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A COLLECTION OF

IN CHAMBERS OPINIONS

BY THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

covering the 2005 Term

and

previously unpublished or uncollected in chambers opinions from 1852, 1861, 1888, 1914, 1936, 1937, and 1942

with

cumulative, up-to-date Tables and Indexes for Volumes 1, 2, 3, and 4

Compiled by

Cynthia Rapp

and

Ross E. Davies

with

Ira Brad Matetsky

December 2006

NOTICE: This supplement is subject to revision before the complete, bound edition of *4 Rapp* is published sometime in the next few years. Please notify the *Green Bag* (editors@greenbag.org) of any errors you find, so that we can fix them now.

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PREFACE

In this *Supplement* we present another crop of interesting opinions, new and old. They range from two delivered by Justices Anthony Kennedy and Ruth Bader Ginsburg during the 2005 Term to, at last, Justice Samuel Nelson's 1852 opinion in *In re Kaine*. It seems that each year also brings some interesting addition to our store of knowledge about in-chambers practice. This year it is a snapshot of oral argument in chambers. Appendix A in this volume is the transcript of a 1936 hearing in *In re Associated Gas & Electric Co.* before Justice Benjamin Cardozo sitting in chambers in his living room in White Plains, New York.

In the 2005 *Supplement* we printed 18 of the 21 missing opinions listed in Cynthia Rapp's introduction to the first volume in this series (two others appeared in the 2004 *Supplement*), and appealed for help tracking down the last one — *Hooper v. Goldstein* (1929). So far, no luck.

We continue to follow the conventions we've used in the other in-chambers volumes: (1) brackets not accompanied by a "Publisher's note" are in the original; (2) running heads are preserved where they appear in the originals, and added to those that lack them; (3) a caption misdesignating the Term in which an opinion was issued is in the original; and (4) party designations ("applicant", "movant", "petitioner", "plaintiff", etc.) are sometimes used more loosely than is the Court's wont, but in each case the identity and posture of the parties are clear, and so they remain unchanged. Also bear in mind that those who would cite for its legal authority an opinion in *In Chambers Opinions* should check for the existence of a version in the *United States Reports*, and, if there is one, read it and cite to it as the primary authority, with a parallel citation if appropriate to the *In Chambers Opinions* version. The relevant *U.S. Reports* citation appears in a "Publisher's note" above each opinion.

The page numbers here are the same as they will be in the bound volume 4 of *In Chambers Opinions*, thus making the *permanent* citations available upon publication of this *Supplement*. If you find any errors — or any in chambers opinions that we have missed — please let us know at editors@greenbag.org. We will give credit where credit is due.

Thanks as always to Cynthia Rapp for performing such a useful public service by collecting and indexing the Justices' solo efforts; to William Suter, Clerk of the Court, for his support of this project; to the George Mason University School of Law and the George Mason Law & Economics Center for their support of the *Green Bag*; to Green Bag Fellow Christine Kymn; and to Susan Davies. And, again, to the indefatigable Ira Matetsky, without whom our offerings would be leaner and our work less interesting.

Ross E. Davies
December 2, 2006

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[Publisher's note: Like *Ex parte Kaine*, 4 Rapp 1393 (1853), this opinion appears in a slightly corrupted form in West's *Federal Cases*. *See* Preface, 4 Rapp v (2004). The Court's printed record of this opinion has been damaged by fire, so it is impossible to be sure that our rendition of that version below is entirely accurate. It is the best we can do for now. From RG 267, Records of the Supreme Court of the United States, Entry 26 Original Jurisdiction Case Files, 1792-2005, Box 4, 1852 to 1855.]

OPINION OF THE HON. SAMUEL NELSON,

On granting the Writ of Habeas Corpus … before the Supreme Court of the United States

In the matter of THOMAS KAINE, claimed as a fugitive from justice under the treaty between the United States and Great Britain, of the 9th August, 1842.

[Publisher's note: This opinion issued on August 3, 1852. *The Extradition Case*, N.Y. TIMES, Aug. 6, 1852.]

NELSON, J. This is an application on the relation of Kaine, for a writ of *Habeas Corpus*, a prisoner in jail, under the custody of the Marshal for the Southern District of New-York, charging that he is detained in prison by virtue of an order made by the Circuit Court of the United States of said district, dated July 9th, 1852, of the April term of said Court, purporting to be made under the treaty between the United States and Great Britain of the 9th of August, 1842, and which order remands the prisoner to the custody of the said Marshal, to be detained under a commitment previously made by Commissioner Bridgham, under the provisions of the aforesaid treaty; and that since the granting of the said order by the Circuit Court, the acting Secretary of State for the United States has issued a warrant directing the Marshal to surrender the prisoner to the government of Great Britain, in pursuance of the provisions of said treaty.

The case having been fully heard in the original proceedings before the Commissioner, in accordance with the requirements of the treaty, and the act of Congress in pursuance thereof, and the decision of that officer, committing the prisoner for the purpose of a surrender to the authorities of Great Britain, as a fugitive from justice, having been subsequently revised and confirmed by the Circuit Court, I have declined granting the

writ of *habeas corpus*, or taking any step in the matter of the application, until the whole of the previous proceedings in the case, including the evidence, points of counsel before the commissioner, and opinion of the Court, were laid before me, that I might be fully apprised of the grounds of the commitment, and of the objections to the same.

It is proper to say, also, that I have entertained the case and called for these proceedings, not with a view to an original hearing of the matter on *habeas corpus*, for the purpose of passing upon the legality or illegality of commitment by the Commissioner, or with a view to a revision of the order of commitment by the Circuit Court, and a final disposition of the same at chambers, but solely for the purpose of ascertaining whether or not the questions involved, or any of them, were of a character so difficult and doubtful, and their final determination by the highest authority was of sufficient public interest to require or justify the submission of them to the Supreme Court of the United States. By a series of decisions in that Court, the questions involved present appropriate subjects of examination in the exercise of its appellate powers. (3 Cranch, 448; 4 ib. 75; 7 Wh. 38; 3 Peters, 193; 7 ib. 568; 5 How., 189, 190.)

Looking at the case in this aspect, and with this view, I find the first and leading allegation is, to the legality of the commitment by the Commissioner, (and the lawfulness of the detention of the prisoner depends on this, as will be seen hereafter,) namely, that he possessed no jurisdiction in the case, and consequently that the warrant of commitment was void. The treaty provides, "that the respective judges and other magistrates of the two governments shall have power, jurisdiction, &c., to issue a warrant," &c.

The act of Congress, 12th Aug., 1848, passed to give effect to the provisions of this treaty, with others, for extradition, provides, "that it shall and may be lawful for any of the Justices of the Supreme Court, or Judges of the several District Courts of the United States, and the Judges of the several State courts, and commissioners authorized so to do by any of the Courts of the United States, are hereby severally vested with powers, jurisdiction," &c. Another section provides, "that it shall be lawful for the courts of the United States, or any of them, to authorize any person or persons to act as commissioner or commissioners under the provisions of this act," &c.

The commissioner before whom the proceedings were had, has not been appointed under and in pursuance of this act of Congress, as one of the officers to carry into execution the provisions of the treaty, but acted in pursuance of his powers derived from an appointment under previous acts of Congress, for the discharge of other special and limited duties; and, were it not for a contrary opinion expressed by the learned District Judge sitting in the Circuit, I should have entertained a very decided opin-

ion that he possessed no power under the act of 1848, to entertain the proceedings in question; and, that an appointment by the Court, in pursuance of the power conferred by that act, was essential to give the commissioner jurisdiction.

It is said, however, that admitting the commissioner possessed no jurisdiction under and in pursuance of the act of 1848, still he was competent to act under and by virtue of the power conferred by the treaty, independently of the act of Congress; and, that the limitation of authority by the act could not control the provisions of the treaty, even if in conflict with them. We have seen that according to the treaty, "the respective judges and other magistrates of the two governments," are empowered to arrest and examine the fugitive; and the argument is, that the commissioner is a magistrate of the government of the United States, within the meaning of the treaty.

Besides taking bail, and depositions of witnesses in civil cases, these officers, by the act of Congress of 23d August, 1842, are authorized to arrest offenders for any crime or offence against the United States, and imprison or bail the same. The thirty-third (33) section of the judiciary act conferred the same power upon justices of the peace of any of the states.

The possession of these powers by the Commissioner whose proceedings are in question, constituted him, as alleged, a magistrate within the terms of the treaty, and by virtue of which, as such magistrate, he had a right to act in the premises, notwithstanding the omission, if not exclusion, of these officers by the terms of the act of Congress, passed to carry into execution the provisions of the treaty. Whether or not this view will sustain the competency of the Commissioner to act under the treaty, independently of any power conferred upon him by the act of 1848, is a question upon which I do not purpose, at this time, to express an opinion.

It is sufficient to say that it is one, at least, involved in much difficulty and doubt, and well deserves the consideration and judgment of the Supreme Court. If the view is a sound one, it would seem to follow, that all justices of the peace, in the several states, possess the like powers to arrest and commit under the treaty, by virtue of their characters as magistrates derived from the powers conferred under the thirty-third (33) section of the Judicary Act of 1789. We can hardly suppose this to have been the intention of the framers of the treaty.

Another ground of objection to the jurisdiction of the Commissioner is, that it was not shown before this officer previous to the institution of the proceedings, or pending the same, that the government of Great Britain, or any officers authorized by the government, had applied or made a demand, for the arrest of Kaine under the treaty; and that an application on behalf of that government was essential to give jurisdiction to act in the matter.

The treaty provides, "that the United States and her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons," &c. In this case the application for the arrest was accompanied by a request from the British Consul, resident in the city of New-York, which would seem to bring the case within the words of the treaty. The act of Congress is silent on the subject.

The language of the treaty is very broad, and if construed literally, would confer authority upon any officer of the British government, however subordinate, and whether civil or military, to make the necessary requisition upon this for the arrest of the fugitive, and so, in the case of a requisition of this government upon Great Britain. But this can hardly be the true construction to be given to the treaty. There must be some limitation in respect to the officers of the respective governments authorized to make the requisition.

There may be some difficulty in settling this limitation in the absence of any regulation by act of Congress. Perhaps the true construction may be, that the requisition shall be made by the government, through the usual organs by which the one holds communication with the other, or by any minister or officer, specially authorized by such government to make the same.

It would scarcely seem fit, as it respected either government, that this power to claim, as prosecutor, an arrest and committal of the supposed fugitive, should be lodged in the hands of every and any officer of the same, who might choose to act in the matter. The act of Congress provides, that in every case of complaint, and of hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any such foreign country may have been granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended.

This provision makes copies of the depositions used before a foreign magistrate who may have issued a warrant there against the offender, certified by said magistrate, and proved to be copies of the original, competent evidence before the magistrate here acting under the treaty.

The act of Congress, doubtless, contemplates that the copy of depositions shall be certified by a magistrate in the foreign country, of competent jurisdiction, to issue the warrant there for the offence, and to commit for trial and punishment; and to make these evidence at all before the magistrate here under the requisition, it should be first shown to his satisfaction by competent proof that the person issuing the warrant, and certifying the depositions, possessed the requisite jurisdiction.

Without such jurisdiction, the whole proceedings in the foreign country would be *coram non judice*, and void. Upon the whole, without pursuing the case any further, I am satisfied, upon the view I have taken of the several questions presented, but more especially the first one, involving the power of the Commissioner, as well as on account of the importance of settling the construction of the treaty and the act of Congress in pursuance thereof, as as to avoid controversies and delays hereafter in these proceedings, it is fit and proper that these questions should be submitted to the consideration and judgment of the Supreme Court.

As I have already stated, the commitment of the prisoner stands upon the authority of the Commissioner, the Circuit Court being of opinion that it was legal and valid, and remanding the prisoner to custody under that order.

I shall, therefore, allow the *habeas corpus*, making it returnable before myself; and when the return is made formally by the Marshal (the substance of which is now before me in the preliminary application), I shall direct an order to be entered, in consequence of the difficult and important questions involved, that the case be heard before all the Justices of the Supreme Court of the United States, in banc., at the beginning of the next term of said court.

As the making up of the record will be matter of form, it will not be necessary that the prisoner be brought up on the return of the writ before me, but he may remain in custody till the final disposition of the case.

[Publisher's note: Here is the writ, as it appeared in a news report, followed by this note: "This writ is directed to the prisoner's counsel, who served the same yesterday on Mr. TALLMADGE, the United States Marshall." *The Extradition Case*, N.Y. Daily Times, Aug. 6, 1852, at 1.]

The President of the United States of America, to the United States Marshall for the Southern District of the State of New-York, or to any other person or persons having the custody of THOMAS KAINE, GREETING:

We command you that you have the body of THOMAS KAINE, by you imprisoned and detained, as it is said, together with the cause of such imprisonment and detention, by whatever name the said KAINE may be called or charged, before our Justices of one Supreme Court of the United States, at his chambers at Cooperstown, N.Y., on the 11th day of August, instant, to do and receive what shall then and there be considered, concerning the said Thomas Kaine.

Witness, SAMUEL NELSON, Esq.

One of the four Justices from said Court, this 3rd day of August, 1852.

[Publisher's note: The original of this opinion is handwritten. The strike-throughs are in the original. From RG 267, Records of the Supreme Court of the United States, Entry 28, National Archives and Records Administration.]

SUPREME COURT OF THE UNITED STATES

Ex parte: In the matter of)
Edward A. Stevens — On petition)
for a Writ of Habeas Corpus ad subjiciendum)

[August 1861.]

Opinion of the Honorable James M. Wayne, Associate Justice of the Supreme Court of the United States.

This case as far as its merits were disclosed by the petition and return to the Writ of Habeas Corpus, has been under my examination for several days, and now it having been fully argued, I shall proceed at once to decide it.

The argument has been precise, indicating with more than usual accuracy the points to be decided, and leaving me nothing to suggest which has not had the consideration of Counsel.

Before stating the facts of the case, I will merely observe that the points to be determined have a constitutional connection with the powers of Congress, to declare war, to raise and support armies, to make rules for the government of the land and naval forces of the United States, to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions, to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed ~~in~~ in the service of the United States, and with the President's obligation to take care that the laws be faithfully executed; and with the constitutional power of Congress by its legislation, to adopt and legitimate acts done by the President in a great national exigency in fulfilment of that duty.

It will not be necessary however in this case to discuss these points in detail. The facts of this proceeding as they are now about to be given, show the connection between them and the constitutional powers just mentioned.

Those facts shall be given as they are found in the record.

