## TAX DEPOSITION QUESTIONS: 8. COURTS ARE CLOSED

# 8. COURTS ARE CLOSED

## Introduction

**The Courts act in collusion with the Executive and the Legislative to perpetrate the income tax fraud and deny the Constitutional protections of Due Process and Separation of Powers.**

## Findings and Conclusions

**With the following series of questions, we will demonstrate that the federal courts are involved in a conspiracy to protect and uphold the federal income tax, in violation of the laws of the United States, the U.S. Constitution, and that these acts amount to Treason against the sovereign People described in Article III of the Constitution and punishable by execution. We will also show that:**

- **Even for crimes where the punishment includes incarceration, tax defendants are routinely denied the right to present defenses based on the Constitution.**
- **The Courts act in collusion with the Executive and the Legislative to perpetrate the income tax fraud.**

Section Summary

## Witnesses:

- Irwin Schiff (National Tax Expert)
- Joseph Banister (Ex. IRS Criminal Investigator)
- John Turner (Ex. IRS Collection)

Transcript

Acrobat version of this section including questions and evidence (large: 5.99 Mbytes)

## Further Study On Our Website:

- What Happened to Justice?: Why There's No Justice in Federal Court and What to Do About It (OFFSITE LINK) - SEDM
- Arguments Against Nonpublication of Court Rulings
- Authorities on Jurisdiction of Federal Courts
- Conflict of Interest Convictions-Antishyster News Magazine, Vol. 8, No. 1
- Do Judges Lie?
- Great IRS Hoax book:
  - Section 1: Introduction
  - Chapter 6: History of Federal Government Income Tax Fraud, Racketeering, and Extortion in the U.S.A.

- Section 6.6: Judicial Conspiracy to Protect the Income Tax
- www.jail4judges.org
- Kharma and the Federal Courts
- Press Clippings Related to the Use of Nonpublication by Courts
- Law or Equity?
- Law Articles Relating to Nonpublication
- Natural Order
- Nonpublication.com
- Our Legal Circus: Clowns, Dancing Bears, and Attorneys
- Publication Rules of Court for the United States and Federal Circuits
- Public Corruption Cases
- Rebellion in the Jury
- The Best Judges Money Can Buy
- The Circle of Strife
- The Federal Mafia Courts Stole Your Right to Trial by Jury!
- The Supreme Court Scam
- The Wicked Stepgovernment
- Three Elements that can Render Court Rulings Invalid
- U.S. Attorney Manual §1-4.000: Standards of Conduct
- U.S. Attorney Manual §9-20.000: Maritime, Territorial, and Indian Jurisdiction

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8.1. Admit that 26 U.S.C. § 7203 imposes a penalty for the crime of willful failure to file a tax return. (WTP #232)

- Click here for 26 U.S.C. §7203 (WTP Exhibit 150)

8.2. Admit that Congress enacted 26 U.S.C. § 7203 in August, 1954. (See 26 U.S.C. § 7203, credits and historical notes.) (WTP #233)

- Click here for 26 U.S.C. §7203 notes (WTP Exhibit 150)

8.3. Admit that the United States Supreme Court in South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) stated: (WTP #234)

> *"[w]e assume that Congress is aware of existing law when it passes legislation."*

- Click here for South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998)
- Click here for South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) (WTP Exhibit 151)

8.4. Admit that Congress enacted 44 U.S.C. § 3512 in 1980. (WTP #235)

- Click here for 44 U.S.C. §3512 (WTP Exhibit 152)

8.5. Admit that 44 U.S.C. § 3512 states that: (WTP #236)

> *(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter if--*

*(1) the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or*
*(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.*
*(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.*

- Click here for 44 U.S.C. §3512 (WTP Exhibit 152)

8.6. Admit that United States Supreme Court Chief Judge Taney in 1863 protested the constitutionality of the income tax as applied to him. (WTP #237)

- Click here for Evans v. Gore, 253 U.S. 245 (1920) (WTP Exhibit 153)

8.7. Admit that United States District Court Judge Walter Evans, in 1919 protested the constitutionality of the income tax as applied to him. (WTP #238)

- Click here for Evans v. Gore, 253 U.S. 245 (1920) (WTP Exhibit 153)

8.8. Admit that United States Circuit Court Judge Joseph W. Woodrough in 1936 protested the constitutionality of the income tax as applied to him. (WTP #239)

- Click here for O'Malley v. Woodrough, 307 U.S. 277 (1939) (WTP Exhibit 154)

8.9. Admit that United States District Court Judge Terry J. Hatter and other federal court judges in the 1980s protested the constitutionality of taxes as applied to them. (See *United States v. Hatter*, 121 S. Ct 1782 (2001) (WTP #240)

- Click here for United States v. Hatter, 121 S.Ct 1782 (2001) (WTP Exhibit 155)

8.10. Admit that even in criminal cases where a loss of freedom can be the result, American citizens who are not judges are precluded by the federal judiciary, and with the express approval and consent of the Department of Justice and U.S. Attorney, from arguing the constitutionality of the income tax as applied to them. (WTP #241)

- Click here to see U.S. v. Farber, 630 F.2d 569, 573, (8th Cir. 1980) (WTP Exhibit 156)

8.11. Admit that the Executive and Judicial branches of the federal government label Americans who challenge the legality of the federal income tax as "tax protesters." (WTP #242)

- Click here to see Department of Justice Criminal Tax Manual, "Tax Protester" Section 40) (WTP Exhibit 157)

8.12. Admit that United States Supreme Court Chief Judge Taney submitted his protest in a letter to the Secretary of the Treasury. (WTP #243)

- Click here for Evans v. Gore, 253 U.S. 245 (1920) (WTP Exhibit 153)

8.13. Admit that letters of protest written to the Secretary of the Treasury by American Citizens are used by the Executive branch of government, and accepted by the Judicial branch of government, as proof of income tax evasion and conspiracy against those who write the letters. (WTP #244)

8.14. Admit that if an individual required to make a return under Section 6012(a) of the Internal Revenue Code fails to make the required return, the statutory procedure authorized by Congress for the determination of the amount of tax due is the "deficiency" procedure set forth at subchapter B of Chapter 63 of the Internal Revenue Code, commencing at Section 6211. (WTP #255)

- Click here for 26 U.S.C. §63 (WTP Exhibit 086)
- Click here for 26 U.S.C. §6012 (WTP Exhibit 020)
- Click here for 26 U.S.C. §6211 (WTP Exhibit 159)

8.15. Admit that if an individual required to make a return under Section 6012(a) of the Internal Revenue Code fails to make the required return, Congress mandated at Section 6212 that the individual is required to be served a "notice of deficiency" setting forth the amount of tax imposed by Subtitle A of the Internal Revenue Code per Section 6211 of the Internal Revenue Code. (WTP #256)

- Click here for 26 U.S.C. §6012 (WTP Exhibit 020)
- Click here for 26 U.S.C. §6211 (WTP Exhibit 159)
- Click here for 26 U.S.C. §6212 (WTP Exhibit 160)

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## QUESTIONS ADDED BY AUTHOR BEYOND ORIGINAL WE THE PEOPLE HEARING

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8.16. Admit that the Internal Revenue Service maintains records on Federal Judges under Treasury/ IRS System of Records 46.002.

- Click here for Privacy Act of 1974 Resource Document #6372

8.17. Admit that 28 U.S.C. §455 makes it illegal for federal judges to hear a case involving conflict of interest on their part.

- Click here for 28 U.S.C. §455

8.18. Admit that most federal judges pay federal income taxes.

8.19. Admit Article 3, Section 1, Clause 1 of the U.S. Constitution requires that salaries of federal judges shall not be diminished while they are in office..

- Click here for Article 3, Section 1, Clause 1 of the U.S. Constitution

8.20. Admit that nonpayment or underpayment of federal income taxes by federal judges could result in diminishment of their salaries because of levy by the IRS..

8.21 Admit that the IRS is part of the Executive Branch of the federal government.

8.22. Admit "political audits" and targeted collection activity covertly or overtly directed by the President of Members of Congress in the Executive Branch could reasonably result in diminishment of the salaries of federal judges through levy or garnishment, and could be used as a weapon to coerce judges in certain cases before them related to income taxes.

8.23. Admit that the "political harassment" of judges described in the previous question using the power of the IRS would violate Article 3, Section 1, Clause 1 of the Constitution and 28 U.S.C. §455 by creating a conflict of interest.

8.24. Admit that the "political harassment" of federal judges by the IRS in the Executive Branch violates the Separation of Powers Doctrine but nevertheless quite reasonably could happen.

8.25. Admit that few federal judges allow any questions about their own level of conflict of interest to be entertained openly in court after the jury has been selected and in front of the jury, including questions about their experiences with the IRS and whether they are currently the target of collection activity.

8.26. Admit that for judges who have conflicts of interest in adjudication of tax-related cases before them, the techniques they might use to influence the case could for their personal benefit or the benefit of the government include the following:

- Issuance of the judge of a protective order against the alleged "taxpayer" seeking information or discovery against the IRS
- Suppression of evidence of IRS wrongdoing submitted to the court by the targeted "taxpayer"
- Ordering the "taxpayer" not to talk about the law in front of jurists on the case
- Censorship and screening of opening and closing statements or anything said by alleged "taxpayer" in front of jury
- Nonpublication of the court transcript.
- Nonpublication of the final judgment so that it may not be cited as precedent.

8.27. Admit that the conflicts of interest described in question 8.26 above all fall under the classification of suppressing or hiding the truth, which amounts to conspiracy to obstruct or conceal wrongdoing, which is identified in John 3:16-21 as a sin, by stating:

> "For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life. For God sent not his Son into the world to condemn the world; but that the world through him might be saved. He that believeth on him is not condemned: but *he that believeth not is condemned already, because he hath not believed in the name of the only begotten Son of God. And* ***this is the condemnation, that light is come into the world, and men loved darkness rather than light, because their deeds were evil. For every one that doeth evil hateth the light, neither cometh to the light, lest his deeds should be reproved. But he that doeth truth cometh to the light, that his deeds may be made manifest, that they are wrought in God.***" [Bible, KJV, John 3:16-21]

- Click here for Bible, John 3:16-21

8.28. Admit that the Seventh Amendment of the U.S. Constitution requires a jury trial for "Suits at common law, where the value in controversy shall exceed twenty dollars".

- Click here for the Seventh Amendment to the U.S. Constitution

8.29. Admit that the U.S. Tax Court *does not* permit jury trials.

- Click here for the Mathes v. C.I.R., 576 F.2d 70

8.30. Admit that according to the U.S. Supreme Court in Downes v. Bidwell, 182 U.S. 244 (1901),

Congress may not pass legislation that retracts or circumvents the operation of the Constitution or the Bill of Rights within a state of the Union of states that is part of the United States of America. In particular, the statement of the court supporting this conclusion is as follows:

> **"The Constitution had attached to it [the land, in this case] irrevocably. *There are steps which can never be taken backward*. The tie that bound the states of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void."** [**Downes v. Bidwell**, 182 U.S. 244 (1901) ]

- Click here for Downes v. Bidwell, 182 U.S. 244 (1901)

8.31. Admit that 28 U.S.C. §2201 prohibits the federal courts from making declaratory judgments about rights or status in the context of federal income taxes. In particular, it states:

> "28 U.S.C. §2201 Creation of Remedy
>
> (a) **In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986**, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, **any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration**, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

- Click here for 28 U.S.C. §2201

8.32. Admit that the "rights and other legal relations" the U.S. supreme Court is referring to includes the Bill of Rights of the U.S. Constitution.

- Click here for Great IRS Hoax, section 5.2.5

8.33. Admit that the prohibition of Congress against legislating away the operation of the U.S. Constitution *does not apply* on federal properties coming under Article 1, Section 8, Clause 17 of the U. S. Constitution that have never been covered by the Constitution.

- Click here for Article 1, Section 8, Clause 17 of the U.S. Constitution

8.34. Admit that because Congress cannot legislate away the operation of the Constitution in the 50 states (that is, in other than federal enclaves within these states), the *only* geographic jurisdiction that federal income tax cases can ***mandatorily*** (by the force of law, rather than by ignorant citizens volunteering) be applied by the courts within these states is federal areas or enclaves, which shall be referred to subsequently as the "federal zone".

- Click here for Great IRS Hoax, section 4.8

8.35. Admit that Thomas Jefferson, one of our founding fathers and author of our Declaration of Independence, said of the following about the powers of juries and the right of juries to *judge the law as well as the facts*:

> *"It is left... to the juries, if they think the permanent judges are under any bias whatever in any cause, to take on themselves to judge the law as well as the fact. They never exercise this power but when they suspect partiality in the judges; and by the exercise of this power they have been the firmest bulwarks of English liberty." -- Thomas Jefferson to Abbe Arnoux, 1789. ME 7:423, Papers 15:283*
>
> *"If the question before [the magistrates] be a question of law only, they decide on it themselves: but if it be of fact, or of fact and law combined, it must be referred to a jury. In the latter case of a combination of law and fact, it is usual for the jurors to decide the fact and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact. If they be mistaken, a decision against right which is casual only is less dangerous to the state and less afflicting to the loser than one which makes part of a regular and uniform system." --Thomas Jefferson: Notes on Virginia Q.XIV, 1782. ME 2:179*
>
> *"The juries [are] our judges of all fact, and of law when they choose it." --Thomas Jefferson to Samuel Kercheval, 1816. ME 15:35*
>
> *"We all know that permanent judges acquire an esprit de corps; that, being known, they are liable to be tempted by bribery; that they are misled by favor, by relationship, by a spirit of party, by a devotion to the executive or legislative; that it is better to leave a cause to the decision of cross and pile than to that of a judge biased to one side; and that the opinion of twelve honest jurymen gives still a better hope of right than cross and pile does." --Thomas Jefferson to Abbe Arnoux, 1789. ME 7:423, Papers 15:283*

- Click here for Cites

8.36. Admit that Thomas Jefferson, one of our founding fathers and author of our Declaration of Independence, said of the following about the ability of the judicial branch and judges in general to undermine and destroy our Republican system of government:

> "At the establishment of our Constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions nevertheless become law by precedent, sapping by little and little the foundations of the Constitution and working its change by construction before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance. In truth, man is not made to be trusted for life if secured against all liability to account." --Thomas Jefferson to A. Coray, 1823. ME 15:486
>
> "This member of the government... has proved that the power of declaring what the law is, *ad libitum*, by sapping and mining, slyly, and without alarm, the foundations of

the Constitution, can do what open force would not dare to attempt." --Thomas Jefferson to Edward Livingston, 1825. ME 16:114

"I do not charge the judges with wilful and ill-intentioned error; but honest error must be arrested where its toleration leads to public ruin. As for the safety of society, we commit honest maniacs to Bedlam; so judges should be withdrawn from their bench whose erroneous biases are leading us to dissolution. It may, indeed, injure them in fame or in fortune; but it saves the republic, which is the first and supreme law." --Thomas Jefferson: Autobiography, 1821. ME 1:122

"If, indeed, a judge goes against the law so grossly, so palpably, as no imputable degree of folly can account for, and nothing but corruption, malice or wilful wrong can explain, and especially if circumstances prove such motives, he may be punished for the corruption, the malice, the wilful wrong; but not for the error: nor is he liable to action by the party grieved. And our form of government constituting its respective functionaries judges of the law which is to guide their decisions, places all within the same reason, under the safeguard of the same rule." --Thomas Jefferson: Batture at New Orleans, 1812. ME 18:130

"One single object... [will merit] the endless gratitude of society: that of restraining the judges from usurping legislation. And with no body of men is this restraint more wanting than with the judges of what is commonly called our General Government, but what I call our foreign department." --Thomas Jefferson to Edward Livingston, 1825. ME 16:113

- Click here for Cites

8.37. Admit that Thomas Jefferson, one of our founding fathers and author of our Declaration of Independence, said of the following about judicial independence and the importance of a moral and ethical and accountable judiciary:

"The judiciary... is a body which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity." --Thomas Jefferson to James Madison, 1789. ME 7:309

"The judges... should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness and attention; their minds should not be distracted with jarring interests; they should not be dependent upon any man or body of men. To these ends they should hold estates for life in their offices, or, in other words, their commissions should be during good behavior, and their salaries ascertained and established by law." --Thomas Jefferson to George Wythe, 1776. ME 4:259, Papers 1:410

"The dignity and stability of government in all its branches, the morals of the people and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive and independent upon both, that so it may be a check upon both, as both should be checks upon that." --Thomas Jefferson to George Wythe, 1776. Papers 1:410

"The Constitution of the United States having divided the powers of government into three branches, legislative, executive, and judiciary, and deposited each with a separate body of magistracy, forbidding either to interfere in the department of the other, the executive are not at liberty to intermeddle in [a] question [that] must be ultimately decided by the Supreme Court." --Thomas Jefferson to Charles Hellstedt,

1791. ME 8:126

"It will be said, that [a federal] court may encroach on the jurisdiction of the State courts. It may. But there will be a power, to wit, Congress, to watch and restrain them. But place the same authority in Congress itself, and there will be no power above them, to perform the same office. They will restrain within due bounds, a jurisdiction exercised by others, much more rigorously than if exercised by themselves." --Thomas Jefferson to James Madison, 1787. ME 6:133

- Click here for Cites

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## SECTION 8-COURTS ARE CLOSED SUMMARY

Our Constitution established a three-branch government. Each branch has its own specific duties and responsibilities.

Above its role to adjudicate certain specified matters in its limited jurisdiction, the Court's purpose to provide a "check and balance" on the other two branches to protect the People from unconstitutional acts of both the Executive and the Legislature.

Unfortunately for the People, to "protect" the federal government, the Courts have effectively "ganged-up" with the other two branches against the People with respect to the income tax laws.

This breach of Constitutional duty has resulted in the perpetration of the income tax fraud for nearly 100 years and untold misery for the families of citizens unlawfully convicted of tax crimes that did not apply to them.

The People today have no real recourse in a court of law to defend against the income tax "system" – or as so aptly coined by tax researcher Irwin Schiff, "The Federal Mafia".

The evidence and the testimony clearly show that our Courts no longer protect Due Process of Law with respect to tax matters. We now have a two-tier standard of due process – one for real/regular crimes – and one for tax "crimes".

Consider for a moment the inherent conflict of interest presented by a judge who receives his salary from the federal coffers. Can he rule objectively on this matter?

Consider a judge who (improperly) instructs a jury that all matters of law are for his discretion only. Juries are never told of their constitutional rights including the right to acquit based on the law.

How can tax crime defendants ever receive Constitutionally protected due process if the very questions of law and its applicability to the defendant are never decided by a jury even though the FACTS of how these critical issues of law and their applicability are the ONLY questions at trial?

Have the People been essentially denied the right to a jury trial in tax matters?

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# WHAT HAPPENED TO JUSTICE?:

**Why You Can't Get Justice in Federal Court and What To Do About It**

The book *What Happened to Justice: Why You Can't Get Justice in Federal Court and What to Do About It* exhaustively analyzes all the historical enactments of Congress from the Statutes at Large and the U.S. Code since the beginning of America to convincingly prove with evidence the following:

1. That there is no justice in federal courts today.
2. How Congress never created and never intended to create Article III Courts.
3. How all of the existing federal district courts are territorial legislative courts created under the authority of Article IV of the United States Constitution.
4. Why Article IV courts are authorized ONLY to dispense, protect, and administer federal property, franchises, benefits, and contracts and are part of the Executive, rather than Judicial, branch of the government.
5. Why we only have TWO, and not THREE branches of government, as the Founding Father envisioned, and how this critical omission deprives people in states of the Union of the protections of their God-given rights provided by the separation of powers doctrine.
6. That most judges sitting on the federal bench today are de facto judges not legally qualified to serve and who may be lawfully impeached, and that the laws designed to prevent them from serving have been carefully hidden and omitted from the U.S. Code in an effort to protect their unlawful activities and contribute to a breakdown of the separation of powers.
7. That most jurors selected to serve in federal district courts are not qualified to serve and may be disqualified if properly challenged for cause.

The book ends with the following two chapters that help you restore justice to federal courts:

- Chapter 6: Putting Federal Judges Back Inside the Box. Shows you how to put corrupted judges back inside their box so they can't deny you justice any longer.
- Chapter 10: Forms. Contains forms you can use to expose and oppose the deception and corruption of the de facto administrative system both as a concerned citizen, a jurist, and a litigant.

The most important information in this book is the techniques provided in chapter 6 for:

1. Essentially destroying any possibility of enforcing federal criminal law against a party who is not domiciled in the federal zone by showing that the judge cannot assemble a lawful jury without violating the Constitution and the laws which implement it from the U.S. Code and the Statutes at Large.
2. Having unlawful de facto judges impeached.
3. Suing judges personally and on behalf of the United States who do not reside in the district for up to THREE TIMES their pay over the period they served as de facto judges and recovering up to one fourth of that amount personally. Note that this does NOT work for federal judges of the District of Columbia but works for other District and Circuit Court judges.
4. Challenging for cause and dismissing jurors who do not reside on federal territory within the district.

