLEGH A. MANNING is hereby designated and appointed to serve as my law clerk from the day of , 1949 at a salary of $4,618.68, per annum.

S. Stanley Reed
Associate Justice of the Supreme Court of the United States.

Approved:

Fred M. Vinson
Chief Justice of the United States.

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

May 19, 1949

JOSEPH BARBASH is hereby designated and appointed to serve as my law clerk from the ____ day of ____, 1949 at a salary of $5,446.32, per annum.

Stanley Reed
Associate Justice of the Supreme Court of the United States.

Approved:

Fred M Vinson
Chief Justice of the United States.

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

May 18, 19 50

Edwin M. Zimmerman is hereby designated and appointed to serve as my law clerk from the first day of August, 19 50 at a salary of $ 5,610.00, per annum.

Stanley Reed
Associate Justice of the Supreme Court of the United States.

Approved:

(Signed) Fred M. Vinson
Chief Justice of the United States.

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

May 18, 19 50

Adam Yarmolinsky is hereby designated and appointed to serve as my law clerk from the ____ day of August, 19 50 at a salary of $5,610.00, per annum.

Stanley Reed
Associate Justice of the Supreme Court of the United States.

Approved:

(Signed) Fred M. Vinson
Chief Justice of the United States.

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

May 6, 19 53

GEORGE B. MICKUM, III is hereby designated and appointed to serve as my law clerk from the day of , 19 53 at a salary of $ 6116.00 , per annum.

Stanley Reed
Associate Justice of the Supreme Court of the United States.

Approved:

(Signed) Fred M. Vinson
Chief Justice of the United States.

[1952]

Monday

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

Dear Chief -

As attitudes influence assignments, I suggest that Dice # 314 be not assigned to me.

I may quite likely wind up in the dissent or in a concur that rests on

the language of the Ohio Court
but leaves the method of
determining the validity
of a release, wholly to
Ohio.

Yrs

Stanley Reed