On the 10th day of August last, Edward A. Stevens residing in the State of Minnesota, and describing himself to be a private soldier in the 1st Minnesota Regiment, alleges that in the month of April last, he voluntarily tendered at Fort Snelling his services to the United States, as a sol-

dier for the period of three months, in obedience to a requisition of the President of the United States and upon a call of the Governor of Minnesota in conformity with it. He then affirms that there were great irregularities in the conduct and proceedings of the United States officer who was authorized to accept his services, and that he did not on that or any other occasion sign any muster roll or article of enlistment, or make any declaration on oath or otherwise obligating himself to serve the United States as a soldier, or to do so in any other capacity. He then proceeds ~~to~~ to state that nevertheless the regiment including himself as one of it, was received and mustered into the service of the United States for the period of three months, from the 29th day of April 1861, that he has done so faithfully, loyally, and truly, and fully performed every command, duty, and call upon him as an accepted volunteer. That the term of three months did expire on the 29th day of July 1861 and that he has become by the laws of the land and by the terms of his said engagement entitled to a full and honorable discharge from such service. That he has asked for such discharge and to be mustered out of the service of the United States but said discharge has been refused. He further states that the regiment was ~~in obedience of the orders of the government~~ first marched from the State of Minnesota to the District of Columbia, thence to the State of Virginia, and performed duty as it was required in camp, in their various marches, and on the field of battle on the 21st July last past. That after said battle he returned with the regiment to the District of Columbia, and remained there until after the term of service for which he ~~had~~ engaged had expired. He then says thinking himself and others in the regiment entitled to a discharge that they had applied for it, but have been detained without having been informed upon what grounds their request had not been complied with. He states that two distinct applications have been made at his instance on behalf of himself and others of the regiment for a discharge without success, that Richard S. Coxe Esq. as their Attorney and Counsel did on the 3d day of August place a statement in the hands of Colonel Townsend Assistant Adjutant General in the Army of the United States, exhibiting the grounds on which their claim for a discharge was made, accompanied by a document signed by a large number of the regiment which was addressed to the Secretary of War asking for a discharge. That no answer having been received to the same, that Mr. Coxe addressed to Adjutant General Thomas another communication on the 6th of August for the same purpose asking for an early reply, to which no response was made, but that the day after the first application was presented, the regiment was marched out of the District of Columbia into the County of Montgomery in the State of Maryland beyond the jurisdiction of the judicial authorities of the District and the reach of their process, by which they were deprived of all intercourse with their counsel. The petitioner

further declares that they now understand, that it has been given out by Colonel Gorman under whose command the regiment continues, that your petitioner and other members of it were mustered according to law into the service of the United States on the 29th of April, but that they were also regularly re-enlisted and mustered on or about the 27th of May for a period of three years or during the war, under the second requisition or call of the President. This the petitioner expressly denies and asserts that its truth can only be sustained by the production of the enlistment muster rolls or a declaration required by law bearing his signature, and further as a matter for this discharge he adds, that the law requires that every recruit before he enlists should be fully and faithfully informed of the nature of the contract into which he is about to enter, that such information is essential to give validity to the enlistment, and that in no respect were the requirements of the law observed, so as to create a valid enlistment or obligation on his part to serve the United States ~~on his part~~ as a soldier, and that the restraint under which he is now held under the pretended right of the United States to hold him is wholly illegal. The foregoing statement was sworn to by the petitioner, and in compliance with his prayer the United States Writ of Habeas Corpus was awarded in his favor. It was directed to Colonel Willis A. Gorman of the 1st Minnesota Regiment commanding him to produce the body of the petitioner with the causes of his detention and with all the papers and documents connected with the same on a day to be designated in said order. And the said Writ of Habeas Corpus was issued by Wm. Thos. Carroll, Clerk of the Supreme Court of the United States with the direction that it should be served by the Marshal of the District of Columbia or by one of his legally authorised deputies. The writ was served according to the order by a deputy of the Marshal upon Colonel Gorman. Upon Colonel Gorman's non appearance his default was entered and a writ of attachment for contempt in neglecting to obey the Writ of Habeas Corpus was ordered to be issued and to be served upon him by the Marshal. It was returned executed, and Colonel Gorman by leave of the Court presented his answer thereto under oath. It was to this effect, that at the time the Writ of Habeas Corpus was served upon him, he was at Edward's Ferry on the Potomac, forty miles from the City of Washington, engaged in military duty requiring his immediate presence and attention. That as soon as that duty was discharged and he could leave his post, he hastened with all diligence to Washington to make a full and respectful obedience to the writ, but that he could not reach the city until the evening, several hours after the time specified, and after the attachment had been issued, that he had no design to disobey the authority or process of the court, that his default was occasioned by public duty beyond his control, and that he was now ready to make his return. The Court being entirely satisfied that there had been no intentional dis-

obedience or contempt, discharged the attachment without costs, and on motion permitted the return to be made to the Writ of Habeas Corpus.

The return of Colonel Gorman was as follows:

That Edward A. Stevens was at the time of exhibiting his petition a private volunteer soldier duly enrolled mustered and received into the service of the United States on the 27th May 1861 — as a volunteer in Company B 1st Regiment of Minnesota Volunteers of which this respondent is duly commissioned as Colonel, and that except for the military duty and service due from him to the United States as a volunteer private in the Regiment, that Stevens has not been and is not imprisoned or in the custody of this respondent. That upon the service of the Writ of Habeas Corpus Stevens applied to him for permission to depart from the camp of the regiment and to proceed to Washington to appear before the Court upon the return of the Writ, and that permission was given to him &c &c and that he is now here to abide its order.

That as to the pretence of Edward A. Stevens set forth in his petition, that he was a soldier in the regiment for three months from the 29th of April 1861, and that the period of his service has expired, respondent says, that on the 15th day of April 1861 the President issued a call for Seventy five thousand volunteers into the service of the United States as soldiers for three months, upon which call Edward A. Stevens and his associates did volunteer and tender their services to the United States for three months. But that subsequently & while the regiment was at Fort Snelling, the President on the 3d day of May by his proclamation called for forty two thousand and thirty four volunteers to serve the United States for three years unless they were sooner discharged. That thereupon the soldiers constituting the 1st Regiment of Minnesota volunteers of which Stevens was one, did on the 27th day of May 1861 volunteer and tender their services to the United States for three years or during the War unless sooner discharged, and that in pursuance of the proclamations and orders of the President, ~~of~~ the 1st Regiment of Minnesota Volunteers of which Stevens was one were duly enrolled, mustered, accepted and received into the service of the United States as volunteer~~s~~ soldiers from the State of Minnesota for three years, from the 29th day of April or during the war unless sooner discharged, that the term of service of Stevens has not yet expired, nor has the regiment been discharged from service. That the regiment and Stevens as a private soldier from the time of their acceptance from the call of the President on the 3d day of May and their acceptance of that call on the 27th of the same month, has been equipped, clothed, subsisted and paid by the United States as volunteer soldiers from the State of Minnesota in the service of the United States for three years from the 29th day of April 1861 or during the war. Colonel Gorman further says, that he is personally acquainted with Edward A. Stevens and

personally witnessed that he was inspected, examined and voluntarily reported, tendered and volunteered himself and was accepted as a soldier into the service of the United States for three years or for during the war, and that he is also acquainted with the handwriting of Stevens and that the signature of Edward A. Stevens on the pay roll marked No. 4 and attested by Captain Downie is the genuine signature of Edward A. Stevens, and that payment was made between the 1st and 3d day of August last. And that further, as to any pretended errors or informalities in respect to the tender and acceptance of Stevens and his associates in their enlistment and enrollment, for three years (without admitting any such to have taken place), he says that by the 3d section of an act of Congress approved the 6th of August 1861 to increase the pay of the privates in the regular army and the volunteers in the service of the United States and for other purposes, it was enacted that all the acts, proclamations, and orders of the President of the United States after the fourth of March Eighteen hundred and sixty one respecting the army and navy of the United States and calling out or relating to the Militia or volunteers from the States were thereby approved and in all respects legalized and made valid to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States, and that the said Edward A. Stevens hath not been and is not held under any illegal ~~settlement~~ restraint. The return then contains the certificate~~s~~ and affidavits of Adjutant General Thomas, Major Paulding, Edward H. Brooke and muster and pay rolls connected with the regiment for which the petitioner called.

The affidavit of E.H. Brooke is as follows:

> Edward H. Brooke being duly sworn deposeth and saith that he is Examining Clerk in the office of the Paymaster General of the United States, and that the papers marked 3 & 4, & attested by the signature of S. Thomas adjutant General are the original Muster Roll & Pay Roll on file in the Paymaster General's office relating to the 1st Regiment of Minnesota Volunteers commanded by Colonel Willis A. Gorman and together constitute the official Record of the Government of the payment made to said Regiment.
>
> That by the course and practice of the Government preliminary to payment of any regiment a Muster Roll is made out & certified by the Company & Regimental officers which is returned to the Paymaster and from it a Pay Roll is made out by the Paymaster who pays the Regiment & returns them to the office of the Paymaster General.

~~E.H. Brooke~~

~~Sworn to & subscribed~~
~~before me this 17th day~~
~~of August 1861—~~

~~Witness my hand & notarial seal~~
~~At Washington D.C.~~
~~Geo C. Thomas~~
Not'y Public.

The affidavit of E.E. Paulding is as follows—

"Edward E. Paulding being duly sworn, deposeth and saith that he is a paymaster in the service of the United States of the rank of major.

That as Paymaster he paid off the 1st Regiment of Minnesota Volunteers commanded by Col Gorman for their services from the time of commencement until the thirtieth day of June.

That he made the payment to Edward A. Stevens specified in the Payroll marked No. 4 attested by the signature of S. Thomas Adjutant General, and at the time of payment had the muster roll marked No. 3 and the pay roll marked No. 4 and the name ~~of~~ "Edward A. Stevens" in the column of signatures on the pay roll is the true and Genuine signature of Edward A. Stevens a private in said Company B to whom ~~the~~ the payment was made.

That the payment to said Regiment ~~were~~ was made & accepted by ~~them~~ the volunteers of it under the instructions relating to three years men which differ from the regulations respecting three months men. That the payment was made at the camp of said regiment near the City of Washington.

By the course and practice of the government preliminary to the payment of a Regiment, a Muster Roll is made out by the commanding officer of the Company & certified by the officer commanding the Regiment and from that Muster Roll a pay roll is made out by the paymaster. The Muster Roll specifies among other things the name rank and age of the soldiers, when, where & by whom they were enrolled, the term of service for which they were enrolled, mustered and accepted into service, when where and by whom they were mustered into service. The Pay Roll specifies the name and rank of the soldiers to whom payment is to be made, the period of service for which payment is to be made, designating when it commenced & the time to which

payment is made, the amount paid, the signature of the person to whom it is made & the company officer attesting payment.

The Muster Roll & payroll are then filed in the paymaster's office and forms the official record of service & payment.

Edw E Paulding
Paymaster USA

Sworn by & subscribed
before me this 17th day
of August 1861
Geo C. Thomas
Not'y Pub.

The certificate of Adjutant General Thomas is as follows:

I, Lorenzo Thomas, Adjutant General of the United States do certify —

1st That by the records of this Office it appears that at Fort Snelling on the 29th day of April 1861 Edward A. Stevens and Eighty two others were duly enrolled mustered and accepted into the service of the United States as volunteers under the call of the President for the period of three months from the aforesaid twenty ninth day of April the date of the aforesaid muster.

2d That afterwards the President having by his proclamation of the 3d day of May called for forty two thousand and thirty four volunteers to serve for the period of three years a requisition upon the Governor of Minnesota for one regiment of volunteers to serve for the period of three years or during the war was made by the War Department on the 15th day of May and Captain A.D. Nelson of the 10th Regiment of United States infantry was instructed by the Adjutant General to perform the duty of Mustering Officer for said Regiment to muster them into the service of the United States for the aforesaid period of the three years.

3d That on the 27th day of May 1861 at Fort Snelling Minnesota Edward A. Stevens and Eighty one other persons were duly enrolled mustered and accepted into the service of the United States by the aforesaid Captain A.D. Nelson as a private in Captain Carlyle A. Bromley's Company B in the first Regiment of Minnesota Volunteers commanded by Colonel Willis A. Gorman called into the service of the United States by the President from the twenty ninth of April 1861 for the term of three years or during the war unless sooner discharged.

4th That the said Edward A. Stevens and Eighty two others are duly entered upon the Pay roll of Company B first Minnesota Regiment as a volunteer to serve for the term of three years or during the war from the date of ~~enlistment~~ enrollment on the 29th day of April unless sooner discharged and did after the 30th day of June 1861 receive from E.E. Paulding Paymaster of the United States the sum of $22.73 as the pay due to him for his service to the said 30th day of June aforesaid and in the presence of Mark W. Downie Captain of said Company B did sign his name on said pay roll for a receipt and acknowledgement of said payment.

5th That the papers marked 1, 2, 3, 4 are true and original papers on file in the War Department relating to the enrollment mustering and pay of the aforesaid Company B first Regiment Minnesota Volunteers to which the said Edward A. Stevens belongs.

In testimony whereof I have hereunto set my hand at the Adjutant Generals office this 17th day of August 1861.

L. Thomas
Adjt. Genl. U.S.A.]

The petition then & the return disclose the following facts. That the petitioner repaired to Fort Snelling under the President's proclamation of the 15th of April and the response to it by the Governor of Minnesota and there with others tendered their services to become volunteer soldiers for three months, and that they were actually accepted as such. That afterwards the President, deeming the national condition to be perilous and requiring from him an additional force to see the laws executed, assumed the responsibility to call for and raise forty two thousand and thirty four volunteers to serve for the period of three years unless sooner discharged, which were to be mustered into service as infantry and cavalry. The proportions of each arm and the details of enrolment and organization were to be made known by the Department of War. At the same time the President announced the circumstances which impelled him to do so, and that he would report them to Congress at its coming extra session relying upon the measure being approved and adopted by it by legislation.

That has been done by the Act of 6th of August 1861. It appears also that when this second call was made by the President that the petitioner and the regiment were doing duty as volunteer soldiers of the U.S. at Fort Snelling under their engagement for three months, but when the second call became known, Col Gorman declares in his return, that the petitioner and the regiment tendered their services to become volunteer soldiers under it for three years or during the war, the time to be counted from the

date of their engagement for three months. Col. Gorman adds, that they were actually mustered into the service of the U.S. and his oath is fully sustained by the affidavit of E.H. Brooke, Examining Clerk in the office of the Paymaster General, by Major Paulding, Paymaster, by the return of Capt Nelson the officer who was authorized to muster the regiment into service, by the signature of Capt Downie who witnessed the petitioner's signature upon the payroll, and by the certificate of Adjutant Genl. Thomas that the papers numbered one, two, three & four which he then furnished and which were called for by the petitioner were original records of his office and were all that related to the subject matter.