There are TWO versions of this item: 1. Downloadable Electronic Book; 2. CD-ROM which adds the Evidence books and many additional resources. The CD version is browsable on either a MAC or a PC using your web browser, but the Autostart feature only works on a PC. Below is a comparative summary of the two versions of this item:

| ***Attribute*** | ***Book Only*** | ***CD*** |
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| What Happened to Justice? Book (175 pages) | √ | √ |

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| Evidence Book, Volume 1 (842 pages)<br><br>• Exhibit 1: Federal Judicial Acts (from Statutes at Large)<br>• Exhibit 2: Creating the Federal Judiciary<br>• Exhibit 3: Judicial Code of 1940<br>• Exhibit 4: U.S. Government Manual<br>• Exhibit 5: William O Douglas Book excerpt: Go East Young Man<br>• Exhibit 6: Title 28, Year 2000<br><br>(NOTE: The above consist of electronically searchable scanned images) | | √ |
| Evidence Book, Volume 2 (1,164 pages)<br><br>• Exhibit 7: List of Judicial Acts, 1789-1845<br>• Exhibit 8: List of Acts Relating to Public Lands<br>• Exhibit 9: Compendium of All Judicial Acts, 1789-1845<br><br>(NOTE: The above exhibits consist of electronically searchable scanned images) | | √ |
| Evidence Book, Volume 3 (521 pages)<br><br>• Exhibit 10: A Study in the Federal Judicial System, Harvard law Review, 1925<br>• Exhibit 11: 40 U.S.C.A. §3112<br>• Exhibit 12: United States ex. re. Laughlin v. Eicher, 56 F.Supp. 972 (1944)<br>• Exhibit 13: 57 Stat. 608-609, R.S. 3490: False Claims Act<br>• Exhibit 14: 31 U.S.C.A. §3729: False Claims Act<br>• Exhibit 15: 70 Stat. 531, July 14, 1956<br>• Exhibit 16: Mookini v. U.S., 303 U.S. 201 (1938)<br>• Exhibit 17: Federal Judge Oaths<br>• Exhibit 18: International Longshoremen v. Juneau Spruce, 342 U. S. 237 (1954)<br><br>(NOTE: The above exhibits consist of electronically searchable scanned images) | | √ |
| Constitution Annotated (2,711 pages) | | √ |
| Exhibit Index<br>(breaks out each individual exhibit so you can look at it individually) | | √ |
| Case Listing<br>(important U.S. Supreme Court cases relating to federal jurisdiction) | | √ |
| Benchbook for U.S. District Court Judges Book (254 pages) | | √ |
| Chambers Handbook for Judges' Law Clerks and Secretaries (198 pages) | | √ |
| Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 and 144 (91 pages) | | √ |
| Additional Reference Links | | √ |
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# Conflict of Interest Convictions

**by Raymond Beach**

*I doubt that there's a police department in the U.S. that isn't at least suspected of having an "unspoken" requirement for their officers to issue a certain number ("quota") of traffic tickets each day. The primary purpose of this "traffic ticket quota" is to generate tax revenue for their cities. Presumably, this ticket quota is imposed by city administrators who "encourage" police officers to satisfy their "unspoken ticket quotas" is by "unspoken" promotion policies. Officers who write lots of tickets (and generate lots of tax revenue) tend to be promoted; officers who write relatively few tickets tend to languish at the same rank or suffer termination. If so, the traffic police have a conflict of interest that subtly compromises the pretense of impartial law enforcement since they tend to profit (through promotions) for writing tickets. However, Mr. Beach discovered that, at least in Alabama, police officers not only have a personal financial interest in writing tickets (and also charging misdemeanors and felonies), but also in securing convictions.*

*In early 1994, Raymond Beach was stopped and ticketed by the City of Hueytown, Alabama police for driving with an expired Drivers License. After a great deal of courthouse wrangling and appeals, on August 15, 1997, Hueytown finally charged Mr. Beach a $25.00 Fine and $42.50 "Court Cost Payment" for his traffic violation.*

*Mr. Beach paid the $67.50, but later began to investigate the true nature of his $42.50 "court costs". He discovered that $3.00 of his "court costs" went to the retirement fund of the Alabama police officers who charge people with traffic offenses – and even more for misdemeanors and felonies. In other words, Alabama police have a personal, financial interest in not only charging people with traffic offenses, misdemeanors, and felonies, but also in convicting them since innocent people and "not guilty" verdicts generate no "court costs" and therefore no contributions to the Alabama police officers retirement fund.*

*As a result, it appears that Alabama police officers not only "profit" by being promoted for issuing tickets, they also profit from "enhancing" their testimony and evidence in court to insure that those charged are absolutely convicted. The police officers' personal financial interest in convictions contradicts any presumption of impartial law enforcement and at minimum, creates the "appearance of impropriety".*

*Although the following information applies specifically to Alabama, I'd be surprised if similar "financial incentives" didn't exist in other states to "motivate" police officers to both charge and convict the maximum number of defendants. Based on the following laws, Mr. Beach wrote a letter to a number of government officials. The footnotes are my comments.*

**Alabama state code § 36-21-66. Alabama peace officers' annuity and benefit fund created; purpose and official designation; composition generally; investment, expenditure, etc., of moneys therein.**[1]

A special fund is hereby established and placed under the management of the board for the purpose of providing retirement allowances and other benefits under the provisions of this article for members of the fund.[2] The fund shall be known as the Alabama peace officers' annuity and benefit fund, by and in which name all of its business[3] shall be transacted, all of its funds invested and all of its cash and securities and other property held in trust for the purposes for which received. All amounts received by the board pursuant to the provisions of this article shall be paid into the fund. The board shall have such control[4] of the fund as shall not be inconsistent with the provisions of this article and with the laws of the state. All moneys of the board shall either be covered into the state treasury or deposited in a special trust account or accounts in any bank or banks in the state, each of which shall have a combined capital and surplus of not less than $2,000,000.00 and may be withdrawn therefrom by vouchers or checks signed by the executive director pursuant to authorization given by the board. All investments of moneys in the fund shall be either deposited with the state treasurer for safekeeping upon

receipt of the state treasurer therefor or deposited with any such bank in a custodial account. The board shall have authority to expend moneys in the fund in accordance with the provisions of this article and to invest any moneys so received pending other needs therefor in any investments which are legal investments for insurance companies under the laws of the state. No member of the board shall have any interest in any such investment or receive any commission with respect thereto. (Acts 1969, No. 999, p. 1855, § 5; Acts 1971, No. 1210, p. 2104, § 5.)

§ 36-21-67. **Imposition of additional court costs in certain criminal and in quasi-criminal proceedings; remittance of proceeds to executive director.**

In all criminal[5] proceedings for the violation of laws of the state or municipal ordinances including violations of state conservation laws of regulations which are tried in any court or tribunal in this state, wherein the defendant is adjudged guilty or pleads guilty or wherein a bond is forfeited and the result of the forfeiture is a final disposition of the case or wherein any penalty is imposed, there is hereby imposed an additional cost of court in the amount of $1.00 for each moving traffic violation, $5.00 in each such proceeding where the offense constitutes a misdemeanor and/or a violation of a municipal ordinance other than moving traffic violations and $10.00 in each such proceeding where the offense constitutes a felony; provided, however, that there shall be no additional cost imposed for violations relating to parking of vehicles.[7]

. . . . It shall be the duty of the clerk or other authority collecting the said court costs to keep accurate records of the amounts due to the board for the benefit of the fund under this section.[8] (Acts 1969, No. 999 p. 1855, § 9; Acts 1971, No. 1210, p. 2104, § 9; Acts 1971, No. 2101, p. 3371.)

Based on this law, I wrote the following letter to the STATE OF ALABAMA ETHICS COMMISSION (a copy was also forwarded to the Alabama Office of Attorney General):

January 9, 1998
Hugh R. Evans, III
Assistant Director General Counsel
c/o Alabama Ethics Commission
100 North Union Street, Suite # 104
Montgomery, Alabama 36103

Office: (334) 242-2997
Fax: (334) 242-0248

RE: Title 36-21-66 & 36-21-67 of the Alabama Code (1975).

Dear Hugh:

On August 15, 1997, I paid a Traffic Citation Fine of $67.50 to the City of Hueytown.

This letter is being forwarded to you for your response and/or explanation, primarily of Title 36-21-67 of the Alabama Code 1975).

After my conversation with a local attorney, and upon further research into the Alabama Code, I discovered something very disturbing.

My question is very simple: *Is it ethical and/or a conflict of interest for a Police Officer to issue a Traffic Citation, thereby profiting and enhancing his retirement/annuity fund when said fine is paid in Court?*

While it may seem that my $3.00 **"**contribution**"** is insignificant, you should consider that my fine was just one (1) of the thirty-eight (38) "contributions" listed on the page enclosed, taken from the two (2) inch thick Monthly Payment Report (dated August 1, 1997 through August 31, 1997), indicating that there were at least one-hundred fifty (150) pages in the record, from the small community of Hueytown, Alabama. The fact is, that each year there are millions of such "contributions" TAKEN[9] from individuals such as myself, across the State of Alabama. Clearly, this lucrative incentive plan for Police Officers to issue Traffic Citations to Citizens is extremely alarming.

The conflict of interest and unethical conduct is readily apparent to me. Is it to you?

Since this is a question of profound importance to the Citizens of this State, I request that you provide an answer to me within ten (10) days. Failing to respond within that time period, I shall conclude that you have no opinion and/or legal position on this controversial issue, and shall act accordingly.

Respectfully,
Raymond H. Beach, Citizen

On January 27, 1998, Hugh Evans III replied to my letter on behalf of the Alabama Ethics Commission and explained in part:

"The Alabama Ethics Commission has no jurisdiction to interpret Title 35, Chapter 21 of the Code of Alabama. Our jurisdiction is limited to Title 35, Chapter 25, which is styled *Code of Ethics for Public Officials, Employees, etc.* . . . "

The Ethics Law is designed to prevent public officials and public employees from using their public office in a manner that might provide a personal gain to themselves, a family member or a business with which they are associated.[10]

"In your fact scenario, the activities you complain of are established by statute, and therefore would not appear to be in conflict with the Alabama Ethics Law."[11]

On February 26, 1998, M.J. Scott of the Alabama Attorney General's Office also replied to my letter:

"The City of Hueytown is acting within its rights to collect any fines that it deems appropriate. This practice is entirely within the laws of Alabama as they currently stand. Our office has not issued any formal opinions on §§ 36-21-66 or 36-21-67. You have the right as a citizen to challenge the constitutionality of the said ordinances in a court of law. If you would like to discuss your legal options, I recommend that you contact a private attorney."

In other words, I can expect no help from the state's administrative agencies in exposing acts committed by Alabama police which, at least, create the "appearance of impropriety" and

may, in fact, be unethical. Therefore, my remaining option is to challenge the law in court as unconstitutional – and hope that the Alabama courts are better able to "see" impropriety and/or unethical acts than are the state's Ethics Commission or Attorney General's Office.

*Those of you who focus on traffic laws might do well to study "court fines" and "court costs" and observe the sage advice, "follow the money trail." The conflict of interest in Alabama might be happening in your state, too. If it is, the validity of a large number of convictions for traffic tickets, misdemeanors, and even felonies might be challenged due to the arresting officer's beneficial interest in securing convictions and consequent lack of impartiality. However, the Alabama Attorney General Office's advice (hire a lawyer and challenge the constitutionality of the police retirement funding process) might be disingenuous.*

*If the Alabama Police Officers Annuity and Benefit Fund is a trust and the police officers are its beneficiaries, then under trust law (heard in courts of equity, not law) they may not serve as trustees who help administer that trust.*

*Does issuing tickets that generate revenue for the trust constitute an "administrative" activity? If it does, the police would be in breach of their fiduciary responsibilities under trust law (not the Constitution) if they both issued tickets and stood to receive trust benefits from those tickets. This might mean that all previous tickets could be challenged, and no future tickets could be issued except by police officer who received no retirement benefit from those tickets. But if the problem is trust-related, the challenge will have to be on basis of trust law in a court of equity where the Constitution is irrelevant and even unwelcome.*

*Further, although Alabama judges and prosecutors do not appear to be members of "POA FU", I wouldn't be surprised if some judges and prosecutors in this country also funded their retirement programs with "contributions" derived from court courts generated whenever they secured a conviction.*

*If anyone in the court room stands to directly profit from a defendant's conviction, there can't be an "impartial tribunal", constitutional guarantees are being ignored, and convictions might be subsequently challenged. In the extreme, there might even be grounds for a defendant who is found guilty (or even arrested) to sue the folks who merely might profit from his conviction.*

[1] This appears to be a trust fund.

[2] "members of the fund" are beneficiaries.

[3] including traffic tickets?

[4] Members of "the board" are the trustees for this trust.

[5] Law?

[6] Equity?

[7] This copy of the law may not be current since it specifies a $1.00 court cost for the police retirement fund and Mr. Beach was charged $3.00. If the legal contribution for traffic tickets has increased from $1 to $3, it's likely that the $5.00/misdemeanor and $10/felony contributions have also increased. In any case, it's apparent that the police retirement fund generates more money for misdemeanors than tickets, and more money yet for felonies. This creates a financial incentive for police to: 1) write multiple charges (presumably every charge will generate a separate court cost contribution); and 2) "upgrade" charges whenever possible from traffic violations or misdemeanors to felonies.

[8] This implies that the court clerk and/or judge are functioning as trustees on behalf of the Alabama police officers fund and its members/beneficiaries - including the police officer who is testifying about a particular ticket or charge.

[9] "Taken" is a good choice of words since "court costs" implies costs that are incurred in the *immediate* operation of the court. That being so, how can "court costs" include contributions to a police retirement fund which won't be spent until years later? Perhaps a better word than "Taken" is "extortion" (the taking of money under the color of law).

[10] Clearly, each Alabama police officer who is a member of the retirement fund stands to benefit from each conviction he helps achieve and therefore seems to achieve a "personal gain". Further, the act creating the retirement fund (§36-21-66) provides that, ". . . all of its *business* shall be transacted" in the fund's name – if the fund does "business" why shouldn't it be regarded as a "business" and therefore subject to the Ethics Law? Mr. Hugh Evans III argument seems faulty.

[11] I.e., Mr. Hugh III implies that since the police retirement fund was established by statute, whatever follows under that statute must be "ethical" because, surely, the state legislature wouldn't (couldn't?) pass an unethical statute. His implicit logic reminds me of former President Richard Nixon's remark, "If the President does it, that means it must be legal."

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

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

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

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

**"But dad, the emperor is naked!"**

Three years of continuous research by the webmaster went into writing this very significant and incredible book. This book is *very different* from most other tax books because:

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

   > *"Evidence of failure to deny statements of others is admissible only when no other explanation is equally consistent with silence." U.S. v. Gross, 276 F.2d 816 (1960).*

   If the "court of public opinion" really were a court, and if the public really were *fully educated* about the law as it is the purpose of this book to bring about, the IRS and our federal government would have been convicted long ago of the following crimes by their own treasonous words and actions thoroughly documented in this book (click here for more details):

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

4. We keep the level of the writing to where a person of average intelligence and no legal background can understand and substantiate the claims we are making for himself.
5. We show you how and where to go to substantiate every claim we make and we encourage you to check the facts for yourself so you will believe what we say is absolutely accurate and truthful.

6. All inferences made are backed up by extensive legal research and justification, and therefore tend to be more convincing and authoritative and understandable than most other tax books. We assume up front that you will question *absolutely every assertion* that we make because we encourage you to do exactly that, so we try to defend every assertion in advance by answering the most important questions that we think will come up. We try to reach *no* unsubstantiated conclusions whatsoever and we avoid the use of personal opinions or anecdotes or misleading IRS publications. Instead, we always try to back up our conclusions with evidence or an authoritative government source such as a court cite or a regulation or statute or quotes from the authors of the law themselves, and we verify every cite so we don't destroy our credibility with irrelevant or erroneous data or conclusions. Frequent corrections and feedback from our 100,000 readers (and growing) also helps considerably to ensure continual improvements in the accuracy and authority and credibility of the document.
7. Absolutely everything in the book is consistent with itself and we try very hard not to put the reader into a state of "cognitive dissonance", which is a favorite obfuscation technique of our criminal government and legal profession. No part of this book conflicts with any other part and there is complete "cognitive unity". Every point made supports and enhances every other point. If the book is truthful, then this must be the case. A true statement cannot conflict with itself or it simply can't be truthful.
8. With every point we make, we try to answer the question of "why" things are the way they are so you can understand our reasoning. We don't flood you with a bunch of rote facts to memorize without explaining why they are important and how they fit in the big picture so you can decide for yourself whether you think it is worth your time to learn them. That way you can learn to think strategically, like most lawyers do.
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10. The entire book, we believe, completely, truthfully, and convincingly answers the following very important question:

    *"How can we interpret and explain federal tax law in a way that makes it completely legal and Constitutional, both from the standpoint of current law and from a historical perspective?"*

If you don't have a lot of time to read EVERYTHING, we recommend reading at least the following chapters in the order listed: 1, 4, 5, 8 (these are mandatory).

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The Great IRS Hoax book draws on works from several prominent sources and authors, such as:

1. The U.S. Constitution.
2. The Family Constitution
3. Amendments to the U.S. Constitution.
4. The Declaration of Independence.
5. The United States Code (U.S.C.), Title 26 (Internal Revenue Code), both the current version and amended past versions.
6. U.S. Supreme Court Cases.
7. U.S. Tax Court findings.
8. The Code of Federal Regulations (CFR), Title 26, both the current version and amended past versions.
9. IRS Forms and Publications (directly from the IRS Website at http://www.irs.gov).
10. U.S. Treasury Department Decisions.
11. Federal District Court cases.
12. Federal Appellate (circuit) court cases.
13. Several websites.
14. A book called *Losing Your Illusions* by Gordon Phillips of the Inform America organization (http://www.informamerica.com).
15. Case studies of IRS enforcement tactics (http://www.neo-tech.com/irs-class-action/).
16. Case studies of various tax protester groups.
17. The IRS' own publications about Tax Protesters.
18. A book entitled *Why No One is Required to File Tax Returns* by William Conklin (http://www.anti-irs.com)
19. Writings of Thomas Jefferson, the author of the Declaration of Independence.
20. Department of Justice, Tax Division, Criminal Tax Manual

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

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

### 3.15 Federal District and Circuit Court Cases

3.15.1 Commercial League Assoc. v. The People, 90 Ill. 166
3.15.2 Jack Cole Co. vs. Alfred McFarland, Sup. Ct. Tenn 337 S.W. 2d 453
3.15.3 1916: Edwards v. Keith 231 F 110, 113
3.15.4 1925: Sims v. Ahrens, 271 SW 720
3.15.5 1937: Stapler v. U.S., 21 F. Supp. AT 739
3.15.6 1937: White Packing Co. v. Robertson, 89 F.2d 775, 779 the 4th Circuit Court
3.15.7 1939: Graves v. People of State of New York (306 S.Ct. 466)
3.15.8 1943: Helvering v. Edison Brothers' Stores, 8 Cir. 133 F2d 575
3.15.9 1946: Lauderdale Cemetary Assoc. v. Mathews, 345 PA 239, 47 A. 2d 277, 280
3.15.10 1947: McCutchin v. Commissioner of IRS, 159 F2d 472 5th Cir. 02/07/1947
3.15.11 1952: Anderson Oldsmobile , Inc. vs Hofferbert, 102 F. Supp. 902
3.15.12 1955: Oliver v. Halstead, 196 VA 992, 86 S.E. 2d 858
3.15.13 1958: Lyddon Co. vs. U.S., 158 Fed. Supp 951
3.15.14 1960: Commissioner of IRS v. Duberstein, 80 5. Ct. 1190
3.15.15 1962: Simmons v. United States, 303 F.2d 160
3.15.16 1969: Conner v. U.S. 303 F. Supp. 1187 Federal District Court, Houston
3.15.17 1986: U.S. v. Stahl, 792 F.2d 1438

### 3.16 IRS Publications

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3.17.1 Uncertainty of the Federal Tax Laws
3.17.2 Reasonable Cause

### 4.4 The Constitution is Supposed to make You the Sovereign and The Government Your Servant



### 4.5 The U.S.A. is a Republic, Not a Democracy



### 4.6 The Three Definitions of "United States"

## 5.5 Why We aren't Liable to *File* Tax Returns or Keep Records



## 5.6 Why We Aren't Liable to Pay Income Tax

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## 5.8 Considerations Involving Government Employment Income

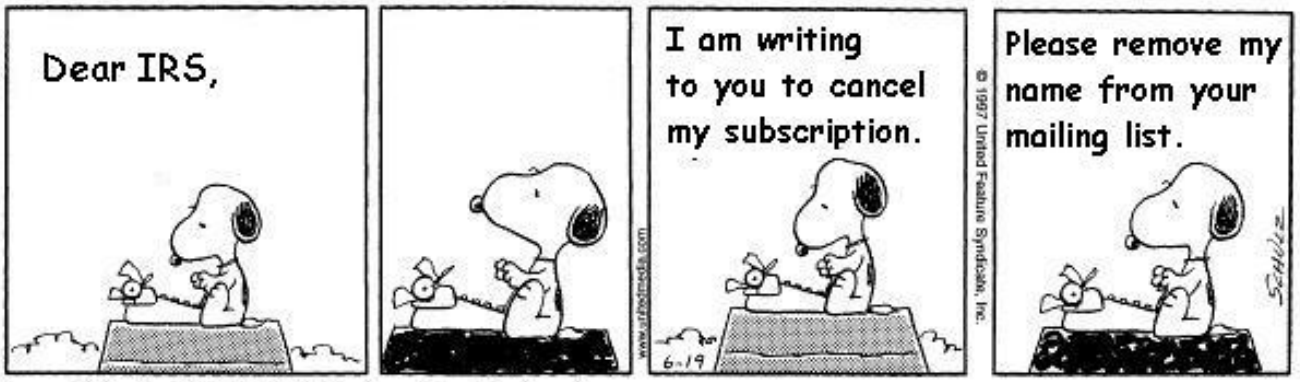
## 5.9 So What Would Have to Be Done To the Constitution To Make Direct Income Taxes Legal?

## 5.10 Abuse of Legal Ignorance and Presumption: Weapons of tyrants

## 6.5 History of Congressional Cover-Ups and Tax Code Obfuscation



## 6.6 Treasury/IRS Cover-Ups, Obfuscation, and Scandals



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# Judicial Accountability Initiative Law 4 JUDGES

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*(All states are patterned after the California Initiative)*

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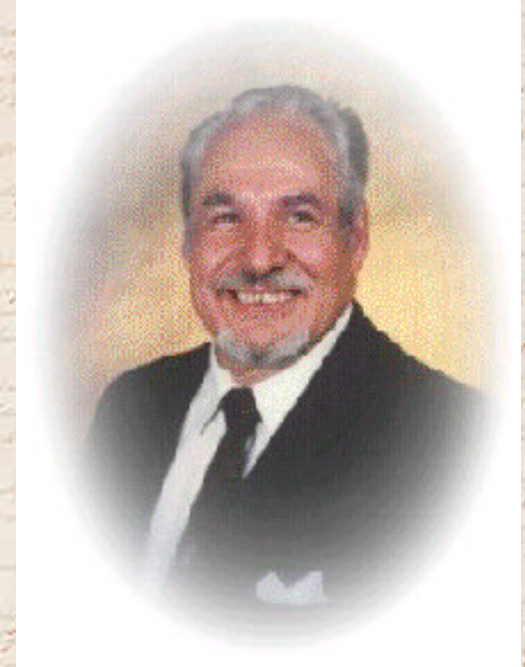
The Judicial Accountability Initiative Law, J.A.I.L., is a single-issue national grassroots organization designed to end the rampant and pervasive judicial corruption in the legal system of the United States. J.A.I.L. recognizes this can be achieved only through making the Judicial Branch of government answerable and accountable to an entity other than itself. At this time it isn't, resulting in the judiciary's arbitrary abuse of the doctrine of judicial immunity, leaving the People without recourse when their inherent rights are violated by judges.



"Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men."
~ Lord Acton, in a letter to Bishop Mandell Creighton, 1887.

Ron Branson, Founder
About Ron Branson

Soon after the founding of our Republic the Founding Fathers realized there was insufficient check on the Judicial Branch of government:

"The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law."
~ Thomas Jefferson, letter to Judge Spencer Roane, September 6, 1819. "The Writings of Thomas Jefferson," edited by Andrew A. Lipscomb, vol. 15, p. 213 (1904).

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In a government by the People and for the People, it is to the People that accountability must be enforced. With the passage of J.A.I.L. accountability to the People in mass will be achieved by Special Grand Juries dedicated to this purpose. These People, who are not officers of any other branch of government or members of the Bar, will be publicly drawn by lottery for limited terms. Complaints will come before them only after every other legal remedy has been attempted. They shall have the power to strip judges of their protection of judicial immunity who are the subject of complaints for criminal acts, and to investigate, indict, and initiate criminal prosecution of wayward judges.

The granting of such power to these Special Grand Juries can only be accomplished through amendment to the Constitutions of each state. Since there is a need for these juries on the federal level there is also a provision for a federal J.A.I.L. Bill. Since there are powerful vested interests in the status quo, and because it is human nature for men always to seek more power and against it to surrender any of it, passage of more than ineffectual cosmetic reform will require the initiative process.

J.A.I.L. is intended to prevent the following acts of judicial malfeasance:

- Any deliberate violation of law
- Fraud or conspiracy
- Intentional violation of due process of law
- Deliberate disregard of material facts
- Judicial acts without jurisdiction
- Blocking of a lawful conclusion of a case
- Any deliberate violation of the state or federal Constitutions

Once passed, the unconstitutional doctrine of Judicial Immunity applied unconditionally will no longer shield a judge guilty of any such misconduct.

Some examples of the above misconduct J.A.I.L. addresses are ignored laws, ignored evidence, eminent domain abuse, confiscation of property without due process, probate fraud, secret dockets, falsifications of court records, misapplication of law, and other abuses. When passed decisions in family court will be governed by law rather than the vested interests of the state. The unconstitutional doctrine of Judicial Immunity applied unconditionally will be eliminated by instituting a fair and effective means for its removal in cases that merit it.

The need for the passage of J.A.I.L. is urgent. Lives and finances are being ruined, properties are being lost, innocent people are going to jail, and families are being torn apart and destroyed.

Dr. Les Sachs, a writer, journalist, and published expert on American corruption now

living abroad, wrote in his article Portrait of America's Legal System:

"The reality is that the United States of America, which proclaims itself the 'land of freedom,' has the most dishonest, dangerous and crooked legal system of any developed nation. Legal corruption is covering America like a blanket."

As time passes these problems will only grow worse manifesting all the more the need for the passage of J.A.I.L.

"JAIL4Judges is the best hope of a practical program for restoring justice in the USA."
~Dr. Les Sachs.

With passage of J.A.I.L., the People will finally be assured of receiving Due Process of Law in all court proceedings which will include the requirement that judges:

1. Address all facts presented by the complaining party according to the evidence shown on the record;
2. Consider opposing facts and evidence as against, and relating to, that of the complaining or moving party (not just arbitrarily superseding plaintiff's facts and evidence);
3. Apply the appropriate law to the facts determined to be relevant and material to the case according to the evidence of record (considering all evidence of both sides without partiality or bias);
4. Submit written findings of fact and conclusions of law in all actions and proceedings-- including a written explanation for motion dispositions-- to legally support the judicial decision reached;
5. Bring the case to a lawful conclusion in a timely fashion as specified by law.

There will be no more arbitrary decision-making by judges.

This Due Process of Law will provide the People Redress of Grievances against their government in an open, honest and complete manner without any appearance of impropriety. The People's unalienable rights to Life, Liberty, and The Pursuit of Happiness, which include but are not limited to:

- The Right to acquire, possess, and protect personal and real property;
- The Right to be secure from intrusion; and
- The Right to privacy

will no longer be "alienated" by government.

The Bill of Rights will be enforced for each individual, providing "Liberty and Justice for All."

The J.A.I.L. initiatives have been customized for each state and can be viewed at the web pages for the individual states and for Washington DC for the federal version.

Our pioneer state for the passage of J.A.I.L. is South Dakota where we expect victory in November 2006. Unlike what was originally thought, there is plenty of corruption to

go around-- even in South Dakota. Citizens of South Dakota have expressed outrage at the corruption they see in their state. Two primary examples are:

1. A man in Sturgis by the name of John Eggers who is a 31-year veteran (now retired) Sheriff of Meade County handed Mr. Branson the front page of the current issue of the Black Hills Press newspaper with his picture on it, in which he was being presented a plaque in his honor. The caption read that the Mayor of Sturgis has proclaimed August 9th as "Sheriff John Eggers Day." Sheriff Eggers was very bold in his opinion about the South Dakota judiciary, and allowed us to quote him as saying, "I am well familiar with the judiciary in this State of South Dakota, and this J.A.I.L. Initiative is very much needed here." Sheriff Eggers also said, and we quote, "No one is above the law," referring to the judges of South Dakota.
2. A man in Deadwood, a small mountain community of about a thousand in population, said "I know two judges who should be in prison, not on the bench." When asked if he was speaking about the State of South Dakota, he emphatically responded: "No! I mean right here in Deadwood!"

**J.A.I.L. is the People,** providing the means by which they can carry out their right and duty to restore the rightful station of government by holding the judiciary, as the intended guardian of their rights against arbitrary power, accountable to the People under constitutional law.
To those who have an ear to hear, let them hear:

- J.A.I.L. is - the Common Denominator of all Organizations
- J.A.I.L. is - the Unifier and the Cause of all Causes
- J.A.I.L. is - the One size fits All
- J.A.I.L. is - the Redress and the Enforcement
- J.A.I.L. is - the Heart of all Accountability
- J.A.I.L. is - the Missing Ingredient of our Constitution.

South Dakota Ad Flyer

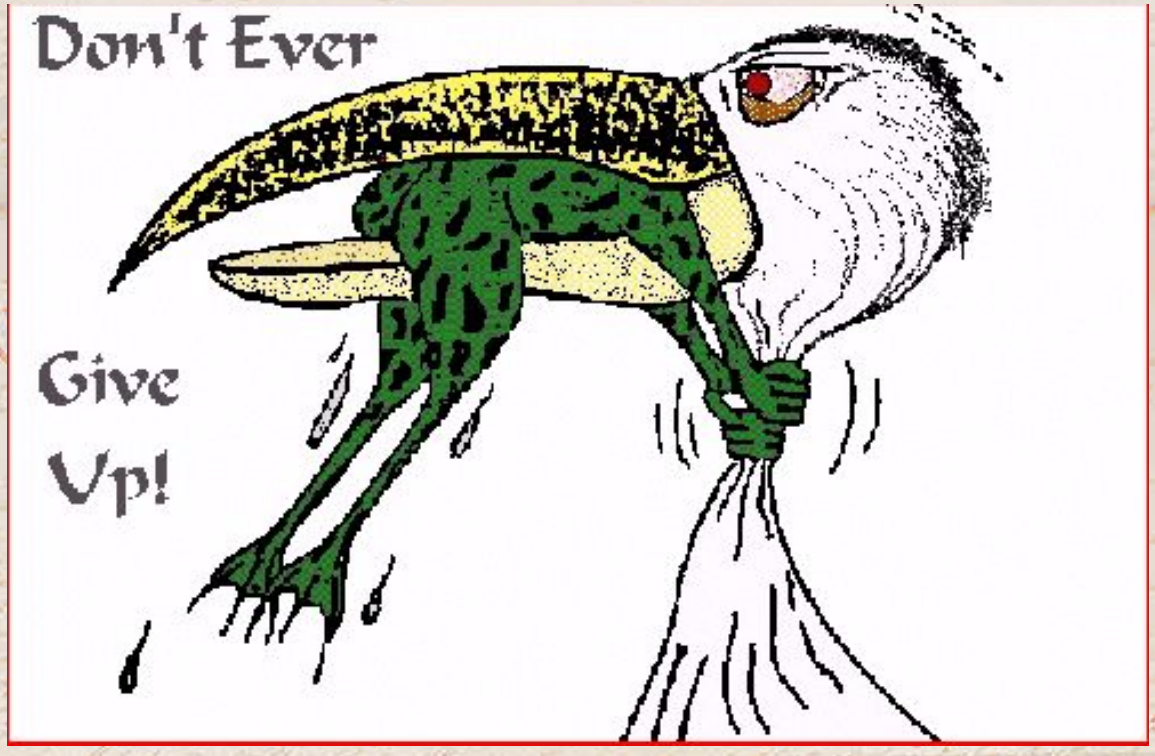
The People's Statement and Petition of Grievance Against The Judiciary

Appellate Court Brief Exposing The Doctrine Of Judicial Immunity

Senator Adam Kline Appears to be Angry

The Victor DePonceau Scam

Find out which judges to vote for at Robe Probe




# B A A  B A A

# "Karma and the Federal Courts"

by

Paul Andrew Mitchell



(November 1996)

The law of karma is this: what goes around, comes around. When you begin with freedom, freedom comes back to dwell in your house.

And so, we have come to this point in decoding Title 28 of the United States Codes: there are two classes of federal "District Courts" in the federal court system.

One class is for the federal zone; the other class is for the State zone.

Using a very powerful rule of statutory construction, "*inclusio unius est exclusio alterius*," we show that the phrase "District Court of the United States" refers to federal courts for the State zone; and the phrase "United States District Court" refers to federal courts for the federal zone.

We have this on the authority of the Supreme Court of the United States, most notably in the cases of American Insurance Company v. 356 Bales of Cotton, and Balzac v. Porto Rico [*sic*].

Now, here's the rub: Since federal courts are creatures of statutes only, they can only cognize subject matters which are assigned to them expressly by statutes.

When it comes to criminal jurisdiction, the controlling statute is 18 U.S.C. 3231.

This statute grants original jurisdiction to the District Courts of the United States ("DCUS"), but does not mention the United States District Courts ("USDC")!

How about them apples?

Remember this carefully:

*Inclusio unius est exclusio alterius* (in Latin ).

Inclusion of one is exclusion of others (in English).

Since the USDC is not mentioned, its omission can be inferred as intentional. (Read that again, then confirm it in Black's Law Dictionary, any edition).

So, from the historian's point of view, Congress has permitted the limited territorial and subject matter jurisdiction of the USDC to be extended, unlawfully, into the State zone, and into subject matters over which said court has no jurisdiction whatsoever.

This deception was maintained as long as nobody noticed, but now it is obvious, and quite difficult to change, without bringing down the whole house of cards (which is happening, by the way. The Liege firemen are literally hosing their own corrupt court buildings, so we're not alone in this department of judicial tyranny.)

By the way, the famous Belgian Firemen from Liege have been invited, via the Internet, to discharge the Belgian debt to the United States by moving their talents State-side. They should return home debt free, in about ten years or so, depending on available supplies of soap and water.

Imagine a sheet of Saran Wrap, which has been yanked too far, by pulling it beyond the strict territorial boundaries which surround the federal zone.

This is the United States District Court ("USDC"), in all its limited Honors and tarnished glory.

Further proof of this bad karma can be found by comparing 18 U.S.

C. 1964(a) and 1964(c). Both statutes grant authority to issue remedies to restrain racketeering activities prohibited by 18 U.S. C. 1962. Section 1964(a) grants civil jurisdiction to issue injunctive relief to the DCUS; Section 1964(c) grants civil jurisdiction to issue injunctive relief to the USDC. Both refer to the exact same subject matter, namely, RICO (Racketeering Influenced and Corrupt Organizations) activities.

So, when these two statutes are otherwise identical, why did Congress need to enact two separate statutes?

The answer is simple: one authority was needed for the DCUS, and the other was needed for the USDC. Simple, really, when the sedition by syntax is explained in language which penetrates the deception.

Now, if this is truly the case, and nobody has been able to prove us wrong about this matter, the United States (federal government) is in a heap of trouble here, because it has been prosecuting people in the wrong courts ever since the Civil War; furthermore, those courts have no criminal jurisdiction whatsoever, because such an authority is completely lacking from Titles 18 and 28, both of which have been enacted into positive law, unlike Title 26, which has not been enacted into positive law. See Title 1 for details.

What do we do with this earth-shaking discovery? Well, when any federal case is filed, the criminal defendant should submit a Freedom of Information Act ("FOIA") request immediately, for such things as any regulations which have been published in the Federal Register, pursuant to the Federal Register Act, for 18 U.S.C. 3231.

It won't hurt to submit similar FOIA requests for the credentials of all federal employees who have "touched" the case in any way.

Since we already know that there are no regulations for 18 U.S.C. 3231, and that federal employees will usually refuse to produce their credentials, your FOIA requests will be met with silence, whereupon you will file a FOIA appeal. Once the appeal deadline has run, you are in court.

But which court? Guess ...

... the answer is the District Court of the United States. What an amazing discovery, yes? A United States District Judge in Arizona, in late Spring of 1996, ruled that the United States District Court ("USDC") is not the proper forum to litigate a request under the FOIA. That can only be because FOIA requests must be litigated in the District Court of the United States ("DCUS").

Now we have the United States checkmated. The proper forum for FOIA is now *res judicata*. If the DCUS is the proper forum for FOIA, and if the USDC is NOT the proper forum for FOIA, then the USDC is not the proper forum for prosecuting violations of Title 18 either, because the USDC does not show up in 5 U.S.C. 552 or in 18 U.S.C. 3231!

Read that last paragraph again, and again, until you get it. It's okay to admit that you must read it several times; this writer once read a paragraph from Hooven and Allison v. Evatt some 20 different times, until the meaning was finally clear.

*Inclusio unius est exclusio alterius*. The omission by Congress of the USDC from 18 U.S.C. 3231 *must* have been intentional; the maxim certainly allows us to infer that it was intentional. Use of this maxim allows for us to exploit one of the most powerful techniques in American jurisprudence. It is called "collateral attack" -- a broadside, rather than a head-on, collision.

Knowledge is power, and power is freedom ...

... freedom. Freedom! FREEDOM!!!

Love it.



Paul Andrew Mitchell

Counselor at Law, Federal Witness

and Citizen of Arizona State



November 2, 1996

# # #

For a related essay, read "Sedition by Syntax" by Ralph Schwan, in the Supreme Law Library.

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**Paul Andrew Mitchell**

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## The Committee for the Rule of Law

**U.S. SUPREME COURT ALLOWS CITATION OF UNPUBLISHED OPINIONS IN ALL FEDERAL COURTS -- SEE "NEWS"**

## Committee for the Rule of Law – Mission Statement

The purpose of the Committee for the Rule of Law is to insure the legal system is held in strict account to the people and to the law. The Committee deals with the accountability of the adjudication process, not what the law, or any particular judgment should be.

The Committee seeks to revive full publication of all decisions of the United States Court of Appeals and the Court of Appeal of California in official reports and to eliminate all rules of court prohibiting the citation of approximately 90% of all decisions of our appellate courts to any court for any purpose.

The Committee brings to light that the courts of appeal across America have become judicial assembly lines dispensing inconsistent product rather than wisdom, often without significant involvement of any authorized justice, let alone *three* independent, qualified and prepared jurists. As a result the law is so inconsistently applied that the Chief Justice of California has publicly said, "You'd have a hard time telling the wheat from the chaff" when reviewing Court of Appeal decisions.

The Committee for the Rule of Law maintains that any rule restricting citation of, or which allows, secret, hidden, or unpublished opinions encourages expedient, not careful, consideration as the basis for judgment, and constitutes an invitation to error, incompetence, corruption and tyranny.

The Committee for the Rule of Law also maintains that full citation and publication of appellate opinions is necessary to allow the democracy to supervise application of the laws it maintains, correct error, assure equal and uniform application, reconcile inconsistencies, and continually improve the logic, purpose, consistency and justness of our

laws, procedures and jurists.

The inconsistent application of law, which is intolerably painful to law abiding litigants and their attorneys, usually meted out by our Courts of Appeal in unpublished opinions, does not attract popular criticism because the judicial system has withdrawn what was previously both the implicit warranty of its work and the force that attracted the attention of the full democracy to every aspect of that work, namely that the law of each case becomes legal precedent for all of us.

The Committee for the Rule of Law believes that common sense and our sacred constitutions require that **the unfettered discipline of *stare decisis* be restored to the judicial system.**

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For recent developments regarding the non-publication of opinions, please look at NEWS.

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# The Best Judges that Money Can Buy



There has been much discussion recently in some quarters concerning the necessity for the federal judiciary to be completely independent of the government. Certainly this was the intention of the Founding Fathers, although some of them expressed grave doubts as to whether or not this was possible. Recently in the Arizona Republic, the paper's editorial staff took the liberty of quoting United States Supreme Court Justice William Rehnquist, who stated that Judicial independence is "one of the crown jewels of our system of government." Rehnquist was also quoted as saying that judges, while not above criticism, should never be threatened with removal because of their rulings because "integrity requires independence."

We would agree with Chief Justice Rehnquist that integrity requires independence. However, we also state that the converse is true: that lack of independence - especially where large sums of money are concerned - can throw the integrity of the federal judiciary into serious question.

Have you ever wondered why some Federal Judges rule the way they do on certain issues? Does it often seem as if some members of federal judiciary utterly dismiss many arguments which plaintiffs bring into court, arguments based solely on statutes, when these arguments contradict the government's unsupported assertions? Does it often seem as if some federal judges permit federal employees to behave in lax, even unlawful, ways without sanctions? Finally, does it often seem that many members of the federal judiciary, particularly U. S. District Court Judges, often rule inexplicably and apparently arbitrarily in favor of the government?

In this article, we shall present a premise, grounded in statute, that the federal judiciary is not at all as independent as Chief Justice Rehnquist claims it to be; indeed, we believe that the allegedly "independent" federal judiciary has the capacity, because of the statutes which we are about to reveal, to be as corrupt and as influenced by money as is any organized mob. There can be no independence nor integrity in a system which permits what essentially appears to be lawful one-sided bribery.

Our fundamental questions is this: How can the federal judiciary be independent and impartial when the law permits the federal government to privately award judges up to $25,000 in undisclosed "cash awards", and further, to privately "erroneously" overpay them up to $10,000, and then to privately "waive" the overpayments?

Although the preceding statement is incredible, we shall support it with specific statutory cites. The reader can then draw his own conclusions.

Let us begin with an analogy: Two people, whom we'll call Mr. White and Mr. Brown, agree to a business arrangement: Mr. White, who produces a certain kind of widget, agrees to sell 100 of these widgets to Mr. Brown. In the agreement, Mr. White promises Mr. Brown that the widgets will perform a certain function. After the sale, Mr. Brown discovers that the widgets do not perform the requisite function. Mr. Brown angrily tells Mr. White that the widgets have failed to perform as advertised. He then threatens to sue Mr. White if he does not make good on the deal. It is clear that the two men cannot reach an agreement. A lawsuit is imminent. Mr. White then suggests to Mr. Brown that, instead of going to court, they go to arbitration. Mr. Brown agrees. But there is one simple thing that Mr. White has neglected to mention: in the state in which both men live, a statute exists that permits *only* Mr. White to offer the arbiter a "cash award", since Mr. White owns the arbitration company, and furthermore, another statute exists that Mr. White's arbitration company is the only arbitration company lawfully permitted to do business in this state. However, still another statute exists that states that, should Mr. Brown, or anyone other than Mr. White, attempt to offer the arbiter a cash award i.e. a bribe, he will have committed a felony. Does this scenario sound fair? Does the arbiter have "independence"? Is the arbiter encouraged by this set-up to have "integrity"? What are the chances of the arbiter's making a truly fair ruling, or that Mr. Brown will receive a "fair trial"?

As ridiculous as the previous scenario sounds, the potential for this same set-up exists in statute for the Federal Judiciary. We shall attempt to lead you, the reader, through the maze of federal statutes which, when added together, provides ample evidence that the strong potential for one-side bribery exists in statute from the federal government to its employees, U.S. District Court Judges.

Let us start with Title 5 of the United States Code (USC) - "Government Organization and Employees" - Part III (Employees), Subpart C (Employee performance) Chapter 45 (Incentive Awards) Subchapter I(Awards for Superior Accomplishments) Section 4502. This section of Title 5 reveals that government employees can receive "cash awards" from their employer of up to $25,000.00:

> "(a) Except as provided by subsection (b) of this section, a cash award under this subchapter [5 USCS §§ 4501 et seq.] may not exceed $10,000.
>
> "(b) When the head of an agency certifies to the Office of Personnel Management that the suggestion, invention, superior accomplishment, or other meritorious effort for which the award is proposed is highly exceptional and unusually outstanding, a cash award in excess of $10,000 but not in excess of $25,000 may be granted with the approval of the Office.