The petitioner does not deny ~~that~~ his being a volunteer soldier in the actual service of the U.S. but his claim is that as his contracts of service either for three months or for three years had not been made pursuant to the regulations of the army, that in either case he was entitled to his discharge. And he impeaches the genuineness of the original papers furnished by the Adjutant Genl, and also declaring that upon their face they do not show a compliance with those army regulations directing how recruits either as volunteers or regular soldiers were to be received or enlisted into the military service of the U.S.

He complains that the nature of the service, the length of ~~service~~ the term, the pay, clothing, rations & other allowances of which a soldier is entitled by law before he signs the enlistment were not explained to him. That the officer enlisting him did not offer to him for his signature the declaration required by the thirteen hundred & third article of the regulations for conducting the recruiting service. That he had not been sworn as a recruit or volunteer soldier is required to be, by the thirteen hundred and sixth article of the regulations & by the tenth article of the articles of war.

Other objections of the same kind were made in argument on behalf of the petitioner by his counsel.

Having fully considered the bearing~~s~~ of the facts of the case in connection with the regulations of the army, I have come to these conclusions, that there was no such ~~substantial such~~ neglect of them by the officer mustering this Regiment into service as has been alleged, though some of them appear to have been omitted in the enrollment of the petitioner. It appears by the papers however that no substantial regulation essential to a contract of enlistment had been disregarded. My conclusion then is, ~~this regard is,~~ that the particulars directed in the regulations of the army for the enrollment and enlistment of soldiers into the service of the United States either as regular soldiers or volunteers are not essential to the validity of the contract of enlistment, where there has been an actual mustering into the service of the U.S. and service rendered by the soldier under it, and that a contract made under such circumstances is binding upon the soldier and the government, notwithstanding the omission by the

mustering officer of any formality prescribed for the enlistment of a recruit.

That a person who has offered himself as a volunteer into the service of the U.S., who has been received and accepted as such, and who has been armed, subsisted and paid by the U.S. as a volunteer, and who has rendered service as such, cannot deny the validity of his enlistment on contract of his engagement for the number of years specified in the muster Roll upon any ground of informality of proceeding in the enlistment. That the muster rolls filed in the War Department and certified to by an officer authorised to muster any volunteer regiment or body of men into the service of the U.S. are official records, and afford conclusive proof as between the soldier and the government upon a questions of a continuance of service or any claim the soldier may make for a discharge from the service, ~~are conclusive proofs~~ that the soldier was received and mustered into the service of the U.S. as a volunteer soldier at the time and place, and for the period set forth in the muster roll & certificate of the mustering officer.

It is my opinion that Congress has constitutional power to legalize and confirm executive acts, proclamations, and orders done for the public good, although they were not when done authorised by any existing laws. That such legislation of Congress, may be made to operate retroactively, to confirm what may have been done under such proclamations and orders, so as to be binding upon the government in regard to contracts made, and the person with whom they were made. And that the third section of an act of Congress of the 6th day of August 1861, legalizing the acts, proclamations and orders of the President, after the 4th of March 1861, respecting the Army and Navy, and calling out and relating to the Militia and volunteers of the States, is constitutional and valid, as if they had been issued and done under the previous authority and direction of Congress.

That the soldiers who volunteered under either the first or second call of the President of the United States, and who were accepted into service, entered into a contract by which they were to be ~~made~~ armed, equipped, subsisted, and paid according to law, and are entitled to the pension and bounty bestowed upon them and their wives and children by Congress, and for this consideration they are bound to serve faithfully for the term for which they were mustered into the service unless sooner discharged, notwithstanding the failure of the mustering officer to administer the oath to them prescribed by the tenth article of the articles of war.

That soldiers who volunteered under the first proclamation of the President, for three months, might afterwards with the consent of the government, volunteer and tender their services for a longer time, upon a call of the President of the United States, and that upon having done so

and being mustered and accepted into service, they are bound to serve as soldiers until the expiration of their second engagement.

It is my judicial opinion upon this case, that it appears that the first Minnesota Regiment were duly mustered into the service of the United States, at Fort Snelling, on the 27th day of May, for the period of three years or during the war, and that Edward A. Stevens is subject to be remanded notwithstanding his petition, into military custody, and I therefore make the following order.

Ordered, that the writ of Habeas Corpus ad subjiciendum awarded by me on a prior day to wit the 10th instant upon the application of Edward A. Stevens the petitioner aforesaid, be and the same is hereby discharged, and that the aforesaid Edward A. Stevens be and he is hereby remitted to his military duty, in the first Minnesota Regiment commanded by Colonel Willis A. Gorman and that until then he remain in the custody of the United States Marshal for this District.

[Publisher's note: As Ira Matetsky reports in his introduction to the second part of the fourth volume of *In Chambers Opinions*, West published this opinion in the *Supreme Court Reporter* under the mistaken impression that it was a decision of the full Court, despite the fact that the report itself discloses that Clark presented his case to Justice Harlan "at chambers." Ira Brad Matetsky, *The Publication and Location of In-Chambers Opinions*, 4 Rapp vii-viii & n.10 (Supp. 2, 2005).]

SUPREME COURT OF THE UNITED STATES

Ex parte CLARK.

(August 7, 1888)

Petition for *Habeas Corpus*.

On the 5th day of July, 1888, the petitioner was convicted in the court of quarter sessions of Allegheny county, Pa., of the offense of selling liquor without license, and sentenced to pay a fine of $500, and to imprisonment in the county jail for the period of three months. In the same month, and in the same court, he was convicted of the offense of selling liquor on Sunday, and sentenced to pay a fine of $200, and to imprisonment in the county jail for the period of 60 days; the latter sentence to take effect and date from the expiration of the former. These prosecutions were under what is known as the "High License Law of Pennsylvania," passed May 13, 1887, and entitled "An act to restrain and regulate the sale of vinous, spirituous, malt, or brewed liquors, or any admixture thereof." The above judgment having been executed by the confinement of the accused in the county jail, and an *allocatur* having been refused by one of the justices of the supreme court of Pennsylvania, Clark presented to Mr. Justice HARLAN, of the supreme court of the United States, at chambers, a petition praying for a writ of *habeas corpus*, to the end that he might be discharged from custody. The petition alleged that on, before, and since June 10, 1888, he was the captain of the steamer Mayflower, a passenger vessel, regularly enrolled and licensed under the laws of the United States, and engaged in navigating the Allegheny, Monongahela, and Ohio rivers; also, that the statute under which he was prosecuted made no provision for the granting to steam-boats of licenses for retailing liquors. The petition further alleged: "That, owing to the competition on said rivers, it is necessary for said steam-boat to have a bar, to accommodate parties traveling upon her, and that it is now, and has for many years past been, the custom for steam-boats on said rivers to have bars, and sell liquor to the passengers traveling on them, and that the only restraint put upon said vessels in the sale of liquor is an act of congress to prohibit the sale to Indians, and that said vessels are wholly and exclusively under the

jurisdiction of the laws of the United States. Your petitioner, therefore, says that the court of quarter sessions of Allegheny county, Pa., had no jurisdiction in the premises, and that its acts are wholly void, and his imprisonment unlawful." It appeared that the offenses charged against the petitioner were committed on the Mayflower, while on waters wholly within the commonwealth of Pennsylvania.

W.L. Bird, for petitioner.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

It is doubtful whether a federal question was sufficiently raised at the trial in the state court of one of these cases. If it was, then the way is open to take that case to the supreme court of the United States upon writ of error. The same course can be adopted in the other case, in which a federal question seems to have been properly raised. In neither case is there perceived any adequate ground for a writ of *habeas corpus*. The only one which can possibly be assigned for the writ is the incompatibility of the Pennsylvania statute of May 13, 1887, with the constitution of the United States. But I am of opinion that the statute is not repugnant to that instrument. It does not interfere with any constitutional right secured to the petitioner. Notwithstanding he has the right, under the navigation laws, to employ the steamer Mayflower on the public navigable waters of the United States, he is subject, while on waters within the limits of Pennsylvania, to such lawful regulations as that commonwealth has established for the purpose of promoting the health and morals of its people. The statute in question, restraining and regulating the sale of vinous, spirituous, malt, and brewed liquors, belongs to that class of regulations. Pennsylvania cannot prevent the navigation of public waters within its limit by vessels or boats licensed under the laws of the United States, but it can forbid the retailing of spirituous liquors upon such vessels, while they are within its territorial limits, except as authorized by its laws. If congress, under the grant of power to regulate commerce between the states, can, by direct legislation upon the subject, override the statute of Pennsylvania, so far as it applies to persons controlling vessels or boats employed in such commerce within its limits,— a proposition which cannot, I think, be sustained,— it has not exercised that power. The application for the writ of *habeas corpus* is denied.

[Publisher's note: This opinion of Justice Joseph R. Lamar is reproduced at pages 12-13 of the Transcript of Record in the case of *Frank v. Mangum*, O.T. 1914, No. 775.]

Opinion of Mr. Justice Lamar.

LEO M. FRANK
v.
THE STATE OF GEORGIA.

Motion to Set Aside Verdict.

[Publisher's note: This opinion issued on November 23, 1914. *Refuses Frank a Writ of Error*, N.Y. TIMES, Nov. 24, 1914.]

The Record discloses that on August 25, 1913, Frank was found guilty of murder by a jury in the Superior Court of Fulton County, Georgia, he, with the consent of his counsel, being absent from the court room when the verdict was rendered. At the same term he made a motion for a new trial in which the fact of his absence was mentioned, though it was not made a ground of the motion. A new trial was refused and the case taken to the Supreme Court of Georgia, where the judgment was affirmed.

Thereafter, on April 16, 1914, and at a subsequent term of the Superior Court, Frank made a "motion to set aside the verdict." The order denying the same was affirmed by the State Supreme Court and thereupon this application for a writ of error was made.

In its opinion in this case the Supreme Court of Georgia, among other things, held:

1. That under the due process clause of the Fourteenth Amendment to the Constitution of the United States, Frank was entitled to be present in court at every stage of the trial, including the time when the jury returned their verdict.

2. That under the laws of Georgia and the practice of its courts a motion for a new trial is a proper method by which to attack a verdict rendered in the prisoner's absence.

3. That when that method of procedure is adopted, the defendant must set out in the motion for a new trial all known grounds of objection to the verdict, including the fact that he was absent when it was rendered.

4. That having elected to make a motion for a new trial and the judgment denying the same having been affirmed by the Supreme Court, the defendant could not thereafter make a motion to set aside the verdict on the ground that he had been absent from the court room when the verdict was rendered.

The laws of the several States fix the method in which, and the time at which, to attack verdicts because of anything occurring during the progress of the trial, including disorderly conduct of the crowd in and out of the court room and the fact that the defendant was not present when the verdict was rendered. It is for the States to determine whether a verdict rendered in the absence of the defendant can be attacked by a motion to set aside the verdict, or by a motion for a new trial, or both. The laws of the States also determine whether the denial of one of these motions will prevent the defendant from subsequently making the other. The decision of the Supreme Court of Georgia in this case holds that, under the laws of that State where a motion for a new trial was made and denied, the defendant could not thereafter make a motion to set aside the verdict on the ground that he was not present when it was returned by the jury. That ruling involves a matter of State practice and presents no Federal question. The writ of error is therefore denied.

JOSEPH R. LAMAR,
Associate Justice Supreme Court of the United States.

[Publisher's note: This opinion of Justice Oliver Wendell Holmes, Jr. is reproduced at page 13 of the Transcript of Record in the case of *Frank v. Mangum*, O.T. 1914, No. 775.]

Opinion of Mr. Justice Holmes.

FRANK
vs.
STATE OF GEORGIA.

[Publisher's note: This opinion issued on November 25, 1914. *Justice to Frank Doubted by Holmes*, N.Y. TIMES, Nov. 27, 1914.]

I understand that I am to assume that the allegations of fact in the motion to set aside are true. On those facts I very seriously doubt if the petitioner has had due process of law — not on the ground of his absence when the verdict was rendered so much as because of the trial taking place in the presence of a hostile demonstration and seemingly dangerous crowd, thought by the presiding Judge to be ready for violence unless a verdict of guilty was rendered. I should not feel prepared to deny a writ of error if I did not consider that I was bound by the decision of the Supreme Court of Georgia that the motion to set aside came too late, and even if I thought that the suggestion of waiver was not enough to meet the Constitutional question and the right to bring the case here. I understand from the headnote and the opinion that the case was finished when the previous motion for a new trial was denied by the Supreme Court and, as cases must be ended at some time, that apart from any question of waiver, the second motion came too late. I think I am bound by this decision even if it reverses a long line of cases and the Counsel for the petitioner were misled to his detriment, which I do not intimate to be my view of the case. I have the impression that there is a case in which the ground that I rely on as showing want of due process of law was rejected by the Court with my dissent, but I have not interrupted discussion with Counsel to try to find it, if it exists.

O.W. HOLMES,
Justice Supreme Court of the United States.

[Publisher's note: This opinion of Justice Joseph R. Lamar is reproduced at pages 229-31 of the Transcript of Record in the case of *Frank v. Mangum*, O.T. 1914, No. 775.]

Opinion of Justice Lamar.

In re LEO FRANK. Habeas Corpus.

Leo Frank's recent application for a writ of error was denied by me on the ground that no Federal question was involved in the ruling of the Supreme Court of Georgia that his Motion to Set Aside the verdict finding him guilty of murder had been filed too late. This petition presents a wholly different question since it is an application for the allowance of an appeal from the judgment of a Federal Court on a record which presents a purely Federal question, irrespective of the regulations governing State practice.

Frank's petition for the writ of habeas corpus, addressed to the Judge of the United States District Court for the Northern District of Georgia, alleges that on his trial for murder in the Superior Court of Fulton County, Georgia, public feeling against him was so great that the presiding judge advised his counsel not to have him present in the court when the verdict was rendered, and that his involuntary absence, under such circumstances, when the verdict was received, deprived him of a hearing to which he was entitled under the Constitution and rendered his conviction void. He avers that his Motion for a New Trial was overruled and he then moved to Set Aside the verdict as being void for want of jurisdiction; That in passing on that Motion the State Supreme Court held that while he had the Constitutional right to be present when the verdict against him was returned into court, yet such verdict could not be attacked, by a Motion to Set Aside, after the expiration of the trial term and after his Motion for a New Trial had been finally refused. He alleges that his attempt to have that judgment reviewed in the Supreme Court of the United States failed because, though a Federal question was raised in the record, the decision of the Supreme Court of Georgia was based on a matter of State practice.

He thereafter filed this petition for a writ of habeas corpus in which he claims that the right to be present at the rendition of the verdict was jurisdictional and that on habeas corpus he is entitled to a hearing on the question as to whether he had waived or could waive his constitutional right to be present when the verdict of guilty was rendered into court.

The District Judge heard no evidence as to the truth of the allegations, but refused the writ on the ground that the facts therein stated did not entitle Frank to the benefit of that remedy. He declined to give the certificate of probable cause and this application for that certificate and

for the allowance of an appeal was then made to me as the Justice assigned to the Fifth Circuit.