"(c) A cash award under this subchapter [5 USCS §§ 4501 et seq.] is in addition to the regular pay of the recipient. Acceptance of a cash award under this subchapter [5 USCS §§ 4501 et seq.] constitutes an agreement that the use by the Government of an idea, method, or device for which the award is made does not form the basis of a further claim of any nature against the Government by the employee, his heirs, or assigns.

> "(d) A cash award to, and expense for the honorary recognition of, an employee may be paid from the fund or appropriation available to the activity primarily benefiting or the various activities benefiting. The head of the agency concerned determines the amount to be paid by each activity for an agency award under section 4503 of this title. The President determines the amount to be paid by each activity for a Presidential award under section 4504 of this title.
>
> "(e) The Office of Personnel Management may by regulation permit agencies to grant employees time off from duty, without loss of pay or charge to leave, as an award in recognition of superior accomplishment or other personal effort that contributes to the quality, efficiency, or economy of Government operations."

Obviously the wording of the preceding statute is somewhat difficult to follow, but careful reading and rereading of it plainly shows that the government has built into its statutes the payment to its employees of what are called "cash awards", and has set up the conditions under which these payments are made. From 5 USC, we now go to 28 USC - known as "Judiciary and Judicial Procedure": Title 28 at Section 602 (Employees) states:

> "(a) The Director shall appoint and fix the compensation of necessary employees of the Administrative Office in accordance with the Administrative Office of the United States Courts Personnel Act of 1990."

Subsection (a) of 28 USC § 602 seems fairly innocuous. But what exactly is the "Administrative Office of the United States Courts Personnel Act of 1990? Well, at Section 3 (a) (1) of the Act, is stated that the Act:

> "establish(es) procedures for employee evaluations, the granting of periodic pay adjustments, incentive awards..."

So who are these "employees" that may be "granted" "incentive awards" of up to $25,000.00?

According to 5 USC § 3371 (3), the Administrative Office of the United States Courts is defined as a "federal agency". 5 USC § 7342 reveals that the Administrative Office of the United States Courts is the "employing agency" for certain federal judges.

5 CFR § 870.103 reveals that the Administrative Office of the United States Courts is the "employing office" for judges of all United States Courts of Appeals; All United States District Courts; The Court of International Trade; The Claims Court; and The District Courts in Guam, the Northern Mariana Islands, and the Virgin Islands. So the law states that these specific categories of federal judges can receive "cash awards" of up to $25,000.00.

But isn't there some law that requires Federal Judges to disclose all of the money that they receive, and whatever sources from which they receive it? Actually, there isn't. The Ethics in Government Act (5 USC Appx §§101 et seq, at § 102, specifically forbids the disclosure of monies earned from the Federal Government. The Ethics in Government Act exists ostensibly only to discourage conflicts of interest between private industry and government employees, between private individuals and government employees, between foreign entities and government employees. However, the Ethics in Government Act ironically fails to protect the general public from any knowledge of graft, corruption or bribery within the government itself. Furthermore, personal financial information is exempt from disclosure under the Privacy Act. Federal judges can thus be paid off completely privately and secretly - and lawfully - by their employer - the federal government - with a payment statutorily dubbed in this case an "incentive award", also referred to as a "cash award." In the case of a private individual, if he or she tried to offer a federal Judge a secret "incentive award" or a "cash award," it would called a "bribe." The attempt of a private individual to bribe a judge is classified by the government as a felony.

But what about the Inspector General, whose job is defined in Title 5 as being "to conduct and supervise audits and investigations relating to the programs and operations of establishments" relevant to federal government employees, and also "to prevent and detect fraud and abuse in such programs and operations"? Can't he determine whether or not federal Judges are being paid off with "cash awards" from the government or "bribes" from private individuals? The Inspector General Act of 1978, (5 USC Appx.)§ 8D, reveals that the Inspector General is "under the authority, direction, and control of the Secretary of the Treasury with respect to audits or investigations…concerning…(E) other matters the disclosure of which would constitute a serious threat to national security. " Section 8D further states:

"the Secretary of the Treasury may prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpena (sic), after such Inspector General has decided to initiate, carry out, or complete such audit or investigation, or to issue such subpena (sic), if the Secretary determines that such prohibition is necessary to prevent the disclosure of any information described under paragraph (1) or to prevent significant impairment to the national interests of the United States."

Section 8E reads exactly the same, except for the substitution of the term "Attorney General" for the term "Secretary of the Treasury." Perhaps it would be an "impairment to the national interests of the United States" to permit the Inspector General to audit the federal Judiciary. And remember, the Attorney General and the Secretary of the Treasury are both appointed to office by the President, and both have the authority to prevent the audit of whomever or whatever they choose, including the accounts of federal judges.

Other government agencies are also permitted to award money to federal judges. The Internal Revenue Service handbook of Delegation Orders 1229-91 reveals that the IRS is permitted to pay "cash monetary awards" to employees of "other government agencies" - which term can easily include federal judges.

The preceding cites would seem to provide enough information to support our contention that federal Judges receive "cash awards" (alias bribes) from their employer, the "United States." But let us go still further; we have evidence that there is in place in the statutes yet another form of bribery, called "erroneous payment" and "waiver." Let us examine portions of the Code of Federal Regulations. 4 CFR (the regulations relevant to 4 USC - "Flag and Seal, Seat of Government and the States") § 91.4 states the following:

> "The Director of the Administrative office of the United States Courts may grant a waiver in whole or in part of a claim of the United States in an amount aggregating not more than $10,000 arising out of an erroneous payment of

pay...." 4 CFR § 91.5 (a)(2): "... all doubts are to be resolved in favor of the applicant."(read Judge). 4 CFR § 91.6 (b): "An erroneous payment, the collection of which is waived pursuant to this subchapter, is deemed valid payment for all purposes."

Again, not only judges are permitted these overpayments and waivers. 28 CFR § 0.155 reveals that employees of the Department of Justice, (e.g. FBI agents and United States Attorneys) are permitted the same waivers. 28 CFR § 0.143 reveals that DOJ employees are eligible for "Incentive Awards." 28 CFR § 0.11 reveals that DOJ employees are eligible for incentive awards for "...personal effort which contributes to the efficiency, economy or other improvement of Government operations..."

What actions might constitute a contribution "to the efficiency, economy or other improvement of Government operations"? Well, the seizure and forfeiture of private property by government agencies certainly adds millions every year to the government coffers. Might those responsible for such actions possibly receive "incentive awards" from the government? The U.S. Attorneys, who have prosecuted the citizens who have been forced to forfeit their houses in IRS seizures, have certainly contributed to the "economy" and "efficiency of Government operations" of the federal government. Federal judges, who have sanctioned those same seizures, have also certainly contributed to the "economy" and "efficiency of Government operations." Both U.S. Attorneys and judges have placed millions of dollars of seized properties into auctions, the profits of which go straight to the federal government. Never mind the havoc in personal lives wrought by the seizure and sale of property by the government; the "Government operations" of this nature are both "efficient" and "economical," at least as far as the coffers of the federal government is concerned. And the U.S. Attorneys and the federal judges are, by law, entitled to cash awards for their contributions to this "efficiency" and "economy." Knowing this, it should come as no surprise that the U.S. Attorneys and federal judges usually have their offices located in the same building, sometimes on the same hall.

But isn't there some sort of rule that prevents a presiding judge from hearing a case in which he has an interest in the subject matter of the case? In fact, there is. 28 USC § 455 (b) (4) reveals that a judge should disqualify himself if he has a "financial interest" in the proceeding. However, we must examine what is actually meant by the term "financial interest." 28 USC § 455(d):

"(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

> "(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
>
> "(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
>
> "(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
>
> "(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities."

So the "cash awards" statutorily awarded to judges do not technically constitute a "financial interest" within the meaning of the term defined.

What we are therefore left with is this: we private Citizens must rely solely upon the integrity of federal judges and others who are eligible for these substantial - and privately awarded - cash awards. The following list is that

of numerous court cases in which judges and other employees and agents of the federal government were convicted of crimes which clearly proved them to be without integrity:

***Judges***

(a) Slade v. United States, 85 F.2d 786 (10th Cir. 1936): Judge bribed juror to acquit a defendant; judge convicted of bribery.

(b) United States v. Manton, 107 F.2d 834 (2nd Cir. 1939): Court of Appeals judge involved in bribes to influence decisions.

(c) McDonald v. Alabama, 57 Ala. App. 529, 329 So.2d 583 (1975): sex for leniency.

(d) United States v. Campbell, 684 F.2d 141 (D.C. Cir. 1982): traffic tickets, judge and gratuity.

(e) United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985): Greylord.

(f) United States v. Hollaway, 778 F.2d 653 (11th Cir. 1985): Two Mobile state court judges.

(g) United States v. LeFevour, 798 F.2d 977 (7th Cir. 1986): Greylord.

(h) United States v. Claiborne, 765 F.2d 784 (9th Cir. 1985); see Harry's vindication, State Bar of Nevada v. Claiborne, 756 P.2d 464 (Nev. 1988).

(i) United States v. Nixon, 816 F.2d 1022 (5th Cir. 1987); habe at 881 F.2d 1305 (5th Cir. 1989): U.S. District Judge convicted of bribery.

(j) United States v. Conn, 769 F.2d 420 (7th Cir. 1985): Greylord.

(k) United States v. Devine, 787 F.2d 1086 (7th Cir. 1986): Greylord.

(l) United States v. Holzer, 816 F.2d 304 (7th Cir. 1987): Greylord.

(m) United States v. Reynolds, 821 F.2d 427 (7th Cir. 1987): Greylord.

(n) United States v. Glecier, 923 F.2d 496 (7th Cir. 1991): Greylord.

(o) United States v. Hastings, 681 F.2d 706 (11th Cir. 1982): This was pre-trial appeal, and later Alcee won criminal case. Is now a member of Congress.

(p) United States v. Kahaner, 317 F.2d 459 (2nd Cir. 1963): State judge and former AUSAs.

***I.R.S. and Other Federal Agents***

(a) Smiler v. United States, 24 F.2d 22 (5th Cir. 1928): Bribe.

(b) Delaney v. United States, 199 F.2d 107 (1st Cir. 1952): Bribe.

(c) United States v. Nunan, 236 F.2d 576 (2nd Cir. 1956): Former IRS Commissioner convicted of tax evasion.

(d) United States v. Umans, 368 F.2d 725 (2nd Cir. 1966): Bribe.

(e) United States v. Barash, 412 F.2d 26 (2nd Cir. 1969): Bribe.

(f) United States v. Polansky, 418 F.2d 444 (2nd Cir. 1969): Bribe.

(g) United States v. Greenberg, 445 F.2d 1158 (2nd Cir. 1971): IRS agent and bribes.

(h) United States v. Weiser, 428 F.2d 932 (2nd Cir. 1969): IRS agent and bribes.

(i) United States v. Lipton, 467 F.2d 1161 (2nd Cir. 1972): IRS agent and bribes.

(j) United States v. Lanci, 669 F.2d 391 (6th Cir. 1982): FBI agent and bribes.

(k) United States v. Miller, 874 F.2d 1255 (9th Cir. 1989): FBI agent giving documents to Soviets.

(l) United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986): AUSA convicted of taking gratuities.

(m) Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942): AUSA and bribes.

(n) Attalallah v. United States, 955 F.2d 776 (1st Cir. 1992): customs agents killed for $700,000.

(o) United States v. Mangan, 575 F.2d 32 (2nd Cir. 1978): crooked IRS agent.

(p) United States v. Johnson, 398 F.2d 29 (7th Cir. 1968): IRS agent guilty of defrauding by filing false returns.

(q) United States v. Morales, 11 F.3d 915 (9th Cir. 1993): IRS agent and bribe.

(r) United States v. Provinzano, 50 F.R.D. 361 (E.D.Wis. 1970): homosexual IRS agent indicted.

***Prosecutorial misconduct.***

(a) United States v. OMNI International Corp., 634 F.Supp. 1414 (D.Md. 1986): Prosecutor Elizabeth Trimble and Special Agents fabricated evidence and a case was dismissed.

(b) United States v. Burnside, 824 F.Supp. 1215 (N.D. Ill. 1993); United States v. Andrews, 824 F.Supp. 1273 (N.D.Ill. 1993); United States v. Boyd, 833 F.Supp. 1277 (N.D.Ill. 1993); United States v. Griffin, 856 F.Supp. 1293 (N.D. Ill. 1994): El Rukn cases where lots of "gifts" and benefits to prosecution witnesses caused vacation of convictions. A major scandal.

(c) United States v. Demjanjuk, 518 F.Supp. 1362 (N.D.Ohio 1981), aff'd, 680 F.2d 32 (6th Cir. 1982). Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985). Demjanjuk v. Meese, 784 F.2d 1114 (D.C.Cir. 1986). Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993): OSI misconduct.

(d) People v. Auld, 815 P.2d 956 (Colo. App. 1991): governmental misconduct caused dismissal of complaint.

(d) The Inslaw affair: Cases dealing with DoJ theft of Promis software.

1. In re Inslaw, Inc., 76 B.R. 224 (Bkrtcy., D.D.C. 1987).

2. In re Inslaw, Inc., 88 B.R. 484 (Bkrtcy., D.D.C. 1987).

3. United States v. Inslaw, Inc., 113 B.R. 802 (D.D.C. 1989).

4. Inslaw, Inc. v. Thornburgh, 753 F.Supp. 1 (D.D.C. 1990), rev., United States v. Inslaw, Inc., 932 F.2d 1467 (D.C.Cir. 1991).

5. In re Inslaw, Inc., 885 F.2d 880 (D.C.Cir. 1989).

(e) LaRouche: In re Caucus Distributors, Inc., 106 B.R. 890.

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None of the bribery charges cited in any of the above cases reflects any prosecutions or convictions for the ubiquitous "incentive award" or overpayments which we have revealed, since these "cash awards" are "lawful" bribes, and therefore can never be prosecuted as crimes while the statutes permitting them are in force.

We believe that the citizens of these United States of the American Union can never truly be "free" unless and until the federal judiciary is completely free from the possibility of government-sponsored graft and corruption. We believe that Congress needs to be apprised of the facts in this article, and that it needs to write laws which permit the Citizens to closely scrutinize the monies which federal judges receive from their employer, the government, especially in cases in which the Citizens' property or freedom is at stake. Until this happens, we believe that we as private Citizens shall be at the disadvantage of the "awards" which the federal government may bestow undisclosed upon federal judges - judges who are supposed to be impartial and to insure us all a fair trial.

Because there is no provision of law for disclosure of financial information on judges, and because there is no Privacy Act System of Records which purports to maintain records on financial affairs relevant to federal judges, we have no proof whatsoever that any federal judge has ever received any of the incentive awards, overpayments or waivers described in this article. We have written this article simply to reveal the evidence published in statute that there exists an enormous potential for what is, essentially, government-sanctioned bribery of judges by the federal government itself, and that there is no way for the public to know whether or not such bribes are being paid. We believe that not all judges know about this information, nor would all judges accept such bribes were they offered.

*The authors would like to thank attorney Lowell (Larry) Becraft for generously sharing with them the numerous court case cites revealing government corruption contained in this article.*

# The Federal Mafia Courts Stole your Seventh Amendment Right to Trial By Jury!

The Federal Mafia Courts stole your Seventh Amendment right to trial by jury. Here is what the Seventh Amendment says about the right of trial by jury:

> *In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*

Here is what the tyrants in the Fifth Circuit court of federal appeals said about your Seventh Amendment right to jury trial in the case of Mathes v. Commissioner of Internal Revenue, 576 F.2d 70, 1978:

> *Taxpayers also assert they were denied their Seventh Amendment right to trial by jury before the Tax Court.* ***The Seventh Amendment preserves the right to jury trial "in suits at common law." Since there was no right of action at common law against a sovereign, enforceable by jury trial or otherwise, there is no constitutional right to a jury trial in a suit against the United States.*** *See 9 C. Wright & A. Miller, Federal Practice & Procedure § 2314, at 68-69 (1971). Thus, there is a right to a jury trial in actions against the United States only if a statute so provides. Congress has not so provided when the taxpayer elects not to pay the assessment and sue for a redetermination in the Tax Court. For a taxpayer to obtain a trial by jury, he must pay the tax allegedly owed and sue for a refund in district court. 28 U.S.C. §§ 2402 and 1346(a)(1). The law is therefore clear that a taxpayer who elects to bring his suit in the Tax Court has no right, statutory or constitutional, to a trial by jury. Phillips v. Commissioner, 283 U.S. 589, 599 n. 9, 51 S. Ct. 608, 75 L. Ed. 1289 (1931); Wickwire v. Reinecke, 275 U.S. 101, 105-106, 48 S. Ct. 43, 72 L. Ed. 184 (1927); Dorl v. Commissioner, 507 F.2d 406, 407 (2d Cir. 1974) (holding it "elementary that there is no right to a jury trial in the Tax Court.").*

Therefore, we only get a trial by jury when litigating against the U.S. government for wrongful taking of taxes if Congress gives its permission by statute! Do you think they will ever do that? Fat chance! The Constitution no longer guarantees a trial by jury if the matter being litigated is taxes and the litigant is suing the federal government. We have the wranglings of corrupt judges like the one above to thank for that.

With the above startling realizations in mind, do you think it is EVER possible to guarantee a fair trial or a balance of power if you are litigating against the IRS in a federal court? Absolute power corrupts absolutely, and there is no better example of that philosophy in action than in the federal courts. The deck in federal court is obviously stacked, which explains why so many irrational and unconstitutional rulings occur in the context of income tax litigation in the federal courts. Another thing that this section ought to convince you of is that it is more productive in a federal court to go after the *individual government officials* involved for corruption, fraud, and extortion under the color of office than it is to go after the government. If they violate the law, they can be held *personally liable*, and because you are not suing a sovereign, the United States Government, you can be assured your right to a Trial by Jury.

Do you STILL think we live in a free country? Our government is no different than having a monarch with absolute power to do whatever it wants with sovereign immunity from prosecution for wrongdoing granted by our corrupt federal courts!



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LIBERTY & PEACE
HARRY BROWNE

WORLDNETDAILY EXCLUSIVE COMMENTARY

# The Supreme Court Scam

Posted: September 4, 2000
1:00 a.m. Eastern

For the past year, Republicans have been trying to explain to us small-government advocates why we should vote for George W. Bush. But since Mr. Bush has no plans to reduce government or improve our lives in any significant way, Republicans have had only one argument: he isn't Al Gore. ("You don't want Al Gore in the White House, do you?")

But after seeing the Republican convention -- with its theme, "big government can be compassionate government" -- it turns out that George Bush *is* Al Gore after all.

Since George Bush loves big government as much as Al Gore does, Republicans have had to find another reason for us to choose Bush over Gore. So they remind us that the next President may select as many as three or four new Supreme Court judges.



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"Do you want Al Gore choosing those judges?" they ask.

The Supreme Court is a favorite Republican whipping boy. They blame the court for many of today's ills -- hoping we'll ignore the role of the big-spending Reagan and Bush administrations and the pork-obsessed, over-regulating, power-hungry Republican Congress.

They neglect to mention that Republican presidents appointed seven of the nine judges on the court they love so much to hate. They expect us to jump at the chance to vote for a president who will undoubtedly appoint more judges like Anthony Kennedy, Sandra Day O'Connor, and David Souter.

And they ignore the fact that even their favorite judges -- Clarence Thomas and Antonin Scalia -- often ignore the plain meaning of the Constitution in an effort to impose their own values on America.

**Picking a Supreme Court judge**

We have bad Supreme Court judges because bad presidents have chosen them. And the court won't be improved by electing another big-government president -- whether his name is Al Gore or George Bush.

Every modern Supreme Court justice decides constitutional questions by referring to something other than the plain language of the Constitution. They invoke "original intent," a "living Constitution," "penumbras," "the greater good," or the "compelling interest" of government. In so doing, they demonstrate that they're unqualified to sit on the Supreme Court.

What should be the proper qualifications of a Supreme Court

Sex-offender stings get thousands of illegals
Complaint cites judge in terror-linked case
Hamas: We'll obtain U.S. money transfer
Questions about Iranian nuke plans not 'serious'
U.S. nuclear sub collides with ship
Hitler-style 'designer' babies coming under fire in Texas
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Rick Warren: Is he or it isn't he?
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judge? Should the president apply a litmus test in choosing nominees?

Yes, he should. If I become president, I will ask six simple questions of any potential judge.

The First Amendment says,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

And yet, when Congress or a legislature makes a law censoring the Internet, restricting political advocacy, prohibiting cigarette advertising on TV, or barring hate speech, the judges don't strike it down automatically. They deliberate to determine whether the government has a "compelling interest" in regulating speech or the press.

But the First Amendment says, "Congress shall make no law. ..."

It doesn't speak of the government's "compelling interest" or provide for any exceptions or qualifications. It says very simply, "Congress shall make no law. ..."

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*No law.*

So the first question I would pose to any potential Supreme Court judge is:

1. *Can you read?*

If the prospect can pass a reading test, we can move on to the second question:

2. *What do the words "Congress shall make no law" mean?*

The Second Amendment says:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

## Again, no exceptions or qualifications are given. So my next question is:

3. *What do the words "shall not be infringed" mean?*

And on from there:

4. *Do the thousands of gun laws now on the books infringe in any way whatsoever on the "right of the people to keep and bear arms"?*

The Ninth Amendment says:

> The enumeration in the Constitution, of certain rights, shall

> not be construed to deny or disparage others retained by the people.

Nowhere in the Constitution is the government given the power to take away your right to privacy, your right to defend yourself, your right to keep your property, your right to choose your own retirement program, or in fact any other right.

So my next question is:

5. *What rights do the people no longer have, and where in the Constitution were those rights taken from the people?*

The 10th Amendment says:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

My final question will be:

6. *Where in the Constitution was it delegated to the United States government the power to interfere in education, health care, law enforcement, welfare, charity, corporate welfare, or any of the many other areas that form a part of today's overbearing, over-regulating, over-expensive federal government?*

These six questions will tell me all I need to know about the kind of judge a potential nominee would be.

**Plain English**

The Constitution isn't written in Chinese, Swahili, or Esperanto. It is in plain English. We don't need anyone to translate or interpret for us. It isn't even necessary to study the history of the adoption of the Constitution, since there's nothing mysterious about its words.

Phrases like "make no law" or "shall not be infringed" or "retained by the people" or "reserved to" are comprised of everyday words that require no search for "original intent" or "penumbras."

The Constitution means what it says it means -- or it means nothing at all. And any judge who overrules the plain English of the Constitution is no judge at all -- whether he's been appointed by a Republican or a Democrat.

Will either Al Gore or George Bush choose judges on the basis of their respect for the plain words of the Constitution?

Of course not. They both believe in big government. They both believe your leaders know what's best for you.

Neither of them thinks of you as a sovereign individual with inalienable rights he should leave alone. And neither of them intends to have his grand plans for a Brave New World derailed by the plain words of the Constitution.

Al Gore doesn't want a Supreme Court judge who will strike down his vision for federal pre-school programs. George Bush doesn't want a judge who will strike down his vision of federal school

vouchers.

Neither of them wants judges who will keep him from meddling in education or violating the Constitution in any other way. Quite the contrary.

So why should you think you'll be any freer with a Bush Supreme Court than one selected by Al Gore? Do you believe George W. Bush -- who hasn't proposed a single reduction in big government -- is determined to keep the government's nose out of your business?

I don't think so. He can't wait to get his hands on the reins of power so he can use your tax money to promote his favorite charities. He can't wait to impose his concept of a good society on you.

**What Do You Want?**
Do you want smaller government?

If so, you will never get it so long as you support those who are making government bigger. You will never get it by inventing excuses to vote for those who are working to make government more expensive, more intrusive, more oppressive.

If you vote Republican or Democratic, you're giving up. You're saying there's no hope you'll ever be free, and so you're just going to make the best of a bad bargain -- by voting for the person who will take you to Hell at the slowest rate.

If you want freedom, you must vote for freedom -- not for big government. When you do so, you may not get what you want this year. But you're paving the way to get freedom in your lifetime -- and maybe even in this decade.

But with the Republicans and Democrats, you'll *never* get what you want. Instead, you, your children, and your grandchildren will face an ever-larger, more intrusive government.

To get freedom, you have to vote for it -- for candidates who are unconditionally for smaller government, with no exceptions and no excuses.

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*Harry Browne is the director of public policy at the American Liberty Foundation. You can read more of his articles and find out about his network radio show at HarryBrowne.org.*

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# THREE ELEMENTS THAT CAN RENDER COURT RULINGS VACATABLE

## 1. Existence of inherent fraud.

- 37 Am Jur 2d at section 8 states, in part: "Fraud vitiates every transaction and all contracts. Indeed, the principle is often stated, in broad and sweeping language, that fraud destroys the validity of everything into which it enters, and that it vitiates the most solemn contracts, documents, and even judgments."

- The general misconception is that any statute passed by legislators bearing the appearance of law constitutes the law of the land. The U.S. Constitution is the supreme law of the land, and any statute, to be valid, must be in agreement. It is impossible for both the Constitution and a law violating it to be valid; one must prevail. This is succinctly stated as follows:

  The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it. An unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.

  Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. . .

  A void act cannot be legally consistent with a valid one. An unconstitutional law cannot operate to supersede any existing valid law. Indeed, insofar as a statute runs counter to the fundamental law of the land, it is superseded thereby.

## 2. Existence of inherent lack of bona fide jurisdiction.

- "Although there formerly was a conflict of authority with respect to the proof of jurisdiction or the lack of jurisdiction, the Supreme Court has declared that **one who claims that the power of the court should be exercised in one's behalf must carry throughout the litigation the burden of showing that he or she is properly in court. Accordingly, if a party's allegations of jurisdictional facts are challenged by an adversary in any appropriate manner, he or she must support them by competent proof**, and, even where they are not so challenged, the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his or her allegations by a preponderance of evidence. However, it is not mandatory upon the court to call upon the party asserting jurisdiction to establish it by proof, in the event that the party's jurisdictional averments are not properly challenged by the adversary, and, in such a case, application may be made of the rule that **proof in support of jurisdictional averments need not be offered where the defendant does not formally plead to [challenge] the jurisdiction.**" *§ 2.455, Federal Procedure*

  [*EDITOR'S COMMENT*: Hello!!!! Does that last statement wake anybody up to the critical reason why it is important to always challenge jurisdiction to be sure it is truly bona fide? Since there is no statute of limitations on fraud, jurisdiction can be challenged at any time, even after a case has been "decided". [smile] And further, were you ever given bona fide written full disclosure that by hiring an attorney, you had been automatically presumed to have waived any jurisdictional challenges because of the attorney being an "officer of the court"???? Hello!!!!]

## 3. Existence of inherent lack of bona fide due process of bona fide law.

- "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized." *Article IV in amendment to the Constitution of the United States*

- "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived or life, liberty or property, without due process of law;** nor shall private property be taken for public use without just compensation." *Article V in amendment to the Constitution of the United States*

**No one is bound to obey an unconstitutional law and no courts are bound to enforce it.**

*Sixteenth American Jurisprudence*
*Second Edition, 1998 version, Section 203 (formerly Section 256)*

- **JURISDICTION** the power to hear and determine a case. 147 P.2d 759, 761. This power may be established and described with reference to particular subjects or to parties who fall into a particular category. In addition to the power to adjudicate, a **valid** exercise of jurisdiction requires fair **notice** and an opportunity for the affected parties to be heard. **Without jurisdiction, a court's judgment is void.** A court must have both SUBJECT MATTER JURISDICTION and PERSONAL JURISDICTION (see below). See also **territorial jurisdiction; title jurisdiction."**

  **SUBJECT MATTER JURISDICTION refers to the competency of the court to hear and determine a particular category of cases. Federal district courts have "limited" jurisdiction in that they have only such jurisdiction as is explicitly conferred by federal statutes. 28 U.S.C. §1330 [EDITOR'S NOTE: see also 40 U.S.C.S. §255] et seq. See LIMITED [SPECIAL] JURISDICTION. Many state trial courts have "general" jurisdiction to hear almost all matters. The parties to a lawsuit may not waive a requirement of subject matter jurisdiction.**

  **TERRITORIAL JURISDICTION the territory over which a government or a subdivision thereof has jurisdiction, 147 P.2d 858, 861; relates to a tribunal's power with regard to the territory within which it is to be exercised, and connotes power over property and persons within such territory. 94 N.E. 2d 438, 440.**

  **TERRITORIAL COURT a court established by Congress under Art. IV, Sec. 3, Cl. 2 of the Constitution, which gives Congress the power to make "all needful rules and regulations respecting the territory or other property belonging to the United States." 370 U.S. 530, 543; 371 F.2d 79, 81.** ***Above definitions from: Barron's Law Dictionary, Fourth Edition.***

- "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, **which district shall have been previously ascertained by law,** and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence." *Article VI in amendment to the Constitution of the United States*

- "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others **retained by the people.**" *Article IX in amendment to the Constitution of the United States*

- "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Article X in amendment to the Constitution of the United States*

- "***Section 1.*** Neither slavery **nor involuntary servitude,** except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Article XIII in amendment to the Constitution of the United States*

- "...Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, **it shall be conclusively presumed that no such jurisdiction has been accepted."** *Excerpted from 40 U.S.C.S. §255*

  "In view of 40 USCS §255, **no jurisdiction exists in United States to enforce federal criminal laws, unless and until consent to accept jurisdiction over lands acquired by United States has been filed in behalf of United States as provided in said section,** and fact that state has authorized government to take jurisdiction is immaterial. Adams v. United States (1943) 319 US 312, 87 L Ed 1421, 63 S Ct 1122. *Excerpted from 40 USCS §255, interpretive note 14.*

- "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; . . ." *Article I, Section 2, Constitution of the state of Ohio*

- "This enumeration of rights shall not be construed to impair or deny others retained by the people, and **all powers, not herein delegated, remain with the people.**" *Article I, Section 20, Constitution of the state of Ohio.*

***Note:*** Preliminary research has found that there may be as many as 50,000,000 (yes, 50 million!) inherently void and vacatable court cases that have already been decided in the courts across the nation. Do you think there's a possibility that one of those just might be yours or someone you know? Is it worth checking into and standing up and challenging? Only **you** can decide. What are you waiting for?



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# 1-4.000
# STANDARDS OF CONDUCT

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## 1-4.010 Introduction

Under Executive Order 11222, each agency of the federal government is responsible for issuing regulations on the standards of conduct, including ethical conduct, for its employees. It is required that these standards be brought to the attention of each employee annually. The Department follows the government-wide standards of conduct promulgated by the Office of Government Ethics (OGE) at 5 C.F.R. Chapter XVI, especially Parts 2634, 2635, 2636, and 2637; and Department of Justice Order 1200.1. In addition, there are supplemental regulations for the Department of Justice which address, among other things, outside employment. *See* 5 C.F.R. § 3801.101-106. Every current employee should be reminded annually of the existence of the standards of conduct contained in 5 C.F.R. Chapter XVI and DOJ Order 1735.1A, and where to review a copy. All employees should review these standards carefully and bring any problems to the attention of their supervisors. Also, all employees are subject to the provisions of 18 U.S.C. § 201 et seq., making criminal certain activities by employees or former employees.

Any questions concerning the applicability of 5 C.F.R. § 2634 et seq., DOJ Order 1735.1A, the statutes upon which these regulations are based (see discussion below), or any other applicable professional standards should be addressed to the Ethics Advisors in the Districts. For example, an employee should contact his/her Ethics Advisor when he/she: (1) is offered a gift in connection with his/her job, including, in certain cases, from another employee, and especially when the offer involves an award, the payment of money, travel and/or lodging expenses, or free attendance at any event; (2) is assigned a matter where his/her official actions may affect his/her financial interest or the interest of any person with whom he/she is seeking or negotiating for future employment; (3) is asked to participate in a matter that might cause a reasonable person to question his/her impartiality; (4) might realize private gain through the use of his/her official position, non-public information, government property, and/or official time; or (5) pursues outside employment or other outside activity that may conflict with his/her official duties.

The Deputy Designated Agency Ethics Official (DDAEO) for the offices of the United States Attorneys and the Executive Office for United States Attorneys (EOUSA) is the Legal Counsel, EOUSA. Unless otherwise indicated in this chapter, "employee" means an employee of EOUSA or a United States Attorney's Office. The DDAEO is authorized to review requests to engage in outside activities employment or other matters which might appear inappropriate or improper under the various applicable standards of conduct. In many cases, employees should, and in some cases, must (*see, e.g.*, USAM 1-4.320), seek approval from the DDAEO before engaging in certain outside activities. Although the role of the DDAEO is to determine whether the activity violates any of the various standards of conduct mentioned in this chapter, the DDAEO will also consider, based on the representations of the requestor, whether engaging in the activity would cause a reasonable person with knowledge of the relevant facts to question the employees impartiality. Approvals are based solely on the information provided by the employee, and may be invalid if the employee provided incorrect or incomplete information.

Disciplinary action for violating a provision of 5 C.F.R. Part 2635 or any agency supplemental regulations will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee made full disclosure of all relevant circumstances. Reliance on any other individual, such as a private attorney, will not shield an employee from discipline. Further, when the employee's conduct violates a criminal statute, reliance on the advice of the DDAEO cannot ensure that the employee will not be prosecuted. Such reliance is, however, a factor considered by the Department in selection of such cases for prosecution.

## 1-4.100 Allegations of Misconduct by Department of Justice Employees -- Reporting Misconduct Allegations

Department employees shall report to their United States Attorney or Assistant Attorney General, or other appropriate supervisor, any evidence or non-frivolous allegation of misconduct that may be in violation of any law, rule, regulation, order, or applicable professional standard. The supervisor shall evaluate whether the misconduct at issue is serious, and if so shall report the evidence or non-frivolous allegation to the Office of Professional Responsibility (OPR) or to the Office of the Inspector General (OIG), and to EOUSA, as set forth below.

If the supervisor was involved in the alleged violation, the supervisor must bring the evidence or allegation to the attention of a higher-ranking official. An employee who wishes to report directly to OPR or OIG may do so.

When a supervisor is uncertain whether an allegation should be referred, the supervisor may telephone OPR or OIG to determine what action to take.

Reporting an allegation raises no inference that the allegation is well-founded.

All employees have a duty to cooperate with internal investigations conducted by OPR, OIG or another internal agency official.

A. **Office of Professional Responsibility of the Department of Justice.** Evidence and non-frivolous allegations of serious misconduct by Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice shall be reported to OPR.

B. **Offices of Professional Responsibility of the Federal Bureau of Investigation and the Drug Enforcement Administration.** Evidence and non-frivolous allegations of serious misconduct by FBI or DEA employees shall be reported to the Office of Professional Responsibility of the FBI or DEA. Employees of the FBI or DEA who wish to report an allegation outside of their component may report to the Deputy Attorney General.

C. **Office of the Inspector General.** Evidence and non-frivolous allegations of waste, fraud, abuse or other misconduct by and Department employee, except as set forth an (A) and (B) above shall be reported to OIG.

D. **Executive Office for United States Attorneys.** Any evidence or non-frivolous allegation involving an employee of a United States Attorney's office or EOUSA shall also be reported to the Legal Counsel, EOUSA.

## 1-4.120 Reporting Allegations in the Course of Judicial Proceedings

A. **Judicial Statements Concerning Misconduct.** Department attorneys shall report to their supervisors any statement by a judge or magistrate indicating a belief that misconduct by a Department employee has occurred, or taking under submission a claim of misconduct. Supervisors shall report to DOJ OPR immediately any evidence or non-frivolous allegation of serious misconduct.

B. **Judicial Findings of Misconduct and Requests for Review.** Whenever a judge or magistrate makes a finding of misconduct by a Department employee or requests an inquiry by the Department into possible misconduct, the finding or request shall be reported immediately to the employee's supervisor and to DOJ OPR, regardless whether the matter is regarded as serious or non-serious.

## 1-4.130 Litigation Concerning Misconduct Allegations

A. **Supervisory Review of Court Filings.** Before any pleading or other document concerning any non-frivolous allegation of serious misconduct is filed, whether in the district court or on appeal, it must be reviewed by a supervisor who is not implicated by the allegation.

B. **Recusal Upon Finding of Misconduct.** A Department attorney who is found to have engaged in misconduct shall not represent the United States in litigation concerning the misconduct finding, unless approval is obtained from the responsible United States Attorney or Assistant Attorney General.

C. **Consultation with DOJ OPR.** The supervisor may consult with DOJ OPR before filing any pleading relating to a misconduct allegation, and must apprise DOJ OPR of any significant developments after a matter has been reported to DOJ OPR pursuant to this section.

## 1-4.140 Office of Professional Responsibility Procedures

A. **Preliminary Review.** Upon receiving an allegation within its jurisdiction, DOJ OPR shall conduct an immediate preliminary review. DOJ OPR shall open an investigation only if it

concludes that further investigation is warranted.

B. **Review of Judicial Findings.** If a judge makes a finding of misconduct by a Department employee or requests an inquiry by the Department into possible misconduct, DOJ OPR shall conduct an expedited inquiry without awaiting further judicial or appellate proceedings.

C. **Notification at Conclusion of Investigation.** Upon the completion of an investigation, DOJ OPR shall promptly notify the subject of the allegation, the employee's supervisor, and the complainant of the results.

D. **Bad Faith Complaints.** If DOJ OPR determines that an allegation made by an attorney was made in bad faith, as a result of gross negligence, or in reckless disregard for the truth, it shall report the complainant's misconduct to the appropriate entity established by the local authorities to handle attorney misconduct.

E. **Former Employees.** DOJ OPR shall obtain the approval of the Deputy Attorney General Before declining to investigate or terminate an investigation on the ground that an employee has left the Department. The decision whether to conduct an investigation under such circumstances will be made on a case-by-case basis.

F. **Public Disclosure of OPR Findings.** DOJ OPR will determine whether to publish a summary of one of its reports in accordance with a memorandum to OPR from the Deputy Attorney General dated December 13, 1993. For a copy, please contact the Legal Counsel staff at 202-514-4024.

## 1-4.200 Public Financial Disclosure Reports

The Ethics in Government Act of 1978, as amended (the "Act"), requires the filing of a Public Financial Disclosure Report (SF-278) by employees in statutorily-specified positions. In general, these positions require the exercise of significant policy-making and command discretion. In each agency the following employees, including Special Government employees, serve in "covered" positions:

A. Employees in senior positions under a pay system other than the General Schedule must file when their positions' rate of basic pay is equivalent to or greater than 120% of the minimum rate of basic pay for GS-15. *See* 5 C.F.R § 2634.202(c). Currently, the minimum rate of basic pay for GS-15 is $83,160. Assistant United States Attorneys who are in paid supervisory positions or serving as a Senior Litigation Counsel and Special Government Employees are required to file.

B. Employees who serve in positions classified above GS-15 under the General Schedule.

Senior Executive Service Employees are required to file.

C. Uniformed officers paid at or above pay grade 0-7.

D. Schedule C and other civilian employees, regardless of pay grade, whose positions are excepted from the competitive service because of their confidential or policy-making character.

E. Each agency's primary Designated Agency Ethics Official, regardless of pay grade. Other ethics officials need file only if they are in another specified category.

F. Presidential nominees requiring Senate confirmation. All United States Attorneys are required to file.

G. All administrative law judges.

A covered employee must file a "new entrant report" within 30 days after assuming a covered position. Reports must be filed each May 15th for the preceding calendar year, and within 30 days after leaving his or her covered position for the period between the last annual report and the date employment is terminated. 5 C.F.R §§ 2634.201 and 202. Reports are not required from employees who serve less than 60 days. 5 C.F.R. § 2634.204. Anyone who files a Public Financial Disclosure Report more than 30 days after its due date, including any extensions which have been granted, shall pay a late filing fee of $200. 5 C.F.R. § 2634.704.

The Attorney General may bring a civil action against any person who does not file, files a false report, or fails to report required information. Employees who file a false report may also be prosecuted. 5 C.F.R. § 2634.701.

This report may be disclosed upon request to any requesting person pursuant to 5 C.F.R. § 2634.603.

## 1-4.220 Confidential Financial Disclosure Reports

The Ethics in Government Act of 1978, as amended, requires the filing of a Confidential Financial Disclosure Report (OGE Form 450) by all special government employees, serving with or without compensation, including those who serve on federal advisory committees, who are not serving as a representative of an industry or another entity or who are not already Federal employees and who are not already required to file a public financial disclosure report. The Act also requires the filing of confidential financial disclosure reports by employees who occupy a position classified at GS-15 or below of the General Schedule, or whose basic rate of pay is less than 120% of the minimum rate of basic pay for GS-15 of the General Schedule, or employees in any other position determined by the designated agency ethics official to be of equal

classification; if:

A. Their duties and responsibilities require them to participate personally and substantially through decision or the exercise of significant judgement in taking a government action regarding:

- contracting or procurement;
- administering or monitoring a grant;
- regulating or auditing any non-federal entity;
- other activities in which the final decision or action will have a direct and substantial economic effect on the interests of any non-federal entity; or

B. The duties and responsibilities of the employee's position require the employee to file such a report to avoid involvement in a real or apparent conflict of interest, and to carry out the purposes behind any statute, Executive Order, rule, or regulation applicable to or administered by that employee.

Within EOUSA and the United States Attorneys' offices the following employees are required to file:

- Assistant United States Attorneys (line AUSAs) (currently, instead of filing an OGE Form 450, AUSAs are using an alternative method approved by the Office of Government Ethics. The chosen alternative method is the use of a "Conflict of Interest Certification" which requires all affected Assistants to certify that no conflict of interest exists in each matter they undertake);
- Special government employees (which includes special AUSAs);
- All Administrative Officers and employees with procurement/and or contracting authority, and
- Employees involved in reviewing grant applications. (Example: "Weed and Seed" grant matters).

Those employees who currently file the public financial disclosure report will not be required to file the confidential report. *See* 5 C.F.R. § 2634.904.

An employee may be excluded from filing if the duties of the position make remote the possibility of a conflict, if the duties involve such a low level of responsibility because there is a substantial degree of supervision and review; or the effect of any conflict on the integrity of the government would be insubstantial, or an alternative procedure is used. *See* 5 C.F.R. § 2634.905 (c). An employee must file a new entrant report within 30 days after assuming a covered position and annually by October 31st. Employees who are expected to work 60 days or less need not file. Employees are not required to file a termination report upon leaving their covered positions. 5 C. F.R. § 2634.903.

The Attorney General may bring a civil action against any person who does not file, files a false report, or fails to report required information. Employees who file a false report may also be prosecuted. 5 C.F.R. § 2634.701.

The primary use of the information on this form is to determine compliance with applicable Federal conflict of interest laws and regulations.

Effective June 10, 1994, United States Attorneys were redelegated the authority to act as Deputy Designated Agency Ethics Officials for the review and certification of Confidential Financial Disclosure Reports filed by reporting individuals within their districts. If they have any questions with respect to this authority, they should contact the Legal Counsel, EOUSA.

## 1-4.300 DOJ Employee Participation in Outside Activities -- Termination Agreements/Contingency Fees

Upon entering on duty, Department attorneys must, in general, withdraw from all cases they are currently handling. Interests in pending matters, such as contingency fees, should be addressed as part of the termination of their private practice. Experience indicates that "cashing out" the sometimes speculative nature of these interests has created problems for incoming employees. In negotiating a termination agreement with a former firm or business associates, an employee should be aware that federal criminal law prohibits Federal employees from participating in any matter, in their official capacity, in which they have a financial interest. 18 U. S.C. § 208, 5 C.F.R. § 2635.401. Federal law also prohibits Federal employees, other than in the proper discharge of their official duties, from representing anyone before a Federal agency or court in connection with a matter in which the United States is a party or has an interest. 18 U.S. C. § 205. In addition, please be mindful of 18 U.S.C. § 209 which prohibits an employee from receiving a salary from any source other than the United States as compensation for his/her services.