Under the Act of 1908 the application for the certificate is not to be determined by any views which may be held as to the effect of the final judgment of the State Supreme Court refusing a New Trial, but by considering whether the nature of the constitutional right asserted in the absence of any decision expressly foreclosing the right to an appeal, leaves the matter so far unsettled as to constitute probable cause justifying the allowance of the appeal.

The Supreme Court of the United States has never determined whether, on a trial for murder in a State court, the due process clause of the Federal Constitution guarantees the defendant a right to be present when the verdict is rendered.

Neither has it decided the effect of a final judgment refusing a New Trial in a case where the defendant did not make the fact of his absence when the verdict was returned a ground of the Motion, nor claim that the rendition of the verdict in his absence was the denial of a right guaranteed by the Federal Constitution.

Nor has it passed upon the effect of its own refusal to grant a writ of error in a case where an alleged jurisdictional question was presented in a Motion filed at a time not authorized by the practice of the State where the trial took place. Such questions are all involved in the present case, and since they have never been settled by any authoritative ruling by the full court, it cannot be said that there is such a want of probable cause as to warrant the refusal of such an appeal. That being true, the Act of Congress requires that the certificate should be given and the appeal allowed.

Dec. 28, 1914. J.R. LAMAR,
Associate Justice Supreme Court of the United States.

[Publisher's note: Here is the associated order by Justice Lamar, from page 231 of the Transcript of Record.]

Filed in the Clerk's Office January 11th, 1915.

O.C. FULLER,
Clerk U. S. District Court, Northern District of Georgia.

Order Allowing Appeal and Certificate of Probable Cause.

Supreme Court of the United States, October Term 1914.

No. ---.

LEO M. FRANK
vs.
C. WHEELER MANGUM, Sheriff of Fulton County Georgia.

On consideration of the petition of Leo M. Frank for an appeal from the order of the District Court of the United States for the Northern District of Georgia, denying the prayer of the petitioner for the issuance of a writ of habeas corpus herein,

It is ordered that said appeal be, and the same is hereby, granted upon the petitioner giving bond in the sum of Three hundred dollars ($300.00), conditioned according to law, and in pursuance of the Act of Congress of March 10th, 1908, Chapter 76, 35 Statutes at Large, page 40, I do hereby certify that there is probable cause for the allowance of said appeal.

(Signed) J.R. LAMAR,
Associate Justice of the Supreme Court of the United States.

Washington, D.C., December 28, 1914.

[Publisher's note: This opinion was delivered orally from the bench (or perhaps the armchair), and is drawn from the typescript transcript of the hearing conducted by Justice Cardozo. For the complete hearing, see Appendix A to this volume. From RG 267, Entry 30, Box 2, Records of the Supreme Court of the United States, National Archives and Records Administration. Justice Cardozo made quite a few handwritten corrections to the transcript, all of which are noted in the complete version in Appendix A. For ease of reading, the version presented here incorporates his changes.]

SUPREME COURT OF THE UNITED STATES

IN THE MATTER

- of the –

ASSOCIATED GAS AND ELECTRIC COMPANY,

Alleged Debtor.

MINUTES OF PROCEEDINGS had in the above entitled matter at a Special Term of the United States Supreme Court held at the residence of Honorable Benjamin Nathan Cordozo, 258 Sound View Avenue, White Plains, New York, on July 2nd, 1936, commencing at 11:00 A.M. o'clock Daylight Saving Time.

JUSTICE CARDOZO, Circuit Justice.

Gentlemen, I am entirely clear that no case has been made which would justify me in granting a stay here. Under the decision in Magnum Company against Coty, a stay is granted by a Justice of the Supreme Court only on a showing of manifest error or overmastering hardship. I feel the applicant has not established either.

If this case were to come before the Supreme Court the merits of Judge Mack's ruling would not be directly considered. All that would be before the Court would be the question whether there had been an abuse of discretion on the part of the Circuit Court of Appeals in refusing to allow an appeal from Judge Mack's order. In the event an abuse was found, then the matter would go to the Circuit Court of Appeals for a ruling on the merits.

Now, the question before the Court would not even be whether there was an abuse of discretion in refusing to allow the appeal from the first order, because the time for review of that order has long since expired.

The question would be whether, if the Circuit Court of Appeals had refused to allow that appeal, there was an abuse of discretion in refusing to allow an appeal from the second order, upon an application made a year or a year and a half later.

Obviously the chance that the Supreme Court would grant a writ of certiorari to review the question whether that constituted a patent abuse of discretion, is a very slim possibility.

Then, when we pass to the question of hardship, it is, of course, impossible to say that inconvenience will not be suffered by the applicant if this stay is refused and a writ of certiorari is ultimately granted and the decree reversed. I think that is a very slender possibility. On the other hand, as against any inconvenience suffered by the applicant must be set the inconvenience that will be suffered by those who oppose the application, and when I hear the many proceedings that have been had in this case, as they have been detailed by counsel, the many maneuvers for which perhaps the debtor is not fully responsible, but which none the less have served to prolong the proceedings,-- when I hear all that and then I am told there is a desire now to tie the case up for a period of months on what seems to me the very slender possibility that the Supreme Court will grant a writ of certiorari, I feel there is no overmastering hardship, even if there is some element of hardship, in refusing the stay, and having in mind all those questions, and gathering from what has been said that the application ought to be promptly decided, I feel that the motion for a stay must be denied.

[Publisher's note: On June 17, 1937, Clerk of the Supreme Court Charles Elmore Cropley wrote to Justice Benjamin N. Cardozo as follows: "I acknowledge receipt of your letter of June 16th enclosing a carbon copy of your letter to Mr. Bryan denying his application for the allowance of an appeal in the case of Wilson, et al., v. O'Malley, et al. This letter will be retained in my files." The letter to which Cropley refers was an in chambers opinion in letter form, typed on Supreme Court stationery. From RG 267, Entry 30, Box 3, Records of the Supreme Court of the United States, National Archives and Records Administration.]

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

White Plains, New York
June 16, 1937

Wilson et al. v. O'Malley et al.

Dear Mr. Bryan,

I feel constrained to deny your application for the allowance of an appeal.

The federal questions in my judgement are not substantial, even if it be assumed that they were seasonably raised.

(1) Upon the decree of dissolution the Superintendent of the Insurance Department of the State of Missouri became the statutory or universal successor of the dissolved corporation. Clark v. Williard, 292 U.S. 112, 120; same v. same, 294 U.S. 211. "He was, in fact, the corporation itself for all purposes of winding up its affairs." Relfe v. Rundle, 103 U.S. 222. There is no doubt that as such successor he became vested with title to tangible personal property in Georgia and elsewhere. Clark v. Williard, supra. The questions is perhaps unsettled whether real estate beyond Missouri -- the jurisdiction of the domicile -- is subject to a different rule. Restatement of Conflict of Laws, #161. On principle it would seem that Georgia is at liberty, if her statutes and her courts permit, to recognize the title of the successor in respect of real estate as well as personalty without violating any restriction of the federal constitution. Just as the title of the corporation was recognized during life, so that of the universal successor may be recognized after death. 294 U.S. at 214. True, Georgia may also be at liberty, if her public policy so dictates, to subordinate the title to the claims of local creditors. Clark v. Williard, supra. But subordination is not mandatory under the federal constitution, even though permitted. The definition of the local policy is for the state tribunals solely. Nothing to the contrary was ruled in Oakey v. Bennett, 11 How. 33. In that case a

decree in bankruptcy against one Hall was made by the District Court of the United States for the Eastern District of Louisiana. The decree was held inoperative to pass title to real estate in Texas, which was then a foreign country. The bankrupt was a natural person, and no question was involved as to a succession established for a corporation by the law of its creation. Nor was there any suggestion in the opinion that recognition of such a succession would violate some immunity established by the federal constitution.

(2) If the foregoing question were the only one in the case, I might perhaps feel that there was doubt enough about it to justify the allowance of an appeal, though as to this I am far from certain. But the point I have considered does not stand alone. The Supreme Court of Georgia placed its judgment upon a second ground, which is primarily one of state law. The court held that the suit must fail by force of the provisions of Section 29A of the Georgia Laws of 1914, p. 135. There is nothing in that statute that offends against the full faith and credit clause of the Constitution of the United States. In substance its requirement is that a creditor shall not be permitted to obtain a receiver for a life insurance corporation unless he has first applied to the Insurance Commissioner (acting with the Attorney General and the Governor) for an order directing the Commissioner to institute receivership proceedings, and unless the Commissioner has failed to act pursuant to such authority. Another section of the same statute provides in effect that such action shall be taken upon a showing of insolvency. If the special tribunal refuses to recognize the decree of the Missouri court as conclusive evidence of insolvency, it will be time enough to complain that full faith and credit has been denied to the Missouri judgment. An order that in the meantime the assets in Georgia shall be maintained in statu quo will not violate the Missouri judgment if you are right in your contention that the succession is ineffective as to real estate in Georgia.

I find it unnecessary to dwell upon other questions suggested in your argument.

Very truly yours,

Benjamin N. Cardozo

P.S. I am returning the papers under separate cover.

W.L. Bryan, Esq.
710 Rhodes Haverty Building
Atlanta, Georgia

[Publisher's note: The original of this opinion is handwritten. It is reproduced on the next page. The date on the original petition and on the exterior of the case file is 1942, which suggests that Justice Black's "1941" is a mistake and that the penciled-in "1942" is the correct date for this opinion. From RG 267, Entry 30, Box 6, Records of the Supreme Court of the United States, National Archives and Records Administration.]

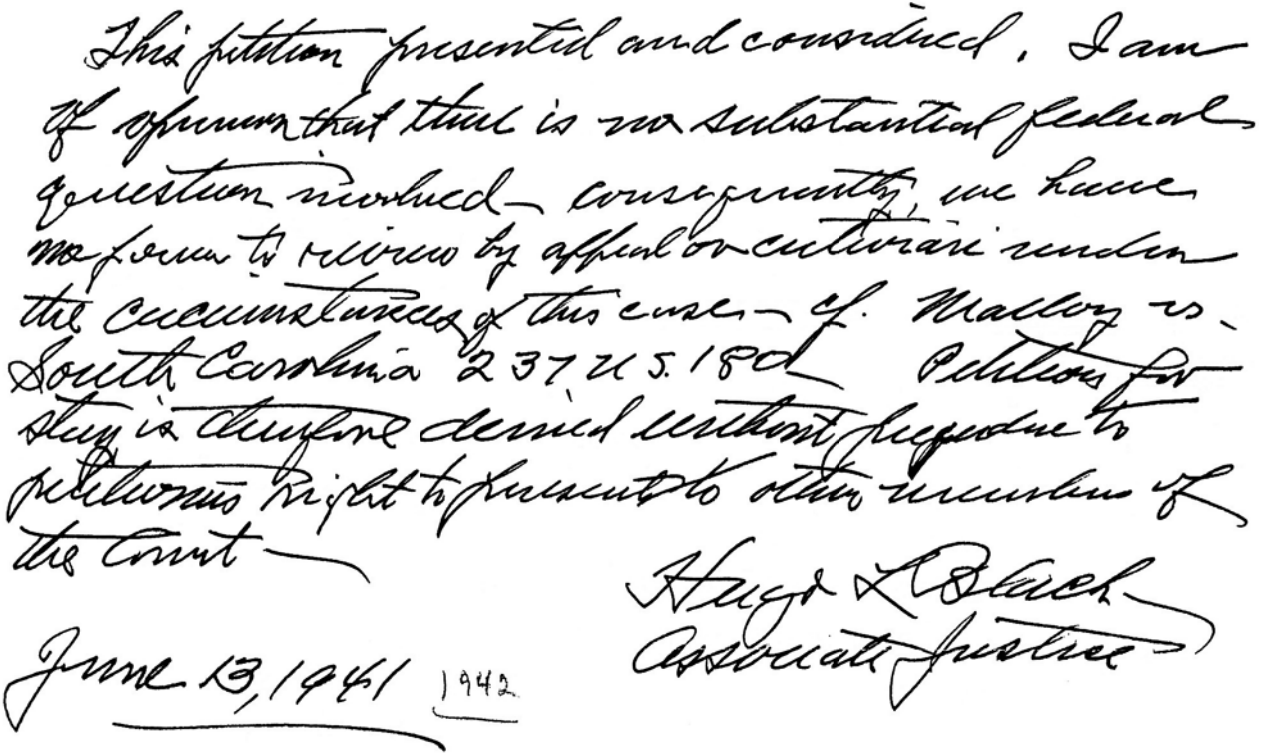
SUPREME COURT OF THE UNITED STATES

HYSLER *v.* FLORIDA

This petition presented and considered, I am of opinion that there is no substantial federal question involved. Consequently, we have no power to review by appeal or certiorari under the circumstances of this case. Cf. Malloy vs. South Carolina 237 U.S. 180. Petition for stay is therefore denied without prejudice to petitioner's right to present to other members of the Court.

Hugo L Black
Associate Justice

June 13, 1941 1942



This petition presented and considered. I am of opinion that there is no substantial federal question involved — consequently, we have no power to review by appeal or certiorari under the circumstances of this case — Cf. Mallory vs. South Carolina 237 U.S. 180 Petition for stay is therefore denied without prejudice to petitioners right to present to other members of the Court —

Hugo L. Black
Associate Justice

June 13, 1941 1942

[Publisher's note: See 546 U.S. ____ for the official version. Two versions of this opinion were released by the Court. The first was peppered with redactions. See 126 S. Ct. 1 (2005). The second had none. 127 S. Ct. 1 (2005). The opinion below is the second one.]

SUPREME COURT OF THE UNITED STATES

No. 05A295

JOHN DOE ET AL. *v.* ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.

ON APPLICATION TO VACATE STAY

[October 7, 2005]

JUSTICE GINSBURG, Circuit Justice.

This is an emergency application to vacate an order entered by the United States Court of Appeals for the Second Circuit staying a preliminary injunction entered by the United States District Court for the District of Connecticut. The applicants — a member of the American Library Association referred to herein as "John Doe," the American Civil Liberties Union, and the American Civil Liberties Union Foundation — brought suit in district court, alleging that the nondisclosure provision set forth in 18 U.S.C. § 2709(c) violates their First Amendment right to freedom of speech. The District Court granted the applicants' motion for a preliminary injunction against enforcement of § 2709(c). A panel of the Second Circuit granted the Government's motion to stay the District Court's judgment pending an expedited appeal. The same panel denied the applicants' subsequent motion to vacate the stay in light of changed circumstances. In view of the character of the constitutional issue presented and the expedited schedule ordered by the Court of Appeals, I deny the application and grant the parties' accompanying motions for leave to file under seal.