In light of the above statutes, the Department has never permitted incoming employees to retain any interest in matters pending before Federal departments (or agencies) or in which the United States is a party or has an interest. If the litigation does not involve the United States and the immediate "cashing out" will create an undue financial burden on an employee or the law firm, the Department has, on limited occasions, permitted the retention of a contingent interest. If, after exhausting all possible avenues for "cashing out" an interest, an employee is unable to do so, he/she should contact the EOUSA Legal Counsel's office regarding the disclosure of contingency fees. The number of interests which an employee may retain must be kept to an absolute minimum and the financial interest must be reduced to a sum certain or a fixed percentage. It should be noted that while these matters are pending, an employee must be disqualified from handling any mater involving the attorney and the law firm(s) handling the referred matter.

## 1-4.320 Outside Activities Generally

Employees may not engage in outside activities, including employment, that conflict with their official duties. An activity conflicts with an employee's official duties if it would require him to disqualify himself from matters so critical that his ability to perform his official duties would be impaired. 5 C.F.R. § 2635.802. Employees are cautioned that even if an outside activity or employment is not prohibited under this regulation or by statute, it may violate other principles or standards set forth in 5 C.F.R. § 2635 et seq, or laws concerning other issues, such as those restricting certain political activities. *See* USAM 1-4.400.

A. **Use of Title.** With rare exceptions, employees engage in outside activities in their private rather than official capacities. Therefore, when engaging in outside activities in their private capacity, employees may not indicate or represent in any way that they are acting on behalf of the Department, or that they are acting in their official capacity. Thus, an employee may not use office letterhead, agency or office business cards, or other material or equipment that would disclose the employee's official title or position if they engage in an outside activity in their private capacity. The incidental identification of an employee's position or office is not prohibited, but if this information is incidentally released it becomes the responsibility of the employee to advise all individuals concerned that he or she is acting in his or her individual capacity and not as a representative of the Department. *See* 5 C.F.R. § 2635.807(b).

B. **Use of Official Time or Excused Absence.** With limited exceptions with respect to pro bono, community service, bar activities and uncompensated law-related teaching (*see* USAM 1-4.350), employees engaging in outside activities do so on their own time. *See* the DOJ Organization and Functions Manual at 30.

C. **Use of Office Resources.** As a general rule, employees may use government property only for official business or as authorized by the government. 5 C.F.R. §§ 2635.101(b)(9), 2635.704(a). However, employees are allowed to use equipment, for non-official purposes, which involves only negligible expense, such as electricity, ink, small amounts of paper, and ordinary wear and tear. In addition, they are allowed limited use of telephones and faxes for local calls, or if they are charged to non-government accounts. Employees may also make limited use of their computers to access the internet for non-official purposes. Finally, use of library equipment at negligible expense is also permitted. 5 C.F.R. § 3801.105. This policy does not authorize the use of commercial electronic databases when there is an extra cost to the government. It also does not override statutes, rules or regulations governing the use of specific types of government property, such as electronic mail, and 41 C.F.R. (FPMR) § 201-21.601 (governing the ordinary use of long-distance telephone services.)

D. **Clerical Support.** Under no circumstances may employees require others, including support staff, to provide assistance with respect to outside activities. Care should be taken

in requesting their assistance on their own time even for compensation, since subordinates may believe that they really have no choice but to say yes. It is especially coercive to ask them to volunteer their outside time without compensation, but if support staff on their own volunteer to support a pro bono or other voluntary service outside activity, their offer may be accepted.

E. **Approval Requirements.** Employees must obtain prior written approval from the EOUSA Legal Counsel for outside employment which involves: (1) the outside practice of law; or (2) a subject matter, policy, or program that is in his or her component's area of responsibility. The EOUSA Legal Counsel can approve requests to engage in the outside practice of law only when it is uncompensated and in the nature of community service, or when the employee will be representing himself, his parents, his children or his spouse. If an employee desires to practice law for compensation, he must obtain approval from the Deputy Attorney General through the EOUSA. United States Attorneys and their Assistants should freely consult with EOUSA on these matters. *See* the DOJ Organization and Functions Manual at 29.

F. **Conflicts of Interest.** Employees may not engage in outside activities that create or appear to create a conflict of interest with their official duties. Such a conflict exists when the outside activity would: (1) require the recusal of the employee from significant aspects of his or her official duties (5 C.F.R. § 2635.802(b)); (2) create an appearance that the employee's official duties were performed in a biased or less than impartial manner (5 C.F. R. § 2635.502); or (3) create an appearance of official sanction or endorsement (5 C.F.R. § 2635.702(b)).

With limited exceptions, outside activities may not include the representation of third parties before the federal government. 18 U.S.C. § 205.

All employees are prohibited by statute from providing legal assistance -- with or without compensation -- in any case in which the United States is a party or has a direct and substantial interest. 18 U.S.C. §§ 203, 205.

All employees are prohibited from providing any outside professional services in criminal or habeas corpus matters in any court, whether with or without compensation.

## 1-4.330 Teaching, Speaking, and Writing

Employees who wish to undertake teaching or speaking engagements or who wish to write for publication are directed to consult 5 C.F.R. § 2635.807 which details the circumstances upon which compensation may be received and the extent to which an employee's title may be used. They should also consult with their United States Attorney. Employees should be cautious to avoid any conflict of interest with their position and to ensure that no interference with the

performance of their official duties occurs. In some instances they may need to use a disclaimer. Assistant United States Attorneys must generally take annual leave or leave without pay for any time required for engaging in these activities during normal business hours. At the discretion of the United States Attorney, Assistants may receive administrative leave for uncompensated law-related teaching. *See* the DOJ Organization and Functions Manual at 30. It is highly advisable for employees to discuss these issues with the Ethics Advisor in their District before undertaking a teaching or lecturing assignment.

## 1-4.340 Civic Organizations, Professional Boards and Committees, and State Grievance Committees

While certain activities can be easily undertaken without creating problems, service on national and local bar committees, state and municipal commissions, corporate boards of directors, arbitration panels, state grievance committees, and similar organizations, with or without remuneration, could have the potential for creating a conflict of interest or an appearance of a conflict of interest. Employees should contact the EOUSA Legal Counsel's office whenever questions arise and should seek prior approval before serving in a leadership position in a bar association. Membership in certain boards of directors has been exempted from the prior approval requirement. *See* the DOJ Organization and Functions Manual at 29. United States Attorneys' involvement in crime prevention efforts is addressed in the DOJ publication entitled "Legal and Ethical Issues Surrounding United States Attorneys' Involvement in Crime Prevention Efforts" issued October 1994, which can be obtained from the EOUSA Office of Legal Counsel.

## 1-4.350 Pro Bono Work

Executive Order 12988, Section 2, provides that "All Federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees to be performed on their own time, including attorneys, as permitted by statute, regulation or other rule or guideline." On March 8, 1996, the Attorney General signed the Department of Justice Policy Statement on Pro Bono Legal and Volunteer Services. This statement summarized existing Department of Justice policies and rules on issues such as leave, conflict of interest, and use of property. It also encourages all employees to set a voluntary personal goal of at least 50 hours per year of pro bono legal and non-legal volunteer service. The Department does not restrict the type of pro bono activities in which employees engage, provided that such activities do not violate any statutory or regulatory restrictions, and provided also that they genuinely are in the public interest. Such activities include, but are not limited to, the provision of legal service to:

- Persons of limited means or other disadvantaged persons;
- Charitable, religious, civic, community, governmental, health and educational organizations in matters which are designed primarily to address the needs of persons of limited means or other disadvantaged persons, or to further their organization purpose;

- Individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights; or
- Activities for improving the law, the legal system, or the legal profession.

Similarly, with respect to other volunteer activities besides pro bono legal work, the Department does not seek to restrict the type of activity as long as it does not violate statutory or regulatory restrictions. All such activities, like any other outside activities, are subject to limitations, including compliance with all conflict of interest statutes and regulations, and compliance with all local unauthorized practice of law statutes and fee requirements. *See* USAM 1-4.320(F).

The approval requirements for pro bono and volunteer service are the same as for any other outside activities. *See* USAM 1-4.010 and 1-4.320E. Since pro bono work by definition is the uncompensated outside practice of law, approval must be sought, but the DDAEO has the authority to approve such requests, as opposed to the outside practice of law for compensation, which only the Deputy Attorney General can approve. In some circumstances it may be possible for the uncompensated outside practice of law to be pre-approved. This could occur in connection with certain legal services or bar association programs. If a district is interested in participating in such a program, it should contact the Legal Counsel, EOUSA, to have the program reviewed. If appropriate, participation in the program will be approved by the Director, EOUSA.

With respect to volunteer or community services other than pro bono legal work, approval may have to be obtained from the DDAEO, depending on the nature of the service, and in any case it is advisable for the employee to seek approval. *See* USAM 1-4.320. Some types of volunteer work have been pre-approved. See Memorandum of March 15, 1996, from Director, EOUSA, to all employees.

Department employees are encouraged to participate in pro bono and volunteer activities outside their regular working hours. Such excused absences should be limited to those situations in which the employee's volunteer/community service meets one or more of the following criteria: is at least indirectly related to the Department's mission; is officially sponsored or sanctioned by the Attorney General; or will enhance the professional development or skills of the employee in his or her current position. The Attorney General encourages employees to participate in the Department-sponsored mentoring programs and volunteer activities that further the Department's program priorities. For example, the strong leadership skills of many Department employees could be put to good use helping at-risk youth in classrooms, youth clubs, shelters, and midnight basketball programs. EOUSA's LECC/Victim Witness Staff has a Volunteer Services Program Coordinator who may be contacted for information about such programs. Limitations on the use of an employee's title or position and on the use of office equipment or personnel are the same as for any outside activity. *See* USAM 1-4.320A-D.

For additional information about performing pro bono and volunteer/community services,

see the DOJ Organization and Functions Manual at 29-30.

## 1-4.400 Political Activity (the Hatch Act)

On February 3, 1994, the Hatch Act Reform Amendments of 1993 became effective. These Amendments made significant changes to 5 U.S.C. §§ 7321 - 7326, where the Hatch Act and its amendments are codified. Generally, the Amendments removed many restrictions on the participation of government employees in political activities. On September 23, 1994, the United States Office of Personnel Management published its regulations implementing the Amendments in the Federal Register. They are codified at 5 C.F.R. §§ 733.101 through 734.702. On October 11, 1994, the Attorney General issued a memorandum concerning restrictions on the political activities of Department of Justice employees. She exercised her authority to impose on political appointees, including non-career SES and Schedule C employees, restrictions similar to those imposed on all employees prior to the 1993 Amendments. The Amendments themselves excluded career members of the Senior Executive Service, employees of the Criminal Division of the Department of Justice (but not of the Criminal Divisions of the offices of the United States Attorneys), and employees of the Federal Bureau of Investigation. Thus, they too, like political appointees, continue to be under restrictions similar to those which existed before the 1993 Amendments. Amendments. Most recently, on January 30, 1998, 5 C.F.R. § 733.101 et seq. has been amended. The new regulations contain additional categories of permissible and prohibited political activities for employees in certain agencies and positions who reside in certain designated localities.

Questions regarding the Hatch Act may be directed to the EOUSA Legal Counsel, the Office of Personnel Management, or the Office of Special Counsel.

## 1-4.410 Restrictions on all Employees

Employees in the Department of Justice may not:

A. Use their official authority or influence to interfere with or affect the result of an election (5 U.S.C. § 7323(a)(1).
B. Solicit, accept or receive a political contribution (5 U.S.C. § 7323(a)(2), except for a political contribution to a multi-candidate political committee from a fellow member of a federal labor organization or certain other employee organizations, as long as the solicited employee is not a subordinate and the activity does not violate G below.
C. Solicit, accept, or receive uncompensated volunteer services from an individual who is a subordinate (5 C.F.R. § 734.303(d)).
D. Allow their official titles to be used in connection with fundraising activities (5 C.F.R. § 734.303(c)).
E. Run for nomination or election to public office in a partisan election (5 U.S.C. § 7323(a)(3)), except that in certain designated communities an employee may run for office in a

local partisan election but only as an independent candidate and may receive, but not solicit, contributions. 5 C.F.R. § 733.107 lists these communities.

F. Solicit or discourage the political activity of any person who is a participant in any matter before the Department (5 U.S.C. § 7323(a)(4)).
G. Engage in political activity (to include wearing political buttons), while on duty, while in a government occupied office or building, while wearing an official uniform or insignia, or while using a government vehicle (5 U.S.C. § 7324(a).
H. Make a political contribution to their employer or employing authority (18 U.S.C. 603).

## 1-4.420 Restrictions on Career SES, Criminal Division, and FBI Employees, and all Political Appointees

These employees may not:

A. Distribute fliers printed by a candidate's campaign committee, a political party, or a partisan political group.
B. Serve as an officer of a political party, a member of a national, state, or local committee of a political party, an officer or member of a committee of a partisan political group, or be a candidate for any of these positions.
C. Organize or reorganize a political party organization or partisan political group.
D. Serve as a delegate, alternate, or proxy to a political party convention.
E. Address a convention, caucus, rally, or similar gathering of a political party or partisan political group in support of or in opposition to a candidate for partisan political office or political party office, if such address is done in concert with such a candidate, political party, or partisan political group.
F. Organize, sell tickets to, promote, or actively participate in a fund-raising activity of a candidate for partisan political office or of a political party or partisan political group.
G. Canvass for votes in support of or in opposition to a candidate for partisan political office or a candidate for political party office, if such canvassing is done in concert with such a candidate, political party, or partisan political group.
H. Endorse or oppose a candidate for partisan political office or a candidate for political party office in a political advertisement, broadcast, campaign literature, or similar material if such endorsement or opposition is done in concert with a candidate, political party, or partisan political group.
I. Initiate or circulate a partisan nominating petition.
J. Act as a recorder, watcher, challenger, or similar officer at polling places in consultation or coordination with a political party, partisan political group, or a candidate for partisan political office.
K. Drive voters to polling places in consultation or coordination with a political party, partisan political group, or a candidate for partisan political office.
L. Run as partisan candidates for local partisan political office even in those communities listed in 5 C.F.R. § 733.107 in which other Department of Justice employees may run for office. However, they may run as independent candidates in a partisan political election for

a local office in the municipality or political subdivision, except for those appointed by the President with the advice and consent of the Senate. *See* 5 C.F.R. 733.105(b) and (c)(1).

The restrictions listed above A through L apply only to Career SES, Criminal Division, FBI Employees, and all Political Appointees, and are permissible activities for all other employees.

## 1-4.430 Permissible Activities

All employees may:

A. Register and vote in any election.
B. Express opinions as individuals on political subjects and candidates privately and, to the extent consistent with the restrictions above, publicly.
C. Display a political picture, sticker, badge, or button in situations that are not connected to their official duties, but employees restricted as outlined in 1-4.420 may not distribute such material.
D. Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization.
E. Be members of a political party or other political organization and participate in its activities to the extent consistent with the restrictions set forth above.
F. Sign a political petition as individuals.
G. Make a financial contribution to a political party or organization, except to one's federal employer.
H. Take an active part, as a candidate or in support of a candidate, in a nonpartisan election.
I. Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character.
J. Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by state or local law, subject to the restrictions set forth above about certain employees not undertaking such activity in concert with political entities.
K. Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise their efficiency or integrity as employees or the neutrality, efficiency or integrity of their agency.

## 1-4.440 Political Referrals

In addition to restricting or limiting certain political activity, the Hatch Act also prohibits selecting officials or others involved in the examining or appointing process for competitive service positions from receiving or considering a recommendation of an applicant from a Senator or Representative, except as to the character or residence of the applicant, unless the recommendation is based on personal knowledge or records of the sender. In no case are USAOs

required to return a letter to the sender even if it does not meet the requirement stated above. Additional guidance on this is available from the EOUSA Office of Legal Counsel.

## 1-4.500 Gifts Received From Foreign Governments

Public Law No. 95-105, codified at 5 U.S.C. § 7342, governs the receipt and disposition of gifts and decorations tendered by foreign governments to federal employees, their spouses, or dependents.

Under 5 U.S.C. § 7342(c)(1)(B), an employee may, in certain circumstances, accept gifts. Under (B)(i), however, if the gift is tangible and of more than minimal value, currently defined as $245 (pursuant to regulation in effect until January 1, 1999), the gift becomes the property of the United States, and, under (c)(2) must be deposited for disposal or use by the government. Under (c)(1)(B)(ii), an employee may in certain circumstances accept an intangible gift of foreign travel or expenses for foreign travel entirely outside of the United States valued at more than $225. Under (c)(3), an employee receiving such a gift must file a statement with the Department, except when acceptance of foreign travel has been authorized in accordance with specific instructions from the Department of Justice. Under § 7342(f), the Department of Justice must submit to the Secretary of State, by January 31 of each year, a list of all such statements filed by employees during the preceding year.

Federal Property Management Regulations (FPMR) Par. 101-41 and Justice Property Management Regulation (JPMR) Part 128-49, prescribe policies and procedures governing utilization, donation, and disposal of gifts and decorations from foreign governments.

In accordance with JPMR Sec. 128-49.201, each United States Attorney's Office is required each year to submit a list of all gifts and decorations valued at greater than $50.00 received by employees, their spouses, or dependents from foreign governments during the preceding year. The list should be sent to the Executive Office, Attention: Facilities Management and Support Services Staff.

A separate statement containing the following information should be submitted by each employee receiving a gift or decoration:

A. For tangible gifts:

- Name and title of recipient;
- Gift, date of acceptance, estimated value, and current disposition or location;
- Identity of foreign donor and government; and
- Circumstances justifying acceptance.

B. For travel or expenses for travel:

C. Name and title of recipient;
D. Brief description of travel or travel expenses occurring entirely outside the United States;
E. Identity of foreign donor or governments; and
F. Circumstances justifying acceptance.

Negative responses may be communicated by telephone to the Facilities Management and Support Services Staff, EOUSA.

## 1-4.600 Post-Government Employment Restrictions

The Ethics in Government Act, 18 U.S.C. § 207 and the regulations promulgated by the Office of Government Ethics and issued at 5 C.F.R. Parts 2637 and 2641, contain several post-employment conflict of interest restrictions. The Act covers former government employees (including all officers, employees, and special government employees, both attorney and non-attorney) which may actually make or reasonably give the appearance of making unfair use of prior government employment and affiliations. Criminal penalties and disciplinary action may be imposed for violations. The three major restrictions covered by § 207 which are applicable to the United States Attorneys' office are discussed seriatim below. These regulations do not incorporate or supplant restrictions that may be contained in other laws or professional codes of conduct. *See*USAM 1-4.650.

NOTE: The regulations at § 2637 are still considered to be in effect even though they refer to provisions of the Ethics in Government Act prior to its 1991 amendment. Specifically, § 2637.202 refers to 18 U.S.C. § 207(b)(1) when it should now refer to § 207(a)(2), and § 2637.203 should refer to § 207(c) rather than § 207(b)(ii).

## 1-4.610 Permanent Prohibition Applicable to all Employees

Under 18 U.S.C. § 207(a)(1), all employees, including special Government employees, are permanently prohibited from knowingly making, with the intent to influence, any communication to or appearance before the United States or the District of Columbia on behalf of someone other than him- or herself or the United States or the District of Columbia, in connection with a particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest, and in which the employee participated personally and substantially while a government employee.

This paragraph does not prohibit a former government employee from taking actions on his or her own behalf or from representing the United States or the District of Columbia when authorized. The matter has to have involved a specific party or parties at the time of the former employee's participation. Although the matter must have involved a party, the person on whose behalf the former employee seeks to make a communication or appearance does not have to be a party for the communication to be prohibited.

The prohibition is against making a communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or District of Columbia.

## 1-4.620 Two-Year Restriction for Supervisors

Under 18 U.S.C. § 207(a)(2), all employees, including special Government employees, are restricted for two years after leaving the government from knowingly making, with the intent to influence, any communication to or appearance before the United States or the District of Columbia on behalf of someone other than himself or herself or the United States or the District of Columbia, in connection with a particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest, and which the former employee knows or reasonably should know was pending under his or her official responsibility within a period of one year before the termination of his or her employment.

Sometimes employees lose responsibility over a matter before they leave Government employment. In spite of the plain language of the statute ("within 2 years after the termination of his or her service or employment" and "within a period of 1 year before the termination of his or her service or employment"), OGE regulations explicitly state that the two years run from the date of termination of responsibility if this occurs before separation from the government, and that the prohibition applies to matters pending under the employee's supervision in the one-year period before termination of such responsibility over the matter, not in the one-year period before termination of employment. 5 C.F.R. § 2637.202(e).

This provision applies to supervisors and managers who did not personally handle a matter, but over which they were responsible. It is designed not only to prevent post-employment conflicts of interest, but also, through the one-year "looking back" proviso, to regulate the conduct of current managers who are contemplating resignation or retirement. Specifically, it is designed to prevent them from making managerial decisions that will be to their benefit after they cease being federal employees. Thus, employees responsible for the supervision of a case are barred from representing anyone, not just a party, in connection with that case for two years after their supervisory responsibility ends, because they might otherwise be tempted to facilitate their post-employment practice by the decisions they make as a federal manager. It is designed not only to deal with actual managerial decisions, but also to prohibit even the appearance that a manager would use his or her federal office for future private gain by using his or her authority during his or her last year of service to his or her private advantage.

This paragraph does not prohibit a former government employee from taking actions on his or her own behalf or from representing the United States when authorized. Although the person represented does not have to be a party, as noted above, the matter has to have involved a specific party or parties at the time it was pending under the former supervisor's authority.

The prohibition is against making a communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or District of Columbia.