Section 2709, as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (hereinafter Patriot Act), authorizes the Federal Bureau of Investigation (FBI) to "request the name, address, length of service, and local and long distance toll billing records of a person or entity" if the FBI asserts in writing that the information sought is "relevant to an authorized investigation to protect against international terrorism or clan-

destine intelligence activities … .” 18 U.S.C. § 2709(b) (2000 ed., Supp. II). The provision authorizes the FBI to issue such requests to “electronic communication service providers.” § 2709(a) (2000 ed.). In this case, the FBI requested information under this Section in the form of a “National Security Letter” (NSL). At issue in this case is § 2709(c), which prohibits the recipient of an NSL from disclosing that fact. *Ibid*. (prohibiting “disclos[ure] to any person that the [FBI] has sought or obtained access to information or records under this section”). The current debate over renewal of the Patriot Act has spawned eight bills, currently pending before the Senate and the House of Representatives, proposing various amendments and revisions to § 2709.

John Doe received an NSL demanding that it disclose “any and all subscriber information, billing information[,] and access logs of any person or entity” associated with a specified Internet Protocol (IP) address during a specified period. The NSL tracked the language of § 2709 and included the admonition that Doe was not to disclose that the FBI had sought or obtained information from it. Doe brought suit in district court, alleging that the gag imposed by § 2709(c) is an unlawful prior restraint on speech that is causing irreparable harm by preventing Doe’s effective participation in the current debate — both in Congress and among the public — regarding proposed revisions to the Patriot Act.

The District Court granted Doe’s motion for a preliminary injunction, holding that Doe demonstrated a substantial likelihood of success on the merits and irreparable harm in the absence of the relief sought. Emergency Application to Vacate Stay, App. B, p. 9 (hereinafter Application). The court determined that, as a “categorical prohibition on the use of any fora for speech, on all topics covered by § 2709(c),” the gag provision is a prior restraint and a content-based restriction on free speech. *Id*., at 12-13. The District Court therefore concluded that the prohibition on disclosure is permissible only if it satisfies strict scrutiny. *Id*., at 13. In its strict-scrutiny analysis, the court considered two Government interests the gag provision might serve: the Government’s general interest in national security and its particular interest in conducting effective counterterrorism investigations. *Id*., at 15. While the District Court acknowledged the Government’s general interest in protecting national security and its expertise in the area of counterterrorism, *ibid*., that court found “nothing in the record” (which included classified and other sealed *ex parte* submissions) suggesting that the Government has a compelling interest in preventing disclosure of Doe’s identity. *Id*., at 17, and nn. 7-8.

The Government’s argument invoked a “mosaic theory”: Although Doe’s identity “may appear innocuous by itself, it could still be significant to a terrorist organization when combined with other information available to it.” *Id*., at 18. The District Court acknowledged that federal

courts have credited the mosaic concept in the Freedom of Information Act (FOIA) context, but it noted that the instant case is distinguishable in this respect: "Th[e] difference between seeking to obtain information and seeking to disclose information already obtained raises [the plaintiffs'] constitutional interests in this case above the constitutional interests held by a FOIA claimant." *Id*., at 19 (quoting *McGehee* v. *Casey*, 718 F.2d 1137, 1147 (CADC 1983)). In any event, the court held, "the defendants' conclusory statements that the mosaic argument is applicable here, absent supporting facts, would not suffice to support a judicial finding to that effect." Application, App. B, at 19-20. The District Court noted in this regard that it had asked counsel for the Government at oral argument if he could confirm that there was, in fact, a "mosaic" in this case — *i.e.*, whether there are in fact other pieces of information that, when combined with Doe's identity, would hinder the investigation. Counsel could not so confirm. *Id*., at 20.

The District Court did not "question that national security can be a compelling state interest, or that nondisclosure of [an] NSL recipient's identity could, in some circumstances, serve that interest." *Ibid*.. [Publisher's note: Double dot in the original.] It found, however, that the Government failed to show a compelling interest in preventing disclosure in this case:

> "Based on the foregoing, including the sealed portion about Doe, and what Doe is, the nature and extent of information about the NSL that has already been disclosed by the defendants, and the nature and extent of the information that will not be disclosed, this court concludes that … the government has not demonstrated a compelling interest in preventing disclosure of the recipient's identity." *Ibid*. (footnote omitted).

The District Court concluded that, "[e]specially in a situation like the instant one, where the statute provides no judicial review of the NSL or the need for its nondisclosure provision, … the permanent gag provision … is not narrowly drawn to serve the government's broadly claimed compelling interest of keeping investigations secret." *Id*., at 22-23. The court also appraised § 2709(c) as "overbroad as applied with regard to the types of information that it encompasses." *Id*., at 23. It found § 2709(c)'s ban "particularly noteworthy" in light of the fact that proponents of the Patriot Act have "consistently relied on the public's faith [that the Government will] apply the statute narrowly … ." *Id*., at 26 (quoting Remarks of Attorney General John Ashcroft, Protecting Life and Liberty (Memphis, Tenn., Sept. 18, 2003), available at http://www.usdoj.gov/archive/ag/speeches/2003/091803memphisremarks.htm (as visited Oct. 7,

2005, and available in Clerk of Court's case file) (characterizing as "hysteria" fears of the Executive's abuse of the increased access to library records under the Patriot Act and stating that "the Department of Justice has neither the staffing, the time[,]nor the inclination to monitor the reading habits of Americans. No offense to the American Library Association, but we just don't care.").

Having thus concluded that § 2709(c) fails strict scrutiny, the court granted the applicants' motion for preliminary injunctive relief, but stayed its ruling until September 20, 2005, to give the Government the opportunity to "file an expedited appeal and submit an application for a stay pending appeal." Application, App. B, at 29. The Government did just that, and on September 20 the Court of Appeals granted the Government's motion:

> "Although there is a question as to the likelihood of [the Government's] success on the merits and some injury to [the applicants] if a stay is granted, the [Government has] demonstrated that [it] will suffer irreparable harm and the public interest [will be] significantly injured if a stay is not granted. The balance of harms tilts in favor of [the Government]. *Mohammed* v. *Reno*, 309 F.3d 95, 100 (CA2 2002). This appeal is hereby expedited and the following briefing schedule is in effect: [The Government's] brief shall be filed no later than September 27, 2005; [the applicants'] brief shall be filed no later than October 4, 2005; [the Government's] reply brief shall be filed no later than October 10, 2005." *Id.*, App. D.

Shortly after the Court of Appeals entered the stay, the parties learned that, through inadvertence, Doe's identity had been publicly available for several days on the District Court's Web site and on PACER, the electronic docket system run by the Administrative Office of the United States Courts. *Id.*, App. F., at 3-5 (decl. of Melissa Goodman). The parties also learned that the media had correctly reported Doe's identity on at least one occasion. See, *e.g.*, Cowan, Librarians Must Stay Silent in Patriot Act Suit, Court Says, N.Y. Times, Sept. 21, 2005, at B2. The applicants immediately moved to vacate the stay in light of this information. The Court of Appeals denied the motion, "on the ground that the additional circumstances relied upon by [the movants] do not materially alter the balance of harms … ." Application, App. E. The applicants then filed the instant emergency application, urging me, in my capacity as Circuit Justice, to vacate the stay and thereby allow Doe to contribute its first-

hand account to the ongoing debate regarding proposed revisions to the Patriot Act.

In support of their plea for an immediate order lifting the stay, the applicants stress that Doe seeks only to confirm its identity as the recipient of an NSL. It does not seek to disclose the content of the NSL, nor does it seek to disclose the date on which it was received. They point out that, in another case bearing the same name involving a *facial* challenge to § 2709, the Government argued that courts should consider the constitutionality of the gag provision on a case-by-case basis, "granting relief where — but only where — it can be shown that the compelling governmental interest[s] underlying the non-disclosure requirement are not in jeopardy." *Id*., App. B, at 18, quoting Defendants-Appellants' Reply Brief 25, in *Gonzales* v. *Doe*, No. 05-0570 (CA2 filed Feb. 3, 2005) (on appeal from *Doe* v. *Ashcroft*, 334 F. Supp. 2d 471 (SDNY 2004)). That is precisely what the District Court did here. The applicants underscore this anomaly: Doe — the only entity in a position to impart a first-hand account of its experience — remains barred from revealing its identity, while others who obtained knowledge of Doe's identity — when that cat was inadvertently let out of the bag — may speak freely on that subject.

Although the applicants' arguments are cogent, I have taken into account several countervailing considerations in declining to vacate the stay kept in place by the Second Circuit pending its disposition of the appeal. I am mindful, first, that "interference with an interim order of a court of appeals cannot be justified solely because [a Circuit Justice] disagrees about the harm a party may suffer." *Certain Named and Unnamed Noncitizen Children* v. *Texas*, 448 U.S. 1327, 1330-1331 (1980) (Powell, J., in chambers). Respect for the assessment of the Court of Appeals is especially warranted when that court is proceeding to adjudication on the merits with due expedition. The principal briefs have been filed and I anticipate that the Court of Appeals will hear argument promptly and render its decision with appropriate care and dispatch.

Also weighing in favor of keeping the stay in effect pending the full airing the Second Circuit has ordered, the District Court held unconstitutional — as applied to the facts of this case — a provision of an Act of Congress. A decision of that moment warrants cautious review. Further, the Government points out that the redacted version of the complaint, prepared in consultation with the Government, identifies Doe as a member of the American Library Association. "The American Library Association," the Government footnotes, "lobbies Congress on behalf of its members and is free to note that one of those members has been served with an NSL."

In sum, the applicants have not shown cause so extraordinary as to

justify this Court's intervention in advance of the expeditious determination of the merits toward which the Second Circuit is swiftly proceeding.

[Publisher's note: See 548 U.S. ____ for the official version.]

SUPREME COURT OF THE UNITED STATES

SAN DIEGANS FOR THE MT. SOLEDAD NATIONAL WAR MEMORIAL

05A1233 *v.*

PHILIP K. PAULSON

CITY OF SAN DIEGO, CALIFORNIA

05A1234 *v.*

PHILIP K. PAULSON

ON APPLICATIONS FOR STAYS

Nos. 05A1233 and 05A1234. Decided July 7, 2006

JUSTICE KENNEDY, Circuit Justice.

In this long-running federal-court litigation the United States District Court for the Southern District of California has ordered that, within 90 days of May 3, 2006, the city of San Diego, California, must comply with an earlier injunction, affirmed on appeal, that barred the city from maintaining a prominent Latin cross at a veterans' memorial on city property. The premise of the injunction was that the cross' permanent presence there violates the California State Constitution. See *Murphy* v. *Bilbray*, 782 F. Supp. 1420, 1426-1427, 1438 (SD Cal. 1991), aff'd, *Ellis* v. *La Mesa*, 990 F.2d 1518, 1520 (CA9 1993), cert. denied *sub nom. San Diego* v. *Paulson*, 513 U.S. 925 (1994); see also *Paulson* v. *San Diego*, 294 F.3d 1124, 1133, and n.7 (CA9 2002) (en banc) (holding that a proposed sale of the memorial violated the state constitution), cert. denied, 538 U.S. 978 (2003). The city has appealed from the District Court's order to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals has ordered expedited briefing and scheduled oral argument for the week of October 16, 2006; it denied, however, a motion to stay the District Court's order pending appeal. In No. 05A1234, the city of San Diego has applied to me, as Circuit Justice, for a stay pending appeal. In No. 05A1233, the San Diegans for the Mt. Soledad National War Memorial, a proposed intervenor in the case, likewise applies for a stay. On July 3, 2006, I issued a temporary stay pending further order. I now grant the city's application, while denying the proposed intervenor's application as moot.

In considering stay applications on matters pending before the Court of Appeals, a Circuit Justice must "try to predict whether four Justices

would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *INS* v. *Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers)); see also, *e.g.*, *Heckler* v. *Redbud Hospital Dist.*, 473 U.S. 1308, 1311-1312 (1985) (Rehnquist, J., in chambers). "This is always a difficult and speculative inquiry." *Legalization Assistance Project*, *supra*, at 1304. Although "a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted," *Heckler*, 473 U.S., at 1312 (internal quotation marks omitted), consideration of the relevant factors leads me to conclude that a stay is appropriate in this case.

To begin with, the equities here support preserving the status quo while the city's appeal proceeds. Compared to the irreparable harm of altering the memorial and removing the cross, the harm in a brief delay pending the Court of Appeals' expedited consideration of the case seems slight. In addition, two further factors make this case "sufficiently unusual," *ibid.*, to warrant granting a stay. First, a recent Act of Congress has deemed the monument a "national memorial honoring veterans of the United States Armed Forces" and has authorized the Secretary of the Interior to take title to the memorial on behalf of the United States if the city offers to donate it. § 116, 118 Stat. 3346. Because this legislation postdates the Court of Appeals' previous decisions in this case, its effect on the litigation has yet to be considered. Second, San Diego voters, seeking to carry out the transfer contemplated by the federal statute, have approved a ballot proposition authorizing donation of the monument to the United States. While the Superior Court of California for the County of San Diego has invalidated the ballot proposition on the grounds that the proposed transfer would violate the California Constitution, *Paulson* v. *Abdelnour*, No. GIC-849667 (Oct. 7, 2005), p. 35, the California Court of Appeal for the Fourth Appellate District has issued an order expediting the city's appeal of the Superior Court decision, see *Paulson* v. *Abdelnour*, No. D047702 (June 20, 2006).

If the state appellate court reverses the Superior Court and allows the memorial to become federal property, its decision may moot the District Court's injunction, which addresses only the legality under state law of the cross' presence on city property, see *Murphy*, *supra*, at 1438. This parallel state-court litigation, furthermore, may present an opportunity for California courts to address state-law issues pertinent to the District Court's injunction. The state appellate court's decision may provide important guidance regarding those issues and the effect, if any, of the recent federal statute.

Although the Court denied certiorari in this litigation at earlier stages, Congress' evident desire to preserve the memorial makes it substantially more likely that four Justices will agree to review the case in the event the Court of Appeals affirms the District Court's order. The previously unaddressed issues created by the federal statute, moreover, reinforce the equities supporting a stay; and the pendency of state-court litigation that may clarify the state-law basis for the District Court's order further supports preserving the status quo. Accordingly, although the Court, and individual Circuit Justices, should be most reluctant to disturb interim actions of the Court of Appeals in cases pending before it, the respect due both to Congress and to the parallel state-court proceedings persuades me that the District Court's order in this case should be stayed pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit or until further order of this Court. If circumstances change significantly, the parties may apply to this Court for reconsideration.

For these reasons, the application in No. 05A1234 is hereby granted. The proposed intervenor San Diegans for the Mt. Soledad National War Memorial was denied leave to intervene in the District Court and in all events seeks no relief beyond the stay granted in No. 05A1234. Separate consideration of the application in No. 05A1233 thus is unnecessary and this application hereby is denied.

APPENDIX A

This appendix contains the complete transcript of the hearing held by Justice Benjamin Cardozo in chambers on July 2, 1936 in the case of

In re Associated Gas and Electric Co.,
4 Rapp 1527 (1936)

The original typescript is in RG 267, Entry 30, Box 2, Records of the Supreme Court of the United States, National Archives and Records Administration. The strike-throughs are in the original. Handwritten corrections — which appear to have been made by Justice Cardozo — are noted in the usual "Publisher's note" brackets.

VOLUME NO. 60

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

– –

IN THE MATTER

- of the –

ASSOCIATED GAS AND ELECTRIC COMPANY,

Alleged Debtor.

– –

259 Sound View Avenue
White Plains, New York,
July 2nd, 1936, 11 A.M.

WELSH & MUNGER
CERTIFIED SHORTHAND REPORTERS
100 STATE STREET
ALBANY, NEW YORK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936

* *

IN THE MATTER

- of the -

ASSOCIATED GAS AND ELECTRIC COMPANY,

Alleged Debtor.

* *

MINUTES OF PROCEEDINGS had in the above entitled matter at a Special Term of the United States Supreme Court held at the residence of Honorable Benjamin Nathan Cordozo [Publisher's note: "Cordozo" should be "Cardozo".], 258 Sound View Avenue, White Plains, New York, on July 2nd, 1936, commencing at 11:00 A.M. o'clock Daylight Saving Time.

– – – –

PRESIDING:

HONORABLE BENJAMIN NATHAN CARDOZO,
JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.

– – – –

APPEARING:

MARTIN C. ANSORGE, ESQUIRE, Attorney and Counselor at Law, 535 Fifth Avenue, New York City, New York, Solicitor for Petitioning Creditors; and

GEORGE J. HATT, 2ND, ESQUIRE, Attorney and Counselor at Law, 74 Chapel Street, Albany, New York, Solicitor for Petitioning Creditors; and

MESSRS. McCLOY AND BRAVMAN, Attorneys and Counselors at Law, 270 Broadway, New York City, New York, (M. FRANCIS BRAVMAN, ESQUIRE, of Counsel, appearing), Solicitors for Petitioning Creditors; and

J. JOYCE KLINGER, ESQUIRE, Attorney and Counselor at Law, 30 Bay Street, Borough of Richmond, New York City, New York, Solicitor for Margaret Johnson, Petitioning Creditor; and

JACOB A. FREEDMAN, ESQUIRE, Attorney and Counselor at Law, 32 Court Street, Borough of Brooklyn, New York City, New York, Solicitor for Lily Koster, Petitioning Creditor; and

JACK LEWIS KRAUS, 2ND, ESQUIRE, JOEL R. PARKER, ESQUIRE, and A. A. LUNIN, ESQUIRE, Attorneys and Counselors at Law, 70 Pine Street, New York City, New York, Solicitors of Counsel to Petitioning Creditors;

MESSRS. TRAVIS, BROWNBACK AND PAXSON, Attorneys and Counselors at Law, 61 Broadway, New York City, New York, (CHARLES M. TRAVIS, ESQUIRE, GARRETT A. BROWNBACK, ESQUIRE, GEORGE M. LePINE, ESQUIRE, and FRANCIS J. SYPHER, ESQUIRE, of Counsel [Publisher's note: There should be a comma here.] appearing), Solicitors for the Associated Gas and Electric Company, Alleged Debtor.

MESSRS. MOSES AND SINGER, Attorneys and Counselors at Law, 30 Pine Street, New York City, New York, [Publisher's note: There should be an open parenthesis here.] ALFRED W. BRESSLER, ESQUIRE, of Counsel, appearing), Solicitors for the Alleged Debtor.

MESSRS. MILLER, OWEN, OTIS AND BAILEY, Attorneys and Counselors at Law, 15 Broad Street, New York City, New York, (CARL M. OWEN, ESQUIRE, of Counsel, appearing), Solicitors for so-called "Dutch Security Holders";

ARCHIBALD L. JACKSON, ESQUIRE, Attorney and Counselor at Law, 149 Broadway, New York City, New York, Solicitor for Voting Trustees of Associated Gas and Electric Company, Alleged Debtor;

MESSRS. PIPER, CAREY AND HALL, Attorneys and Counselors at Law, 1637 Baltimore Trust Building, Baltimore, Maryland, Solicitors for General Investment Corporation and others;

MESSRS. KERNAN AND KERNAN, Attorneys and Counselors at Law, Devereux Building, Utica, New York, Solicitors for John M. Daly, R. D. Fitch, S. J Magee, B. B. Robinson, and Daniel Starch, Escrow Agents under Escrow Agreement dated May 15, 1933;

MESSRS. MORRIS, PLANTE AND SAXE, Attorneys and Counselors at Law, 76 William Street, New York City, New York, ROBERT C.

MORRIS, ESQUIRE, and (ROBERT C. BEATTY, ESQUIRE, of Counsel [Publisher's note: There should be a comma here.] appearing), Solicitors for Irving McD Garfield, Chairman, Louis R. Comstock, Edward F. Colladay, Moses H. Grossman, and Charles F. Tuttle, Secretary, Members of General Protective Committee for Security Holders of Associated Gas and Electric Company and Subsidiaries as Amicus Curiae;

FRANCIS H. HORAN, ESQUIRE, Assistant United States Attorney in and for the Southern District of New York, Federal Building, New York City, New York, Solicitors for the Government, as Amicus Curiae.

FRANK J. WIDEMAN, ESQUIRE, Special Assistant to the Attorney General of the United States, Washington, D.C., By [Publisher's note: "By" should be "by".] LUCIUS A. BUCK, ESQUIRE, Special Assistant to the Attorney General of the United States, Washington, D.C., Solicitors for the Government as Amicus Curiae.

MORRIS KANFER, ESQUIRE, Principal Attorney and Counselor at Law, Washington, D.C., for the Bureau of Internal Revenue of the United States, Washington, D.C.

MR. TRAVIS: If your Honor please, this is an application for a stay pending an application to the Supreme Court for a writ of certiorari.

The case is an involuntary proceeding under Section 77-B against the Associated Gas & Electric Company, which is one of the largest public utility holding companies in the country. The proceeding was instituted a little over two years ago. The debtor — I am referring to the Associated Gas & Electric Company as the debtor, because that is the term used in the statute — had never defaulted in the payment of its interest charges and has never since defaulted. It had at the time no maturity of interest and it has not since had any maturity of principal, and it has not since had any maturity of principal. [Publisher's note: The repetition is in the original.] There is no pending maturity of principal at the present time, and in fact over 93 per cent. of its debt does not mature until after 1947.

At the outset of the proceeding I will give your Honor just a brief history. On motion of the debtor, attacking the sufficiency of the petition, the petition was held insufficient, but the petitioning creditors were given an opportunity to amend and bring in intervenors which they did. The total amount of claims which were presented by the petitioning creditors, and intervenors, was only about 3/100 of 1 per cent. of the total debt as alleged in the petition. Thereafter, at the request of the debtor, Judge Mack, who had been designated by Judge Manton to conduct the case in

the Northern District of New York, separated the issue of good faith from the other issues and tried that question in advance.

Section 77-B provides that an involuntary petition may be instituted by three creditors who, together, hold $1,000 or more of claims, and that if the issues are controverted by the debtor, the Court shall try the issues and if the Court is satisfied that the petition complies with the provisions of Section 77-B, and is satisfied that the petition was filed in good faith, then the Court shall approve the petition, otherwise it shall dismiss the petition. That trial of the question of good faith occurred in October, 1934. Judge Mack, at the close of the testimony on that question, took the position that good faith meant simply honesty of intention and freedom from racketeering. We asked for leave to appeal to the Circuit Court of Appeals but that was denied. The petitioning creditors then asked for a limited form of injunction against the debtor to restrain it, and its subsidiary companies, from making transfers out of the regular course of business without notice to the petitioning creditors. That was heard late in the year 1934 and was decided by Judge Mack about a year ago. He granted that very limited form of injunction.

After his decision, Judge Mack set the matter down for argument early in October of last year, on the principles of valuation to be applied in determining the solvency of such a company as this, stating that he would expect to appoint a Master and would like to give the Master instructions when he did so.

Just before that date came around, the Public Utility Holding Company Act had become law, and our opponents, counsel for the petitioning creditors, were willing to cooperate with us in taking various steps in the simplification of the subsidiary structure to get ready for the effective date of that Act, which was December 1st. The argument was postponed accordingly, and after that we had some negotiations with counsel for the petitioning creditors looking toward some method of action, which would avoid the trial of the issue of insolvency and would enable the company to go ahead with the plans for simplification and with some arrangement with regard to the directors, but those negotiations fell through and we finally, in March of this year, got around to arguing the questions of the principles of valuation.

Now, in the meantime there had been a decision by the Circuit Court of Appeals, of the Second Circuit, placing a different construction on the requirement of good faith; at least we thought so; from what Judge Mack had given to it. In addition, the company had been paying all its fixed interest charges. Notwithstanding the pendency of this bankruptcy proceeding, those earnings had been improving and to such a point that there was every prospect that during the current year dividends would be earned on its preferred stock, in whole or in part. We felt that under those

conditions it would be an outrage to have to go ahead with the trial of insolvency in a case of this sort. It was not a simple case. This company is a holding company. It has 95 operating subsidiary companies, situate in 26 States and the Philippine Islands. There are practically no outstanding minority interests in the subsidiary companies and a valuation of the interests of the debtor, through various sub-holding company links, would involve a valuation of the physical properties of all of these operating companies, various elements of tangible and intangible values, such as have been present in rate cases, and require a tremendous amount of investigation and expert testimony, and being convinced that there was no necessity, under the circumstances of the case, for any trial, and that the requirements of good faith, as laid down by the Circuit Court of Appeals, had not been met, we made a motion to dismiss the petition. That was heard by Judge Mack in April of this year and after hearing argument he denied the petition with an opinion distinguishing or attempting to distinguish this case from the one in the Circuit Court of Appeals on which we had principally relied. We applied to the Circuit Court of Appeals for leave to appeal and that was denied. We asked for or made a motion for rehearing and that was denied. So that we have been unable to obtain any review from the Circuit Court of Appeals, although we have tried now on three occasions.

We believe that this is a situation which presents important questions for the Supreme Court. There have been no decisions in the Supreme Court construing the requirements of good faith under Section 77-B of the Bankruptcy Act, or what is necessary, both by way of allegation and proof, to show compliance with the provisions of Section 77-B.

THE COURT: What decision of the Circuit Court of Appeals are you asking the Supreme Court to review; the refusal to allow the appeal?

MR. TRAVIS: Yes, your Honor.

THE COURT: On the ground that was an abuse of discretion?

MR. TRAVIS: Yes, your Honor, and we propose to follow the practice in the Fox case. In that case, according to the record, Mr. Fox was fined for contempt, as a result of a refusal or failure to attend on a supplementary proceeding, and he applied for leave to appeal to the Circuit Court of Appeals, which leave was denied, according to the affidavit of his attorney. Oh, yes, the Meyer case is the one I have in mind.

I was going to say that from the standpoint of this Fox case --

THE COURT: The Meyer case did not involve any such question. That did not involve an abuse of discretion. That ~~inol~~ involved the question of power.

MR. TRAVIS: Well, in the Meyer case, your Honor, there were --

THE COURT: The question there was whether the remedy was by appeal from the decision of the District Court or by petition for review to be allowed by the Circuit Court of Appeals.

MR. TRAVIS: Yes, your Honor, but in that case there was a petition for leave to appeal which was denied by the Circuit Court of Appeals, and the opinion of the Supreme Court, Mr. Justice Stone, indicates that the Supreme Court did review the exercise of discretion.

THE COURT: Well, as incidental to the other questions we took up. We may have considered everything, but we did not hear the case for the purpose of reviewing the exercise of discretion.

MR. TRAVIS: That is the decision. That is the only question we have and the one on which I --

THE COURT: Now, what are you asking that I stay; the hearing before a Master pending application for certiorari?

MR. TRAVIS: Yes, your Honor.

THE COURT: Of course, under the Magnum [Publisher's note: The letter "u" in "Magnum" is a handwritten correction over the letter "a".] vs. Coty [Publisher's note: The letter "y" in "Coty" is a handwritten correction over the letter "e".] case, a [Publisher's note: The word "a" is a handwritten correction over the word "the".] Justice of the Supreme Court stays proceedings on an [Publisher's note: The word "an" is a handwritten insert.] application for certiorari only on the plainest showing of error or upon the showing of hardship so very great as to make the very strongest appeal to the exercise of his discretion. Where the Circuit Court of Appeals has refused a stay, it is only in an extraordinary case a Justice of the Supreme Court grants it. HAs [Publisher's note: "HAs" should be "Has".] the Circuit Court of Appeals refused a stay here?

MR. TRAVIS: No, your Honor, they granted a stay pending an application for leave to appeal to the Circuit Court of Appeals. That automatically fell when leave was denied. We applied to Judge Manton two days ago for a stay and Judge Manton said that he would prefer to have it taken up, in the first instance, with Mr. Justice Stone, Circuit Justice. We then communicated with Mr. Justice Stone night before last and he said that he was leaving early this morning for Maine and that his calendar was completely filled up and that if we brought it before your Honor, he wanted us to tell you that it was perfectly agreeable to him for your Honor to handle it. We then went back to Judge Manton and reported to him and Judge Manton suggested our coming before your Honor this morning, and

called up to make the appointment, so that no application for a stay to the Circuit Court of Appeals has as yet been acted upon. If your Honor thinks we should --

THE COURT: Well, I think what has happened is, perhaps, almost equivalent to the denial of a stay by the Circuit Court of Appeals. Judge Manton has in effect denied it. The Circuit Court of Appeals has refused to hear the case. It is obvious that court would refuse to grant a stay or at least it may be assumed it would, so I am not laying stress on your failure to go to the Circuit Court of Appeals although that is the ordinary practice, but, in any event, the Circuit Court of Appeals has considered the case, has found there is no abuse of discretion in any action taken by Judge Mack, and naturally does not hold that there has been any abuse of discretion in [Publisher's note: The word "in" is a handwritten correction over the word "by".] its own action.

Now, it would be a very rare case in which the Supreme Court would grant a writ of certiorari to review the exercise of discretion in a matter of that kind.

MR. TRAVIS: Yes, your Honor, I realize it.

THE COURT: A very rare case, and I do not believe I ought to grant a stay of proceedings that would tie up the whole case for the summer on the suggestion that you are going to apply for a writ of that sort. You are still free to apply for it and if the Supreme Court grants it, these proceedings would be futile, if reversed by the Supreme Court, but it seems to me the allowing of a writ of certiorari of that kind is not a sufficient ground to justify me, as a single Judge, in tying up this case for the summer months. If it were a matter of tying it up for a week or two that would be different.