## 1-4.630 One-Year "Cooling-Off" Period

Under 18 U.S.C. § 207(c), a senior employee may not make any communication to or appearance before his or her former agency on any matter in which the former employee seeks official action on behalf of any other person, except the United States, within one year after termination of his or her service or employment as such officer or employee.

According to 5 C.F.R. 2641.201(c), the one year runs from the time the individual ceases to be a senior employee, rather than from termination of government employment.

For the purposes of this section, only the United States Attorneys are considered to be "senior" employees.

The matter does not have to involve specific parties, and does not have to have been pending when the individual was the United States Attorney. The statute prohibits former United States Attorneys from contacting their former agency even on matters arising after they ceased being the United States Attorney, if they arise within one year of their departure. It was designed to prevent the use of personal influence based upon past Government affiliations. The prohibition applies even when the United States is not a party and even when it does not have a direct and substantial interest.

Unlike the other prohibitions, this one is limited to communications to or appearances before the employee's former agency. The statute, at § 207(h), allows OGE to designate components within a department to be separate agencies, thus allowing senior employees to make communications to or appearances before other components. At our request, OGE has issued regulations under which, for United States Attorneys, the agency consists only of his or her former district, the office of the United States Marshal for his or her former district, and EOUSA.

NOTE: In 1993, the Department asked OGE to eliminate the local Marshal's office from this definition, so that a former United States Attorney could make a communication or appearance before that entity within one year of no longer being the United States Attorney. The Department was orally advised that OGE would approve this request. However, it has never published a federal register notice amending Appendix B to 5 C.F.R. Part 2641 in this regard, and advises us that until it does so the prohibition still applies.

The other two restrictions allow a former employee to represent the United States or the District of Columbia, when properly authorized, regardless of earlier participation or supervision of the same matter. The one-year "cooling off" period restricts this to representation of the United

States, and does not mention the District of Columbia. As with the other restrictions, this one does not preclude a former employee from taking actions on his or her own behalf.

## 1-4.640 Sanctions

Former employees willfully in violation of § 207 are subject to a sentence of imprisonment for up to five years. If not willful, the maximum sentence is one year. Substantial fines may also be imposed. In addition, offenders are subject to a civil penalty of up to $50,000 per infraction.

## 1-4.650 Other Restrictions on Post-Employment Activities

In addition to 18 U.S.C. § 207, the American Bar Association (ABA) Code of Professional Responsibility, the ABA Model Rules of Professional Conduct, rules of state bar associations, and court decisions restrict the conduct of attorneys who are former government employees and their firms and affiliates. There is nothing in § 207 which prevents courts and bar associations from holding former government employees to standards more demanding than the minimal requirements of the criminal law. *See* 5 C.F.R. 2637.101(c)(9).

Presidential appointees were also asked to sign a "pledge" which subjects them to a 5 year ban on certain activities when they leave the government. All Presidential appointees should be mindful of this additional restriction when they leave the government.

## 1-4.660 Restrictions on Seeking Employment Outside the Government

Besides restricting certain post-employment activities, law and regulation require employees in certain circumstances to choose between participating in a particular matter and seeking employment. Specifically, 18 U.S.C. § 208 and 5 C.F.R. § 2625.601 preclude an employee from participating in an activity, absent a waiver, if the employee is seeking employment with persons who would be affected by the performance of lack of performance of the employee's official duties. For further information, see August 26, 1996, Agency Ethics Official Memorandum on Seeking Employment in the Private Sector.

## 1-4.700 Purchase or Use of Certain Forfeited and Other Property

Absent the approval of the Director, EOUSA, no employee shall purchase, directly or indirectly, from the Department of Justice or its agents property forfeited to the United States and no employee shall use property forfeited to the United States which has been purchased, directly or indirectly from the Department of Justice or its agents by his or her spouse or minor children. Approval may be granted only on the basis of a written determination by the Director, EOUSA, that in the mind of a reasonable person with knowledge of the circumstances, purchase or use by the employee of the asset will not raise a question as to whether the employee has used his or her official position or nonpublic information to obtain or assist in an advantageous purchase or

create an appearance of loss of impartiality in the performance of the employee's duties. A copy of the written determination shall be filed with the Deputy Attorney General. 5 C.F.R. § 3801.104.

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# 9-20.000
# MARITIME, TERRITORIAL AND INDIAN JURISDICTION

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### 9-20.100 Introduction

This chapter contains the Department's policy relating to maritime, territorial and Indian jurisdiction. Useful background material can also be found in the Criminal Resource Manual:

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| **Maritime, Territorial and Indian Jurisdiction -- Generally** | Criminal Resource Manual at 662 |
| Special Maritime and Territorial Jurisdiction | Criminal Resource Manual at 663 |
| Territorial Jurisdiction | Criminal Resource Manual at 664 |
| Determining Federal Jurisdiction | Criminal Resource Manual at 665 |
| Proof of Territorial Jurisdiction | Criminal Resource Manual at 666 |
| Assimilative Crimes Act, 18 U.S.C. § 13 | Criminal Resource Manual at 667 |
| Limited Criminal Jurisdiction Over Property Held Proprietorially | Criminal Resource Manual at 668 |

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| Prosecution of Military Personnel | Criminal Resource Manual at 669 |
| Maritime Jurisdiction | Criminal Resource Manual at 670 |
| Great Lakes Jurisdiction | Criminal Resource Manual at 671 |
| General Maritime Offenses | Criminal Resource Manual at 672 |
| Aircraft Jurisdiction | Criminal Resource Manual at 673 |
| **Indian Jurisdiction** | |
| Indian Country -- Introduction | Criminal Resource Manual at 674 |
| Investigative Jurisdiction | Criminal Resource Manual at 675 |
| MOU re Indian Law Enforcement Reform Act | Criminal Resource Manual at 676 |
| Indian Country Defined | Criminal Resource Manual at 677 |
| The General Crimes Act -- 18 U.S.C. § 1152 | Criminal Resource Manual at 678 |
| The Major Crimes Act -- 18 U.S.C. § 1153 | Criminal Resource Manual at 679 |
| Lesser Included Offenses Under 18 U.S.C. § 1153 | Criminal Resource Manual at 680 |
| Indian Jurisdiction -- Tribal Options | Criminal Resource Manual at 681 |
| Successive Prosecutions | Criminal Resource Manual at 682 |
| "Victimless Crimes" | Criminal Resource Manual at 683 |
| Memorandum for Benjamin R. Civiletti Re Jurisdiction Over "Victimless" Crimes Committed by Non-indians on Indian Reservations | Criminal Resource Manual at 684 |
| Exclusive Federal Jurisdiction Over Offenses by Non-Indians Against Indians | Criminal Resource Manual at 685 |
| Who is an "Indian"? | Criminal Resource Manual at 686 |
| Tribal Court Jurisdiction | Criminal Resource Manual at 687 |

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| State Jurisdiction | Criminal Resource Manual at 688 |
| Jurisdictional Summary | Criminal Resource Manual at 689 |
| Embezzlement and Theft from Tribal Organization | Criminal Resource Manual at 690 |
| Indian Gaming | Criminal Resource Manual at 691 |

**9-20.115 Prosecution of Military Personnel**

Many violations of Federal criminal law are also violations of the Uniform Code of Military Justice (U.C.M.J.) for which military personnel are subject to court martial (e.g., drug offenses, theft of government property, etc.). The U.C.M.J. also punishes a number of acts which are not otherwise specifically declared to be Federal crimes, but which may become such when committed on a facility over which the United States exercises legislative jurisdiction as a result of the assimilation of state law under the Assimilative Crimes Act. *See* Criminal Resource Manual at 667.

To avoid conflict over investigative and prosecutive jurisdiction, the Attorney General and the Secretary of Defense executed a memorandum of understanding (MOU) relating to the investigation and prosecution of crimes over which the Department of Justice and Department of Defense have concurrent jurisdiction. The agreement provides generally that all crimes committed on military reservations by individuals subject to the Uniform Code of Military Justice shall be investigated and prosecuted by the military department concerned, with certain exceptions. The agreement permits civil investigation and prosecution in Federal district court in any case when circumstances render such action more appropriate. If questions arise concerning the operation of the agreement, the United States Attorney should contact the section of the Criminal Division having responsibility over the Federal statute allegedly violated. *See* the Criminal Resource Manual at 669, for the text of the MOU.

**9-20.220 Investigative Jurisdiction -- Indian Country Offenses**

In 1993, the Department of Justice and the Department of the Interior entered into a memorandum of understanding (MOU) that established guidelines regarding the respective jurisdictions of the Bureau of Indian Affairs (BIA) and the Federal Bureau of Investigation (FBI). *See* the Criminal Resource Manual at 675. Part IV of the MOU requires each United States Attorney whose criminal jurisdiction includes Indian country to develop local written guidelines outlining the responsibilities of the BIA, FBI, and the Tribal Criminal Investigators, if applicable. *See* the Criminal Resource Manual at 676, for the full text of the MOU.

**9-20.230 Supervising Section -- Indian Country Offenses**

The Office of Enforcement Operations of the Criminal Division has general supervisory responsibility for Indian country offenses. However, the Child Exploitation and Obscenity Section has responsibility for child abuse offenses, and other Sections, such as the Terrorism and Violent Crime Section, should be consulted on questions involving the substantive elements of offenses within their areas of responsibility. See USAM 9-4.000 for statutory assignments of the various Sections. The Appellate, General Litigation, and Indian Resources Sections of the Environment and Natural Resources Division have Indian country expertise and should be consulted on questions of tribal rights, treaties, boundaries and related matters.

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# § 7203. Willful failure to file return, supply information, or pay tax



Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

# Sec. 7203. - Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting ''felony'' for ''misdemeanor'' and ''5 years'' for ''1 year''

# Notes on Sec. 7203.

**SOURCE**

Aug. 16, 1954, ch. 736, 68A Stat. 851
Pub. L. 90-364, title I, Sec. 103(e)(5), June 28, 1968, 82 Stat. 264
Pub. L. 97-248, title III, Sec. 327, 329(b), Sept. 3, 1982, 96 Stat. 617, 618
Pub. L. 98-369, div. A, title IV, Sec. 412(b)(9), July 18, 1984, 98 Stat. 792
Pub. L. 100-690, title VII, Sec. 7601(a)(2)(B), Nov. 18, 1988, 102 Stat. 4504
Pub. L. 101-647, title XXXIII, Sec. 3303(a), Nov. 29, 1990, 104 Stat. 4918.

**AMENDMENTS**

1990 - Pub. L. 101-647 substituted ''substituting 'felony' for 'misdemeanor' and'' for ''substituting''. 1988 - Pub. L. 100-690 inserted at end ''In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting '5 years' for '1 year'.'' 1984 - Pub. L. 98-369 struck out ''(other than a return required under the authority of section 6015)'' after ''to make a return''. 1982 - Pub. L. 97-248, Sec. 329(b), substituted ''$25,000 ($100,000 in the case of a corporation)'' for ''$10,000''.

Pub. L. 97-248, Sec. 327, inserted last sentence providing that, in the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. 1968 - Pub. L. 90-364 struck out reference to section 6016

**EFFECTIVE DATE OF 1990 AMENDMENT**

Section 3303(c) of Pub. L. 101-647 provided that: ''The amendment made by subsection (a) (amending this section) shall apply to actions, and failures to act, occurring after the date of the enactment of this Act (Nov. 29, 1990).''

**EFFECTIVE DATE OF 1988 AMENDMENT**

Amendment by Pub. L. 100-690 applicable to actions after Nov. 18, 1988, see section 7601(a)(3) of Pub. L. 100-690, set out as a note under section 6050I of this title

**EFFECTIVE DATE OF 1984 AMENDMENT**

Amendment by Pub. L. 98-369 applicable with respect to taxable years beginning after Dec. 31, 1984, see section 414(a)(1) of Pub. L. 98-369, set out as a note under section 6654 of this title

**EFFECTIVE DATE OF 1982 AMENDMENT**

Amendment by section 329(b) of Pub. L. 97-248 applicable to offenses committed after Sept. 3, 1982, see section 329(e) of Pub. L. 97-248, set out as a note under section 7201 of this title

**EFFECTIVE DATE OF 1968 AMENDMENT**

Amendment by Pub. L. 90-364 applicable with respect to taxable years beginning after Dec. 31, 1967, except as provided by section 104 of Pub. L. 90-364, see section 103(f) of Pub. L. 90-364, set out as a note under section 243 of this title

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 5684, 6038, 6038A, 6046A, 6686, 6698 of this title; title 7 section 12a; title 18 section 3237

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NOTE: *Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co ., 200 U.S. 321, 337 .*

# U.S. Supreme Court

**Syllabus**

**SOUTH DAKOTA v. YANKTON SIOUX TRIBE**

**ET AL . CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

**No. 96-1581.**
**Argued December 8, 1997 -**
**Decided January 26, 1998**

The Yankton Sioux Reservation in South Dakota was established pursuant to an 1858 Treaty between the United States and the Yankton Tribe. Congress subsequently retreated from the reservation concept and passed the 1887 Dawes Act, which permitted the Government to allot tracts of tribal land to individual Indians and, with tribal consent, to open the remaining holdings to non-Indian settlement. In accordance with the Dawes Act, members of the respondent Tribe received individual allotments and the Government then negotiated with the Tribe for the cession of the remaining, unallotted reservation lands. An agreement reached in 1892 provided that the Tribe would "cede, sell, relinquish, and convey to the United States" all of its unallotted lands; in return, the Government agreed to pay the Tribe $600,000. Article XVII of the agreement, a saving clause, stated that nothing in its terms "shall be construed to abrogate the [1858] treaty" and that "all provisions of the said treaty . . . shall be in full force and effect, the same as though this agreement had not been made." Congress ratified the agreement in an 1894 statute, and non-Indians rapidly acquired the ceded lands.

In this case, tribal, federal, and state officials disagree as to the environmental regulations applicable to a solid waste disposal facility that lies on unallotted, non-Indian fee land, but falls within the reservation's original 1858 boundaries. The Tribe and the Federal Government contend that the site remains part of the reservation and is therefore subject to federal environmental regulations, while petitioner State maintains that the 1894 divestiture of Indian property effected a diminishment of the

Tribe's territory, such that the ceded lands no longer constitute "Indian country" under 18 U.S.C. § 1151 (a), and the State now has primary jurisdiction over them. The District Court declined to enjoin construction of the landfill but granted the Tribe a declaratory judgment that the 1894 Act did not alter the 1858 reservation boundaries, and consequently that the waste site lies within an Indian reservation where federal environmental regulations apply. The Eighth Circuit affirmed.

*Held:* The 1894 Act's operative language and the circumstances surrounding its passage demonstrate that Congress intended to diminish the Yankton Reservation. Pp. 11-27.

**(a)** States acquired primary jurisdiction over unallotted opened lands if the applicable surplus land Act freed those lands of their reservation status and thereby diminished the reservation boundaries, Solem v. Bartlett, 465 U.S. 463, 467 , but the entire opened area remained Indian country if the Act simply offered non-Indians the opportunity to purchase land within established reservation boundaries, id., at 470. The touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose, see Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 , and Congress' intent to alter an Indian treaty's terms by diminishing a reservation must be "clear and plain," United States v. Dion, 476 U.S. 734, 738 -739. The most probative evidence of congressional intent is the statutory language, but the Court will also consider the historical context surrounding the Act's passage, and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there. Hagen v. Utah, 510 U.S. 399, 411 . Ambiguities must be resolved in favor of the Indians, and the Court will not lightly find diminishment. Ibid. Pp. 11-12.

**(b)** The plain language of the 1894 Act evinces congressional intent to diminish the reservation. Article I's "cession" language-the Tribe will "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands"and Article II's "sum certain" language-whereby the United States pledges a fixed payment of $600,000 in return-is "precisely suited" to terminating reservation status. See DeCoteau v. District County Court for Tenth Judicial Dist., 420 U.S. 425, 445 . Indeed, when a surplus land Act contains both explicit cession language, evidencing "the present and total surrender of all tribal interests," and a provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises. See Solem, supra , at 470; see also Hagen, supra, at 411. Pp. 13-14.

**(c)** The Court rejects the Tribe's argument that, because the 1894 Act's saving clause purported to conserve the 1858 Treaty, the existing reservation boundaries were maintained. Such a literal construc tion would eviscerate the 1892 agreement by impugning the entire sale. Rather, it seems most likely that the parties inserted Article XVIII, including both the general statement regarding the force of the 1858 Treaty and a particular provision ensuring that the "Yankton Indians shall continue to receive their annuities under [that Treaty]," for the limited purpose of assuaging the Tribe's concerns about their entitlement to annuities. Discussion of the annuities figured prominently in the negotiations that led to the 1892 agreement, but no mention was made of the preservation of the 1858 boundaries. Pp. 14-18.

**(d)** Neither the 1894 Act's clause reserving sections of each township for schools nor its prohibition on liquor within the ceded lands supports the Tribe's position. The Court agrees with the State that the school sections clause reinforces the view that Congress intended to extinguish the reservation status of the unallotted land. See, e.g., Rosebud, supra, at 601; but see Solem, supra , at 474. Moreover, the most reasonable inference from the inclusion of the liquor prohibition is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country," where alcohol already had been banned. Rosebud, supra , at 613. Pp. 18-20.

**(e)** Although the Act's historical context and the area's subsequent treatment are not such compelling evidence that, standing alone, they would indicate diminishment, neither do they rebut the "almost insurmountable presumption" that arises from the statute's plain terms. The manner in which the Government negotiated the transaction with the Tribe and the tenor of the legislative reports presented to Congress reveal a contemporaneous understanding that the 1894 Act modified the reservation. See Solem, supra, at 471. The legislative history itself adds little because Congress considered several surplus land sale agreements at the same time, but the few relevant references from the floor debates support a finding of diminishment. In addition, the Presidential Proclamation opening the lands to settlement contains language indicating that the Nation's Chief Executive viewed the reservation boundaries as altered. See Rosebud, supra , at 602-603. Pp. 20-23.

**(f)** Despite the apparent contemporaneous understanding that the 1894 Act diminished the reservation, in the years since, both Congress and the Executive Branch have described the reservation in contradictory terms and treated the region in an inconsistent manner. The mixed record reveals no dominant approach, and it carries but little force in light of the strong textual and contemporaneous evidence of diminishment. E.g., Rosebud, supra, at 605, n. 27. Pp. 23-25.

**(g)** Demographic factors also signify diminishment: The Yankton population in the region promptly and drastically declined after the 1894 Act, and the area remains predominantly populated by nonIndians with only a few surviving pockets of Indian allotments. Solem , 465 U.S., at 471 , and n. 12. The Court's holding is further reinforced by the State's assumption of jurisdiction over the ceded territory almost immediately after the 1894 Act, and by the lack of evidence that the Tribe has attempted until recently to exercise jurisdiction over nontrust lands. Id., at 1456. Finally, the Yankton Constitution, drafted in 1932 and amended in 1962, defines the Tribe's territory to include only those tribal lands within the 1858 boundaries "now owned" by the Tribe. Pp. 25-26.

**(h)** The conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common, caution the Court to limit its holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation. The Court need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly declines to do so. See, e.g., Hagen, supra, at 421. P. 27.

99 F. 3d 1439, reversed and remanded.

O'CONNOR , J., delivered the opinion for a unanimous Court.

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# U.S. Supreme Court

**No. 96-1581**

**SOUTH DAKOTA, PETITIONER v. YANKTON SIOUXTRIBE**

**ETAL . ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

**[January 26, 1998]**

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether, in an 1894 statute that ratified an agreement for the sale of surplus tribal lands, Congress diminished the boundaries of the Yankton Sioux Reservation in South Dakota. The reservation was established pursuant to an 1858 treaty between the United States and the Yankton Sioux Tribe. Subsequently, under the General Allotment Act of 1887, Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. § 331 (the Dawes Act), individual members of the Tribe received allotments of reservation land, and the Government then negotiated with the Tribe for the cession of the remaining, unallotted lands. The issue we confront illustrates the jurisdictional quandaries wrought by the allotment policy: We must decide whether a landfill constructed on nonIndian fee land that falls within the boundaries of the original Yankton Reservation remains subject to federal environmental regulations. If the divestiture of Indian property in 1894 effected a diminishment of Indian territory, then the ceded lands no longer constitute "Indian country" as defined by 18 U.S.C. § 1151(a), and the State now has primary jurisdiction over them. In light of the operative language of the 1894 Act, and the circumstances surrounding its passage, we hold that Congress intended to diminish the Yankton Reservation and consequently that the waste site is not in Indian country.

I

A

At the outset of the 19th century, the Yankton Sioux Tribe held exclusive dominion over 13 million acres of land between the Des Moines and Missouri rivers, near the boundary that currently divides North and South Dakota. H. Hoover, The Yankton Sioux 25 (1988). In 1858, the Yanktons entered into a treaty with the United States renouncing their claim to more than 11 million acres of their aboriginal lands in the north-central plains. Treaty of Apr. 19, 1858, 11 Stat. 743. Pursuant to the agreement, the Tribe ceded

> "all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit-Beginning at the mouth of the Naw-izi-wakoo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres."

Art. I, id., at 744.

The retained portion of the Tribe's lands, located in what is now the southeastern part of Charles Mix County, South Dakota, was later surveyed and determined to encompass 430,405 acres. See Letter from the Commissioner of Indian Affairs to the Secretary of the Interior (Dec. 9, 1893), reprinted in S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 5 (1894) (hereinafter Letter). In consideration for the cession of lands and release of claims, the United States pledged to protect the Yankton Tribe in their "quiet and peaceable possession" of this reservation and agreed that "[n]o white person," with narrow exceptions, would "be permitted to reside or make any settlement upon any part of the [reservation]." Arts. IV, X, 11 Stat. 744, 747. The Federal Government further promised to pay the Tribe, or expend for the benefit of members of the Tribe, $1.6 million over a 50-year period, and appropriated an additional $50,000 to aid the Tribe in its transition to the reservation through the purchase of livestock and agricultural implements, and the construction of houses, schools, and other buildings.