MR. TRAVIS: Your Honor, under ordinary circumstances, I presume there would not be any great hardship in going ahead with the trial but this is such an unusual case, involving so much expense and so much interference with the normal conduct of the business of this debtor, and subsidiary companies, we feel it is one that really requires an extraordinary remedy.

THE COURT: Well, I shall [Publisher's note: The word "shall" is a handwritten correction over the word "will".] be glad to listen to anything further that may be said in support of the application or in opposition to it, but I approach the case with a feeling that you would have to make out a very strong showing to justify me in granting a stay.

MR. OWEN: May I be heard, your Honor?

THE COURT: Certainly.

MR. OWEN: Our firm, Miller, Owen, Otis & Bailey, represent the so-called Dutch security holders. They have over 5 per cent. of one class of stock, and accordingly intervened in the proceedings as of right, and I join with Mr. Travis in this application.

The proceeding itself, the whole 77-B proceeding, as he has pointed out, is a most unusual proceeding. We have an alleged debtor who had never defaulted in anything and has not defaulted since. Mr. Kraus will claim that it has defaulted on some buy-back of security obligations given by enthusiastic salesmen when they sold securities. Except for that, no other default has been pointed to. He claims something in the nature of an alleged default because there were certain securities, convertible at the option of the debtor, and the debtor exercised its option to convert those securities into stock. With respect to the buy-back obligations, if existing, they were created in 1928 and 1929. The securities involved went down in the market to almost nothing and not withstanding that a very few inconsequential suits have been brought on any such claims. As your Honor may be well aware, practically every company in the United States, that sold securities in the period of 1929, was confronted with claims of that kind. I think that can be disregarded as any evidence of default on the part of this debtor. So, we have a situation in which a proceeding was brought to put a great company into a 77-B proceeding and wipe out its stockholders, based on no defaults existing prior to the proceeding and no defaults since, based on a claim of insolvency and acts of bankruptcy.

The acts of bankruptcy, which are alleged, except one, consist in the payment of interest to these petitioning creditors, interest which they have received. One act of bankruptcy claimed is that the debtor in 1934 bought from one Tempe Parker some securities in the neighborhood of three or four thousand dollars, an inconsequential situation, taking into account the size of this great corporation, if the allegation can be proved.

Now, when they carry on the proceeding two years after it has been brought, and with the great improvement in business, we have reached a point where it is still insisted we shall go to the great expense of trying whether this corporation is insolvent and has committed an act of bankruptcy, and what is asked to be stayed, during the summer, pending the application for a writ of certiorari, is the trial before an appointee of Judge Mack, who, he says, will be a mere examiner.

In March of this year Judge Mack said he would not appoint a Special Master, that he found so much good was to be obtained by his hearing the case himself, so that he would have the evidence at first hand, after a hearing of three days of argument, as to the principles to be applied by a Special Master, he said he would not determine the principles

to be applied, he would rule on the evidence presented, and he would not appoint a Special Master.

Now, due to the exigency of his taking a very proper vacation, he is pressed to appoint a Special Master and under the pressure he says, "All I will do is appoint simply one who will be an examiner, and I want to say when I come back I may terminate the work he is doing and go on myself." That is not a very satisfactory way, particularly inasmuch as Judge Mack certainly cannot at this stage of the game direct that Special Master or that examiner as to what kind of testimony to take, what rules of values to apply, so we may have a proceeding during this summer before such examiner that will turn out to be a total waste of energy and entirely futile. That is what is really asked to be stayed pending an application by this debtor, under these circumstances, to have reviewed these great questions whether a proceeding at that time and at this time, two years after it is brought, should not be terminated either for lack of good faith in the statutory sense it was brought or that the proceeding at this time is purely futile.

We feel this case is an extraordinary case where your Honor might very well grant a stay during the summer months.

THE COURT: Have you Judge Mack's opinion dealing with the case?

MR. OWEN: On good faith?

THE COURT: Yes, on any question?

MR. KRAUS: There are three opinions he has written at different times on that subject.

MR. TRAVIS: I think they are all together in our petition for leave to appeal. It is the opinion of Judge Mack which he rendered in 1934.

THE COURT: When was that brought before the Circuit Court of Appeals?

MR. BROWNBACK: In December.

MR. TRAVIS: In December of that year.

THE COURT: You are not asking to review that?

MR. TRAVIS: No, your Honor.

MR. KRAUS: And no application was made for certiorari in connection with that refusal.

THE COURT: I was referring a [Publisher's note: The space after the word "a" is a handwritten correction.] moment ago to the question of

good faith, something the Supreme Court might consider that if it be brought by this petition.

MR. OWEN: Yes, the petition was based on the Manati Sugar Case decided since, and we felt laid down proper rules for the decision of the case which had not been applied in the earlier case.

MR. TRAVIS: Judge Mack, in his opinion, practically confined good faith to honesty of intention. That is at page 30, and his opinion of May of this year is at page 18.

(Opinion handed to the Court.)

THE COURT: As I understand it, an application was made to Judge Mack to dismiss on the ground of bad faith and that was denied, leave to appeal was denied, back in 1934, and then an application for a reargument, in effect, was made in 1936.

MR. TRAVIS: No, your Honor. That is not quite it, your Honor. There was -- the question was decided -- was tried as a separate issue in 1934 and Judge Mack then held that the petition was filed in good faith but what he held was that good faith meant honesty of intention and that he found honesty of intention, and, therefore, held the petition was filed in good faith. We did argue that it meant something more than that but Judge Mack held otherwise. After that we did try to get an appeal but were denied an appeal and after that there were some additional decisions by the Circuit Court of Appeals of the Second Circuit and also decisions of some of the Circuit Courts of Appeal of other circuits, bearing on these bankruptcy amendments and our application in April of this year was in an attempt to review Judge Mack's decision on the facts, that it was not honesty of intention at all.

Our proposition was that Section 77-B, in requiring good faith meant that there should be a prompt and bona fide effort on the part of the petitioning creditors to produce a feasible plan and to gain support for the plan and that two years had expired and practically nothing [Publisher's note: There probably should be a "had" here.] been accomplished in that connection, and that the allegations also of the petition were insufficient to comply with the requirements as laid down by the Circuit Court of Appeals of the Second Circuit.

THE COURT: That later phase of the case, it seems to me, could have been brought up on petition to review the original ruling because any intervening events naturally would have to stand on a different basis.

MR. TRAVIS: We tried to bring it up originally, your Honor.

THE COURT: Yes, but you made no application to appeal to the Supreme Court then.

MR. TRAVIS: No, we did not at that time.

THE COURT: That was away back in 1934.

MR. OWEN: Your Honor, part of the situation with respect to the present petition was this, our very strong claim that there never had been any need of reorganization and that the intervening events of two years, the improvement of the financial condition of this debtor, demonstrated that whether or not there had ever been any foundation for any belief there was a need of reorganization, it was clear there was now no need of reorganization.

THE COURT: I understand you claim intervening events strengthen your original position. That is about all.

MR. OWEN: And intervening decisions had shown that the good faith was not limited to honesty of intention but required that the petitioners should have a plan ready, which they never did have, that they should give evidence of general support, which Judge Mack admits in his opinion they do not have and that there should be a need of reorganization which we claim never had been demonstrated and could not be demonstrated.

MR. TRAVIS: One of my associates calls my attention to the fact I did not hand your Honor a copy of our application for a stay.

THE COURT: Does anybody else wish to be heard in support of the application?

MR. BROWNBACK: I would like to say, your Honor, one thing, that in the fall of 1934 there was very little law on what was meant by the question of good faith. Judge Mack did decide the question, that it was honesty of intention, and later decisions have confirmed that it is not only honesty of intention but it is determined on a factor such as whether there is a need for the relief.

In regard to this stay, I do not know whether Mr. Travis has pointed out that we have earned our fixed charges by a substantial margin. No one will be injured and everyone has been paid and everyone will be paid, and a creditor cannot ask anything more than payment.

THE COURT: Is there anybody to be heard in opposition?

MR. BROWNBACK: I want to add one thing. In our petition for rehearing, which we filed, that was based largely on your Honor's decision in the Lowden case last fall, although when we filed our petition that had

not been published and had not come to our attention, and your Honor laid down the principle that if after the petition, the company becomes solvent, the petition should be dismissed. We think this petition raises the question, assuming we were unable to pay our debts in June, 1934, then we have a case where we have become able, and whether intervening ability to pay debts, if it becomes a fact during the interval, should not call for a dismissal of the petition.

MR. KRAUS: I am sorry to state in the historic narration of events that have preceded the instant application, it has been stated to your Honor many things that are scarcely borne out by the record of what has transpired.

If I may be permitted to give a brief sketch of the antecedents I think it may be of some help to your Honor in disposing of this application before him. We must go back, even prior, for the moment, to the actual filing of the petition, under Section 77-B, in June of 1934. In company with associate counsel, I, representing certain security holders, of this company, held a series of conferences with counsel for the debtor in 1933 and up to the filing of the petition in 1934, the object of which was to urge on the debtor a decent form of reorganization which was obviously essential.

After having transferred from the Associated Gas & Electric Company, the debtor in this case, its assets, to its one subsidiary, the Associated Gas & Electric Corporation, the company then went to its security holders and virtually said to them, "If you want the same security that originally stood behind your debentures, you must accept 50 cents on the dollar in the obligations of the subsidiary company to whom these assets have been transferred."

Now, that will illustrate the essential equities which anteceded the entire litigation which has resulted.

In June, of 1934, after the passage of Section 77B, we, who had strenuously fought against the disruptive influences of a receivership or ordinary bankruptcy, where the subsidiaries could not be held in with the parent holding company, perceived that Section 77B presented a genuine opportunity constructively and really to work out some salvation for the unfortunate security holders of a system that had in a large measure been builded on grossly inflated valuations and subjected to a management which has been publicly characterized adversely by every investigating body that has had occasion to deal with it.

Now, in June, of 1934, thereupon, certain of the security holders of the system were selected as the banner bearers in whose name to file the original petition that was filed. Two things happened. In the first place, the matter was duly assigned by the Clerk of the Northern District Court, in its regular order, to Mr. Justice Cooper. The debtor made a motion to

dismiss the petition that was originally filed and made that motion returnable before Mr. Justice Bryant, to whom the case had not been assigned, and secured an ex parte extension of time to answer, until after the determination of the motion to dismiss. Judge Cooper, thereupon, issued a show cause order accelerating or asking them to show cause why the prolonged return date of the motion to dismiss should not be accelerated and the matter should not be heard before him. Thereupon, this debtor prevailed upon Judge Cooper to certify his disqualification to the senior Judge of the Second Circuit, and that is the manner in which Judge Mack came to be assigned to this case. I might add in that connection that the debtor has, just within the last few weeks, made application to Judge Mack, under both sections 20 and 21 of the Judicial Code, seeking to have him disqualify himself both on the grounds of bias and prejudice and upon the ground of an asserted interest, all of which, when Judge Mack referred the same to Judge Patterson for an advisory opinion, he characterized as ~~as~~ frivolous.

Now, there followed after the matter was referred to Judge Mack, a series of postponements, in each instance at the instigation of the debtor, and during this period by direct approaches which were made to the clients of attorneys for petitioning creditors, four out of five of those original petitioning creditors were induced by this debtor to withdraw. The Tempe Parker incident, which is one of those incidents to which Mr. Owen has referred, is one where, on the record of this case, the very facts that would be brought out show that she, one of the original petitioning creditors, was simply paid off in being persuaded by this debtor to withdraw her participation in these proceedings. Thereupon, ten additional creditors joined -- were used to join the surviving original petitioners and thereupon the petition was amended and they were allowed to intervene by Judge Mack, who heard all the proceedings from that time forth.

Now, the debtor was the one who persuaded Judge Mack to hear its motion to dismiss on the ground that good faith could not be established, in advance of the insolvency hearing, with the consented stipulation that for such purposes the insolvency of the debtor and its commission of acts of bankruptcy should be deemed to have been proved. Those hearings were extensively conducted and Judge Mack allowed the widest latitude to this debtor in its efforts to tear down and to destroy the numerous petitioning creditors, that is, ten or eleven of them, and their counsel, and at the conclusion Judge Mack held, not that the debtor had failed to show bad faith, but that the petitioning creditors and their counsel had affirmatively established their good faith within every intent of this Act and the statement that is made here to your Honor that he limited that to mere honesty of intention is simply contrary to the record and contrary to his decision because he had said before hearing the witnesses called on be-

half of the petitioning creditors, or their part of the case, that if it were a mere question of honesty of intention, they would not have to take the stand at all.

Now, after that was decided in that fashion, they made a motion before Judge Mack to reargue that and that was reargued and Judge Mack again wrote a considered written opinion on the subject again denying their motion to dismiss and an order denying their motion to dismiss was entered and the debtor applied to the Circuit Court of Appeals for leave to appeal [Publisher's note: The letter "a" in "appeal" is a handwritten insertion.]. That leave was unanimously denied. This Manati case had not been heard by the Circuit Court of Appeals at that time, but the debtor certainly was familiar with it because both to Judge Mack and to the Circuit Court of Appeals the debtor cited in its briefs the decision of Judge Cox, in the Court of first resort, that constituted the basis of the affirmance by the Circuit Court of Appeals in the Manati Sugar case. The Manati Sugar case, incidentally, I ~~mad~~ may add, was decided in January of 1935, and the present application to dimiss was ~~nott~~ not made until March or April of 1936, a most astounding period of time in which counsel, and there are numerous and distinguished counsel for the debtor with extensive offices, failed to hear what was the opinion of the Circuit Court of this Department, which has become so famous in cases pursuant to 77B.

In the interim a proceeding was instituted supposedly not by the debtor, but by a company officered by officers of the debtor and so forth, before Judge Bryant, seeking to prohibit Judge Mack from continuing in the case. That proceeding was brought in the winter of 1934. From the denial of that application for a writ, an appeal was also taken to the Circuit Court of Appeals and eventually an application was made to the Supreme Court for a writ of certiorari which was similarly denied.

Following the conclusion of the determination of the issue of good faith, an injunction was sought, and in deciding whether or not to allow an injunction, Judge Mack held that his setting the time for a continuation of the trial would necessarily depend upon whether an injunction existed or not, because patently he conceived there ~~were~~ would be less exigency requiring a speedy trial in the event that an injunction were granted than if none were allowed and also because it was apparent to everyone that one of the things that would necessarily be established by the petitioning creditors, in persuading Judge Mack to grant the limited injunction which they sought, was a showing of the debtor's insolvency.

I might parenthetically add that in granting the injunction which he did in an opinion of June 17, 1935, Judge Mack held that the petitioning creditors had established a prima facie case of insolvency so that that is also a part of the record of these proceedings. The injunction was not alone extensively argued before Judge Mack but there were voluminous

affidavits and memoranda back and forth, literally running into hundreds upon hundreds of printed pages, affidavits, sur-rebuttal affidavits, and re-sur-rebuttal affidavits on behalf of various experts on both sides, so that the decision Judge Mack made in granting the injunction was with a full knowledge of such facts as had been brought to his attention by both sides in such regard.

Now, after the injunction was granted, and again at the very first moment when we had an opportunity to proceed, we earnestly entreated the trial of the issue of insolvency. I think that your Honor will realize that if this debtor were willing to face that issue, if this were such a contemptible allegation and so easily disproved as they assert, they long ago, at the very inception of these proceedings, before we went through all the trials and tribulations that these intervening years have witnessed, they would have said, "Produce your proofs and we will meet you on them" and there would have been a speedy determination of the matter.

May I also respectfully direct to your Honor's attention the fact that the Congress, in 77-B, stated the issues of insolvency and good faith, if they are controverted in the answer in the proceeding, shall be summarily determined by the Judge in charge of the case, so that we have here a proceeding now that has been pending for upwards of two years where the essential issues have yet to be met because of the successful assertion by this debtor of every type of technical application and dilatory play that has ever been witnessed in any case in so far as we have been able to ascertain in legal history.

Now, if I may briefly continue --

THE COURT: Are you submitting any affidavit in opposition?

MR. KRAUS: I have only seen these papers a few moments before coming in here. They were handed to me on your Honor's lawn. May I point out --

MR. TRAVIS: Your Honor, Mr. Kraus had his copy of the application we made to Judge Manton, and we have not made any changes.

MR. KRAUS: There have been quite discernible changes made in this without notice to me until I received it five minutes before entering your Honor's house.

MR. TRAVIS: Twenty minutes before.

THE COURT: That is all right, I simply inquired with regard to it.

MR. KRAUS: Your Honor inquired whether the new motion to dismiss, which was, of course, nothing but a motion for a reargument, was not a motion for reargument and the debtor's counsel assured your Honor that

that was not so. In Judge Mack's opinion denying that -- I don't know whether that has been given to your Honor or not --

THE COURT: Yes, he characterized it as in effect a motion for rehearing, I noticed that.

MR. KRAUS: Yes, he said the application was for a rehearing because of an interim occurrence.

Of course, the only real ground of interim occurrence they allege is the Manati Sugar decision, so readily distinguishable on its face as to be an authority for us and not against us in this case, and I think that has been made patent by the refusal of the Circuit Court of Appeals to allow an appeal from the denial by Judge Mack of the petition to dismiss brought in April of this year, and may I also respectfully direct your Honor's attention to the fact, although I do not believe it was mentioned, that after the Circuit Court of Appeals denied that application for leave to appeal, the debtor sought a reargument.

MR. TRAVIS: I stated that.

MR. KRAUS: On the application for leave to appeal in June of this year, and that that application for leave to reargue was similarly denied.

Reference has been made to the pausity [Publisher's note: This probably should be "paucity".] in numbers and smallness in amount of claims of petitioning creditors.

THE COURT: I do not believe that concerns me on an application of this kind.

MR. KRAUS: I might state, however, without burdening your Honor with the details of the situation, may I point out incidentally that there have been some 59 hearings in this case, consuming some 7,000 pages of testimony and argument alone in this proceeding, up to this time, largely produced by efforts of the defendant to raise technical questions of various kinds, and by means of which thus far they have successfully evaded and avoided a trial on the merits,

Now, Judge Mack is unfortunately about to sail for Europe. He said that if it were not for the necessity of taking that vacation, which exists in his case, that although he had made previous plans, he would postpone them, because he regarded the delay that has transpired in this case as being so unfortunate.

Now, the debtor, or those who represented it, stated that all that will happen, following the granting of a stay, is that the hearings that are to be conducted in his absence by a master, if he be allowed to appoint one, and he is prevented, he feels ethically, while these applications for a stay are pending, from going forward to appoint a master, and he has not been

able to do that because immediately his disqualification was refused the debtor made the application for a stay here just as they have also notified us they are to make an application for a stay before Judge Manton this afternoon in conjunction with their application for leave to appeal from the refusal to disqualify.

Now, besides preventing Judge Mack from going forward and appointing a Master to go forward and get to these essential books and records, among other things, where statutes of limitations have been running, which is part of the defense tactics, we believe, of this debtor, against both civil and criminal liabilities on the part of the management, as we have asserted, weekly taking out thousands of dollars in so-called management fees, which we believe to be the property of our clients and other security holders, every month's delay simply adds to those possibilities which we consider dire in this case.

Besides that, this injunction is pending.

If a stay is granted in such form as is applied for, when the debtor serves us with notices of these different transfers it is making from time to time, we can do nothing about it.

MR. TRAVIS: No, no.

MR. KRAUS: How can we, in the form of stay which you ask?

MR. TRAVIS: No, no.

MR. KRAUS: It is certainly the form of your application.

MR. TRAVIS: The Circuit Court of Appeals has issued stays up to this time and we have not claimed it interfered with the notices under the injunction.

THE COURT: I do not think it is necessary to go into details of that kind.

MR. KRAUS: I am only explaining generally why we believe here that where all they are doing is asking for a certiorari, a stay pending a certiorari from the denial by the Circuit Court of Appeals of the motion for leave to appeal and reargument of that motion for leave to appeal from the denial of a motion previously denied by the Circuit Court of Appeals, and by the learned Justice below, overva [Publisher's note: "overva" should be "over a".] period of years, where if they want to bring such issues as these -- they have said they were then novel, and if they were novel in 1934, why was not the application for certiorari made to the Supreme Court in 1934? They are less novel today, certainly, than they were in 1934. For all those reasons we respectfully submit this application should not be entertained by you.

MR. JENNINGS: May I say a word?

THE COURT: Yes.

MR. JENNINGS: I am speaking in behalf of the United States. The United States in December of 1935 determined there was something in excess of $50,000,000 due to the Government from the debtor. Pursuant to that determination a claim was made in the guise of a deficiency assessment against the debtor which has not been paid. The Government has followed these proceedings quite carefully and has appeared from time to time as amicus curiae in the proceedings both in the District Court as well as in the Circuit Court of Appeals. Briefs have been filed, most of which have been directed to the questions which have been advanced, we believe, for the purpose of delay. As soon as we received information of the proposed action by the debtor, we prepared very quickly and in rather rough form a brief, as amicus, on the question which is before your Honor today. At the time the brief was prepared it was with the understanding that the matter would be presented to Judge Manton. For that reason the brief is not in the best of form. The brief purports to set forth reasons why this stay should not be granted, on two grounds: First, that the determination is not a final one, and second, that this is not a proceeding which the Supreme Court is likely to review. If your Honor so desires, we would be glad to file that brief with you on this question.

THE COURT: You may file anything you wish. Does anybody else desire to be heard?

MR. MORRIS: Yes, your Honor, I would like to address the Court. My firm represents the General Protective Committee for Security Holders for the Associated Gas & Electric Company and Subsidiaries. We speak in opposition to this application for a stay. We do not think that there should be a stay. We are very apprehensive that if there is a stay there will be a continued spending in an extravagant way by these management corporations and agencies. We deem it, therefore, of great importance that the case should be permitted to proceed.

I observe in this petition for a stay, which was just handed to me just prior to my entering this room, that it is stated that there was not at the commencement of this proceeding and has not been at any time since any substantial demand by security holders of the debtor for a reorganization of the debtor under Section 77B of the Bankruptcy Act.

I may say that the committee that my firm represents, represents security holders in, I believe, 12 States and the District of Columbia. The character of those security holders is, banks, trust companies, estates, insurance companies, and I believe a hospital and various individuals, and the amount, I will state generally, is several times the amount represented by the petitioning creditors here. In other words, we represent a very con-

siderable number of people all over the United States who are very much interested in this proceeding and its outcome.

I respectfully offer my opposition to the petition for the stay.

MR. OWEN: Mr. Morris, may I ask how many security holders of the debtor, and how much of the security holders of the debtor you represent?

MR. MORRIS: I regret I cannot answer that question accurately at this time.

MR. OWEN: Can you answer it generally?

MR. MORRIS: I have answered it generally as to numbers. I cannot speak of the amount.

MR. OWEN: I thought from what has been said you are speaking of creditors of the System and not creditors of the debtor.

MR. MORRIS: Creditors of the debtor and subsidiaries as well.

MR. OWEN: That is different. We have pressed, your Honor, for an answer to this question with respect to this committee, which was not permitted to intervene, but we have pressed for an answer to that question every time it has been up for hearing and have never been able to get anything but a general answer.

MR. KRAUS: May I respectfully ~~take~~ state the fact that the interests represented by Mr. Owen are junior stockholders of this company and in the event insolvency is established there will be no equity for them.

MR. TRAVIS: They are vitally interested for that reason.

I do not want to take up your Honor's time any further but there are certain statements madeby [Publisher's note: "madeby" should be "made by".] Mr. Kraus which in my opinion are misleading and entirely untrue with respect to this company's activities and his statement about criminal liability is certainly not frank in view of the fact the United States District Attorney investigated this company for two and a half years and only last December dismissed the proceeding and the Grand Jury found no indictment.

MR. KRAUS: On the ground the particular acts investigated by it had in a large measure had statutes of limitation act against them.

MR. TRAVIS: No.

MR. KRAUS: That is my understanding.

MR. JENNINGS: That is my understanding also.

MR. TRAVIS: If those had expired, there is no question of any criminal liability at this time.

Mr. Kraus stated that Judge Mack, in the injunction case, held that the petitioning creditors had proved a prima facie case of insolvency. That is misleading. Judge Mack said for the purpose of the limited form of injunction required they had proved a prima facie case of insolvency and he continued that that meant that they had not proved that the situation was not merely a negligible case of insolvency. He did not hold that for the purpose of this case as a whole, that any prima facie case of insolvency had been found.

Now, your Honor, with respect to this alleged indulgence in every dilatory tactic, as a matter of fact, before the petition for dismissal was filed in April of this year, this debtor had only made three or four motions in the two years of this proceeding; one, an original motion to dismiss the petition for insolvency, and Judge Mack held that was insufficient. Another was an application for a separate trial of the issue of good faith, and another one for the rehearing of that issue, and a motion to strike out an affidavit. That is all we have heard and we never, before this petition was filed, obtained a single stay from the Circuit Court of Appeals except when Judge Mack decided to hear this trial himself, he decided to hear it in his chambers in New York City, although the case was then pending in the Northern District. We believed that he had no power to hear it there. We went to the Circuit Court of Appeals and applied for leave to appeal. They granted it and held Judge Mack had no power to hear the trial of the case outside the district in which the case was pending. The case was subsequently, however, transferred as a whole, on application, in accordance with the provisions of Section 77B.

MR. KRAUS: Also an appeal was taken from that and a stay was granted pending that appeal; I mean, a motion for leave to appeal, and denied.

THE COURT: Gentlemen, I am entirely clear that [Publisher's note: The word "that" is a handwritten insertion.] no case has been made [Publisher's note: A comma has been struck here.] which would justify me in granting a stay here. Under [Publisher's note: The word "Under" is a handwritten correction over the word "In".] the decision in [Publisher's note: The word "in" is a handwritten correction over the word "of".] Magnum [Publisher's note: The letter "u" in "Magnum" is a handwritten correction over the letter "a".] Company against Coty [Publisher's note: The letter "y" in "Coty" is a handwritten correction over the letter "e".], a stay [Publisher's note: The words "of the Court" have been been struck here.] is granted by a Justice of the Supreme Court only on a showing of manifest error or overmastering hardship. I feel the applicant has not established either.

If this case were to come before the Supreme Court the merits of Judge Mack's ruling would not be directly considered. All that would be before the Court would be the question [Publisher's note: The word "of" has been struck here.] whether there had been an abuse of discretion on the part of the Circuit Court of Appeals in refusing to allow an appeal from Judge Mack's order. In the event an abuse was found, then the matter would go to the Circuit Court of Appeals for a ruling on the merits.

Now, the question before the Court would not even be whether there was an abuse of discretion in refusing to allow the appeal from the first order, because the time for review of that order has long since expired. The question would be whether, if the Circuit Court of Appeals had refused to allow that appeal, there was an abuse of discretion in refusing to allow an appeal from the second order, upon an application made a year or a year and a half later.

Obviously the chance that the Supreme Court would grant a writ of certiorari to review the question [Publisher's note: The word "of" has been struck here.] whether that constituted a patent abuse of discretion, is a very slim possibility.

Then, when we pass to the question of hardship, it is, of course, impossible to say that [Publisher's note: The word "that" is a handwritten insertion.] inconvenience will not be suffered by the applicant if this stay is refused and a writ of certiorari is ultimately granted and the decree reversed. I think that is a very slender possibility. On the other hand, as against any inconvenience suffered by the applicant must be set the inconvenience that will be suffered by those who oppose [Publisher's note: The letter "d" has been struck from the end of the word "opposed".] the application, and when I hear the many proceedings that have been had in this case, as they have been detailed by counsel, the many [Publisher's note: The words "the many" are a handwritten insertion.] maneuvers for which perhaps the debtor is not fully responsible, but which none the less have served to prolong the proceedings,-- when I hear all that and then I am told there is a desire now to tie the case up for a period of months on what seems to me the very slender possibility that [Publisher's note: The word "that" is a handwritten insertion.] the Supreme Court will grant a writ of certiorari, [Publisher's note: The comma is a handwritten correction over a period.] I feel there is no overmastering hardship, even if there is some element of hardship, in refusing the stay, and having in mind all [Publisher's note: The word "of" has been been struck here.] those questions, and gathering from what has been said that the application ought to be promptly decided, I feel that the motion for a stay must be denied.

MR. TRAVIS: I want to thank your Honor for the very courteous hearing.

THE COURT: It has been a pleasure to have seen [Publisher's note: The letter "s" in "seen" is a handwritten correction over the letter "b".] you all.

With reference to these papers, I will file with the Clerk of the Supreme Court the petition. This is the petition to the Circuit Court of Appeals?

MR. TRAVIS: These were all the supporting papers.

MR. BROWNBACK: They were incorporated in the petition.

THE COURT: I will file only this petition. Here is a brief on behalf of the Government. There is no objection to filing it. There may be no necessity, perhaps, but I might as well file that, and I will endorse on these papers the statement that after hearing [Publisher's note: The words "that after hearing" are a handwritten correction over the word "about".] the argument of counsel, and giving consideration thereto [Publisher's note: The words "and giving" and "thereto" are handwritten insertions.], [Publisher's note: The words "and that" have been struck here.] the application is denied.