Not all of this assistance was forthcoming, and the Tribe experienced severe financial difficulties in the years that followed, compounded by weather cycles of drought and devastating floods. When war broke out between the United States and the Sioux Nation in 1862, the Yankton Tribe alone sided with the Federal Government, a decision that isolated it from the rest of the Sioux Federation and caused severe inner turmoil as well. The Tribe's difficulties coincided with a period of rapid growth in the United States' population, increasing westward migration, and ensuing demands from non-Indians to open Indian holdings throughout the Western States to settlement.

In response to these "familiar forces," DeCoteau v. District County Court for Tenth Judicial Dist., 420 U.S. 425, 431 (1975), Congress retreated from the reservation concept and began to dismantle the territories that it had previously set aside as permanent and exclusive homes for Indian tribes. See Solem v. Bartlett, 465 U.S. 463, 466 (1984). The pressure from westward-bound homesteaders, and the belief that the Indians would benefit from private property ownership, prompted passage of the Dawes Act in 1887, 24 Stat. 388. The Dawes Act permitted the Federal Government to allot tracts of tribal land to individual Indians and, with tribal consent, to open the remaining holdings to non-Indian settlement. Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers. See Hearings on H. R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 428 (1934) (statement of D. S. Otis on the history of the allotment policy). With respect to the Yankton Reservation in particular, some Members of Congress speculated that "close contact with the frugal, moral, and industrious people who will settle [on the reservation] [would] stimulate individual effort and make [the Tribe's] progress much more rapid than heretofore." Report of the Senate Committee on Indian Affairs, S. Rep. No. 196, 53d Cong., 2d Sess., 1 (1894).

In accordance with the Dawes Act, each member of the Yankton Tribe received a 160-acre tract from the existing reservation, held in trust by the United States for 25 years. Members of the Tribe acquired parcels of land throughout the 1858 reservation, although many of the allotments were clustered in the southern part, near the Missouri River. By 1890, the allotting agent had apportioned 167,325 acres of reservation land, 95,000 additional acres were subsequently allotted under the Act of February 28, 1891, 26 Stat. 795, and a small amount of acreage was reserved for government and religious purposes. The surplus amounted to approximately 168,000 acres of unallotted lands. See Letter, at 5.

In 1892, the Secretary of the Interior dispatched a threemember Yankton Indian Commission to Greenwood, South Dakota, to negotiate for the acquisition of these surplus lands. See Act of July 13, 1892, 27 Stat. 137 (appropriating funds to enable the Secretary to "negotiate with any Indians for the surrender of portions of their respective reservations"). When the Commissioners arrived on the reservation in October 1892, they informed the Tribe that they had been sent by the "Great Father" to discuss the cession of "this land that [members of the Tribe] hold in common," Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. No. 27, at 48, and they abruptly encountered opposition to the sale from traditionalist tribal leaders. See Report of the Yankton Indian Commission (Mar. 31, 1893), reprinted in S. Exec. Doc. No. 27, at 9-11 (hereinafter Report). In the lengthy negotiations that followed, members of the Tribe raised concerns about the suggested price per acre, the preservation of their annuities under the 1858 Treaty, and other outstanding claims against the United States, but they did not discuss the future boundaries of the reservation. Once the Commissioners garnered a measure of support for the sale of the unallotted lands, they submitted a proposed agreement to the Tribe. 1 Article I of the agreement provided that the Tribe would "cede, sell, relinquish, and convey to the United States" all of the unallotted lands on the reservation. Pursuant to Article II, the United States agreed to compensate the Tribe in a single payment of $600,000, which amounted to $3.60 per acre. 2

Much of the agreement focused on the payment and disposition of that sum. Article VII further provided that all the signatories and adult male members of the Tribe would receive a 20-dollar gold piece to commemorate the agreement. Some members of the Tribe also sought unpaid wages from their service as scouts in the Sioux War, and in Article XV, the United States recognized their claim. The saving clause in Article XVIII, the core of the current disagreement between the parties to this case, stated that nothing in the agreement's terms "shall be construed to abrogate the treaty [of 1858]" and that "all provisions of the said treaty . . . shall be in full force and effect, the same as though this agreement had not been made."

By March 1893, the Commissioners had collected signatures from 255 of the 458 male members of the Tribe eligible to vote, and thus obtained the requisite majority endorsement. The Yankton Indian Commission filed its report in May 1893, but congressional consideration was delayed by an investigation into allegations of fraud in the procurement of signatures. On August 15, 1894, Congress finally ratified the 1892 agreement, together with similar surplus land sale agreements between the United States and the Siletz and Nez Perce Tribes. Act of Aug. 15, 1894, 28 Stat. 286. The 1894 Act incorporated the 1892 agreement in its entirety and appropriated the necessary funds to compensate the Tribe for the ceded lands, to satisfy the claims for scout pay, and to award the commemorative 20dollar gold pieces. Congress also prescribed the punishment for violating a liquor prohibition included in the agreement and reserved certain sections in each township for common-school purposes. Ibid.

President Cleveland issued a proclamation opening the ceded lands to settlement as of May 21, 1895, and nonIndians rapidly acquired them. By the turn of the century, 90 percent of the unallotted tracts had been settled. See Yankton Sioux Tribe v. United States , 623 F. 2d 159, 171 (Ct. Cl. 1980). A majority of the individual allotments granted to members of the Tribe also were subsequently conveyed in fee by the members to non-Indians. Today, the total Indian holdings in the region consist of approximately 30,000 acres of allotted land and 6,000 acres of tribal land. Indian Reservations: A State and Federal Handbook 260 (1986).

Although formally repudiated with the passage of the Indian Reorganization Act in 1934, 48 Stat. 984, 25 U.S.C. § 461 the policy favoring assimilation of Indian tribes through the allotment of reservation land left behind a lasting legacy. The conflict between the modernday approach to tribal self-determination and the assimilation impetus of the allotment era has engendered "a spate of jurisdictional disputes between state and federal officials as to which sovereign has authority over lands that were opened by the [surplus land] Acts and have since passed out of Indian ownership." Solem , 465 U.S., at 467 .

B

We confront such a dispute in the instant case, in which tribal, federal, and state officials disagree as to the environmental regulations applicable to a proposed waste site. In February 1992, several South Dakota counties formed the Southern Missouri Recycling and Waste Management District for the purpose of constructing a municipal solid waste disposal facility. The Waste District acquired the site for the landfill, which falls within the 1858 boundaries of the Yankton Sioux Reservation, in fee from a nonIndian. The predicate for the parties' claims in this case is that the waste site lies on land ceded in the 1894 Act, and the record supports that assumption.

In the Tribe's complaint, the proposed landfill is described as "the south one-half north one-quarter (S#275 N#274), Section 6, Township 96 North, Range 65 West (S6, T96N, R65W) of the Fifth Principal Meridan [sic], Charles Mix County, South Dakota." App. 24. That description corresponds to the account of a tract of land deeded to Lars K. Langeland under the Homestead Act in 1904. See App.

to Brief for Respondent Southern Missouri Waste Management District 1a-2a. Because all of the land allotted to individual Indians on the Yankton Reservation was inalienable, pursuant to the Dawes Act, during a 25-year trust period, the tract acquired by a homesteader in 1904 and currently owned by the Waste District must consist of unallotted land ceded in the 1894 Act. (The Dawes Act was amended in 1906 by the Burke Act, 34 Stat. 182, 25 U.S.C. § 349 which permitted the issuance of some feesimple patents before the expiration of the 25-year trust period, but the restrictions on alienation remained in place as of 1904.)

When the Waste District sought a state permit for the landfill, the Yankton Tribe intervened and objected on environmental grounds, arguing that the proposed compacted clay liner was inadequate to prevent leakage. After an administrative hearing in December 1993, the State Board of Minerals and the Environment granted the solid waste permit, finding that South Dakota regulations did not require the installation of the synthetic composite liner the Tribe had requested. The Sixth Judicial Circuit affirmed the Board's decision, and no appeal was taken to the State Supreme Court.

In September 1994, the Tribe filed suit in the Federal District Court for the District of South Dakota to enjoin construction of the landfill, and the Waste District joined South Dakota as a third party so that the State could defend its jurisdiction to grant the permit. The Tribe also sought a declaratory judgment that the permit did not comport with Federal Environmental Protection Agency (EPA) regulations mandating the installation of a composite liner in the landfill. See 40 CFR §258.40(b) (1997). The District Court held, in accordance with our decision in South Dakota v. Bourland, 508 U.S. 679, 692 (1993), that the Tribe itself could not assert regulatory jurisdiction over the non-Indian activity on fee lands. Furthermore, because the Tribe did not establish that the landfill would compromise the "political integrity, the economic security, or the health or welfare of the tribe," the court concluded that the Tribe could not invoke its inherent sovereignty under the exceptions in Montana v. United States, 450 U.S. 544, 566 (1981). Accordingly, the court declined to enjoin the landfill project, a decision the Tribe does not appeal. The District Court also determined, however, that the 1894 Act did not diminish the exterior boundaries of the reservation as delineated in the 1858 Treaty between the United States and the Tribe, and consequently that the waste site lies within an Indian reservation where federal environmental regulations apply.

On appeal by the State, 3

a divided panel of the Court of Appeals for the Eighth Circuit agreed that "Congress intended by its 1894 Act that the Yankton Sioux sell their surplus lands to the government, but not their governmental authority over it." 99 F. 3d 1439, 1457 (CA8 1996). The court relied primarily on the saving clause in Article XVIII, reasoning that, given its "unusually expansive language," other sections of the 1894 Act "should be read narrowly to minimize any conflict with the 1858 treaty." Id., at 1447. The court further concluded that neither the historical evidence nor the demographic development of the area could sustain a finding of diminishment. Id., at 1457.

We granted certiorari to resolve a conflict between the decision of the Court of Appeals and a number of decisions of the South Dakota Supreme Court declaring that the reservation has been diminished. 4

520 U. S. ___ (1997). We now reverse the Eighth Circuit's decision and hold that the unallotted lands ceded as a result of the 1894 Act did not retain reservation status.

II

States acquired primary jurisdiction over unallotted opened lands where "the applicable surplus land

Act freed that land of its reservation status and thereby diminished the reservation boundaries." Solem , 465 U.S., at 467 . In contrast, if a surplus land Act "simply offered non-Indians the opportunity to purchase land within established reservation boundaries," id., at 470, then the entire opened area remained Indian country. Our touchstone to determine whether a given statute diminished or retained res- ervation boundaries is congressional purpose. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 (1977). Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). Accordingly, only Congress can alter the terms of an Indian treaty by diminishing a reservation, United States v. Celestine, 215 U.S. 278, 285 (1909), and its intent to do so must be "clear and plain," United States v. Dion, 476 U.S. 734, 738 -739 (1986).

Here, we must determine whether Congress intended by the 1894 Act to modify the reservation set aside for the Yankton Tribe in the 1858 Treaty. Our inquiry is informed by the understanding that, at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because "[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar," Solem , 465 U.S., at 468 , and in part because Congress then assumed that the reservation system would fade over time. "Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." Ibid.; see also Hagen , 510 U.S., at 426 (Blackmun, J., dissenting) ("As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen"). Thus, although "[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands," we have held that we will also consider "the historical context surrounding the passage of the surplus land Acts," and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there. Id., at 411. Throughout this inquiry, "we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment." Ibid.

A

Article I of the 1894 Act provides that the Tribe will "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation"; pursuant to Article II, the United States pledges a fixed payment of $600,000 in return. This "cession" and "sum certain" language is "precisely suited" to terminating reservation status. See DeCoteau , 420 U.S., at 445 . Indeed, we have held that when a surplus land Act contains both explicit language of cession, evidencing "the present and total surrender of all tribal interests," and a provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises. Solem, supra , at 470; see also Hagen, supra , at 411.

The terms of the 1894 Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in DeCoteau, supra , at 445, and, as in DeCoteau , the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe. Moreover, the Act we construe here more clearly indicates diminishment than did the surplus land Act at issue in Hagen , which we concluded diminished reservation lands even though it provided only that "all the unallotted lands within said reservation shall be restored to the public domain." See 510 U.S., at 412 .

The 1894 Act is also readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries. In both Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 355 (1962), and Mattz v. Arnett, 412 U.S. 481, 501 -502 (1973), we held that Acts declaring surplus land "subject to settle ment, entry, and purchase," without more, did not evince

congressional intent to diminish the reservations. Likewise, in Solem , we did not read a phrase authorizing the Secretary of the Interior to "sell and dispose" of surplus lands belonging to the Cheyenne River Sioux as language of cession. See 465 U.S., at 472 . In contrast, the 1894 Act at issue here-a negotiated agreement providing for the total surrender of tribal claims in exchange for a fixed payment-bears the hallmarks of congressional intent to diminish a reservation.

B

The Yankton Tribe and the United States, appearing as amicus for the Tribe, rest their argument against diminishment primarily on the saving clause in Article XVIII of the 1894 Act. The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the existing reservation boundaries were maintained. The United States urges a similarly "holistic" construction of the agreement, which would presume that the parties intended to modify the 1858 Treaty only insofar as necessary to open the surplus lands for settlement, without fundamentally altering the Treaty's terms.

Such a literal construction of the saving clause, as the South Dakota Supreme Court noted in State v. Greger , 559 N. W. 2d 854, 863 (S. D. 1997), would "impugn the entire sale." The unconditional relinquishment of the Tribe's territory for settlement by non-Indian homesteaders can by no means be reconciled with the central provisions of the 1858 Treaty, which recognized the reservation as the Tribe's "permanent" home and prohibited white settlement there. See Oregon Dept. of Fish and Wildlife v. Klamath Tribe, 473 U.S. 753, 770 (1985) (discounting a saving clause on the basis of a "glaring inconsistency" between the original treaty and the subsequent agreement). Moreover, the Government's contention that the Tribe intended to cede some property but maintain the entire reservation as its territory contradicts the common understanding of the time: that tribal ownership was a critical component of reservation status. See Solem, supra , at 468. We "cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's late claims." Klamath, supra, at 774 (internal quotation marks and citation omitted).

Rather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it a "sensible construction" that avoids this "absurd conclusion." See United States v. Granderson, 511 U.S. 39, 56 (1994) (internal quotation marks omitted). The most plausible interpretation of Article XVIII revolves around the annuities in the form of cash, guns, ammunition, food, and clothing that the Tribe was to receive in exchange for its aboriginal claims for 50 years after the 1858 Treaty. Along with the proposed sale price, these annuities and other unrealized Yankton claims dominated the 1892 negotiations between the Commissioners and the Tribe. The tribal historian testified, before the District Court, that the loss of their rations would have been "disastrous" to the Tribe, App. 589, and members of the Tribe clearly perceived a threat to the annuities. At a particularly tense point in the negotiations, when the tide seemed to turn in favor of forces opposing the sale, Commissioner John J. Cole warned:

> "I want you to understand that you are absolutely dependent upon the Great Father to-day for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes. . . . Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result! Not onefourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe."

Council of the Yankton Indians (Dec. 10, 1892), transcribed in S. Exec. Doc. No. 27, at 74.

Given the Tribe's evident concern with reaffirmance of the Government's obligations under the 1858 Treaty, and the Commissioners' tendency to wield the payments as an inducement to sign the agreement, we conclude that the saving clause pertains to the continuance of annuities, not the 1858 borders.

The language in Article XVIII specifically ensuring that the "Yankton Indians shall continue to receive their annuities under the [1858 Treaty]" underscores the limited purpose and scope of the saving clause. It is true that the Court avoids interpreting statutes in a way that "renders some words altogether redundant." Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995). But in light of the fact that the record of the negotiations between the Commissioners and the Yankton Tribe contains no discussion of the preservation of the 1858 boundaries but many references to the Government's failure to fulfill earlier promises, see, e.g., Council of the Yankton Indians (Dec. 3, 1892), transcribed in S. Exec. Doc. No. 27, at 54-55, it seems most likely that the parties inserted and understood Article XVIII, including both the general statement regarding the force of the 1858 Treaty and the particular provision that payments would continue as specified therein, to assuage the Tribes' concerns about their past claims and future entitlements.

Indeed, apart from the pledge to pay annuities, it is hard to identify any provision in the 1858 Treaty that the Tribe might have sought to preserve, other than those plainly inconsistent with or expressly included in the 1894 Act. The Government points to Article XI of the Treaty, in which the Tribe agreed to submit for federal resolution "all matters of dispute and difficulty between themselves and other Indians," 11 Stat. 743, and urges us to extrapolate from this provision that the Tribe implicitly retained jurisdiction over internal matters, and from there to apply the standard canon of Indian law that "[o]nce powers of tribal self-government or other Indian rights are shown to exist, by treaty or otherwise, later federal action which might arguably abridge them is construed narrowly in favor of retaining Indian rights." F. Cohen, Handbook of Federal Indian Law 224 (1982) (hereinafter Cohen). But the Treaty's reference to tribal authority is indirect, at best, and it does not persuade us to view the saving clause as an agreement to maintain exclusive tribal governance within the original reservation boundaries.

The Tribe further contends that because Article XVIII affirms that the 1858 Treaty will govern "the same as though [the 1892 agreement] had not been made," without reference to consistency between those agreements, it has more force than the standard saving clause. While the language of the saving clause is indeed unusual, we do not think it is meaningfully distinct from the saving clauses that have failed to move this Court to find that preexisting treaties remain in effect under comparable circumstances. See, e.g. , Klamath , 473 U.S., at 769 -770; Montana v. United States, 450 U.S. 544, 548 , 558-559 (1981); Rosebud , 430 U.S., at 623 (Marshall, J., dissenting). Furthermore, "it is a commonplace of statutory construction that the specific" cession and sum certain language in Articles I and II "governs the general" terms of the saving clause. See Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

Finally, the Tribe argues that, at a minimum, the saving clause renders the statute equivocal, and that confronted with that ambiguity we must adopt the reading that favors the Tribe. See Carpenter v. Shaw, 280 U.S. 363, 367 (1930). The principle according to which ambiguities are resolved to the benefit of Indian tribes is not, however, "a license to disregard clear expressions of tribal and congressional intent." DeCoteau , 420 U.S., at 447 ; see also South Carolina v. Catawba Tribe, Inc., 476 U.S. 498, 506 (1986). In previous decisions, this Court has recognized that the precise cession and sum certain language contained in the 1894 Act plainly indicates diminishment, and a reasonable interpretation of the saving clause does not conflict with a like conclusion in this case.

C

Both the State and the Tribe seek support for their respective positions in two other provisions of the 1894 Act: a clause reserving sections of each township for schools and a prohibition on liquor within the ceded lands. Upon ratification, Congress added that "the sixteenth and thirty-sixth sections in each Congressional township . . . shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." 28 Stat. 319. This "school sections clause" parallels the enabling act admitting South Dakota to the Union, which grants the State sections 16 and 36 in every township for the support of common schools, but expressly exempts reservation land "until the reservation shall have been extinguished and such lands restored to . . . the public domain." Act of Feb. 22, 1889, 25 Stat. 679. When considering a similar provision included in the Act ceding the Rosebud Sioux Reservation in South Dakota, the Court discerned congressional intent to diminish the reservation, "thereby making the sections available for disposition to the State of South Dakota for 'school sections.' " Rosebud , 430 U.S., at 601 . The Tribe argues that the clause in the 1894 Act specifying the application of state law would be superfluous if Congress intended to diminish the reservation. As the Court stated in DeCoteau , however, "the natural inference would be that state law is to govern the manner in which the 16th and 36th sections are to be employed 'for common school purposes,' " which "implies nothing about the presence or absence of state civil and criminal jurisdiction over the remainder of the ceded lands." 420 U.S., at 446 , n. 33.

Although we agree with the State that the school sections clause reinforces the view that Congress intended to extinguish the reservation status of the unallotted land, a somewhat contradictory provision counsels against finding the reservation terminated. Article VII of the 1894 Act reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes." In Solem , the Court noted with respect to virtually identical language that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." 465 U.S., at 474 .

The State's position is more persuasively supported by the liquor prohibition included in Article XVII of the agreement. The provision prohibits the sale or offering of "intoxicating liquors" on "any of the lands by this agreement ceded and sold to the United States" or "any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty," 28 Stat. 318, thus signaling a jurisdictional distinction between reservation and ceded land. The Commissioners' report recommends that Congress "fix a penalty for the violation of this provision which will make it most effective in preventing the introduction of intoxicants within the limits of the reservation," Report, at 21, which could be read to suggest that ceded lands remained part of the reservation. We conclude, however, that "[t]he most reasonable inference from the inclusion of this provision is that Congress was aware that the opened, unallotted ar eas would henceforth not be 'Indian country.' " Rosebud, supra , at 613. By 1892, Congress already had enacted laws prohibiting alcohol on Indian reservations, see Cohen 306-307, and "[w]e assume that Congress is aware of existing law when it passes legislation," Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990). Furthermore, the Commissioner of Indian Affairs described the provision as prohibiting "the sale or disposition of intoxicants upon any of the lands now within the Yankton Reservation," Letter, at 6-7 (emphasis added), indicating that the lands would be severed from the reservation upon ratification of the agreement. In Perrin v. United States, 232 U.S. 478 (1914), we implied that the lands conveyed by the 1894 Act lost their reservation status when we construed Article XVII as applying to "ceded lands formerly included in the Yankton Sioux Indian Reservation." Id., at 480. We now reaffirm that the terms of the 1894 Act, including both the explicit language of cession and the surrounding provisions, attest to Congress' intent to diminish the Yankton Reservation.

III

Although we perceive congressional intent to diminish the reservation in the plain statutory language, we also take note of the contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends. Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished. See Solem , 465 U.S., at 471 . In this case, although the context of the Act is not so compelling that, standing alone, it would indicate diminishment, neither does it rebut the "almost insurmountable presumption" that arises from the statute's plain terms. Id., at 470.

A

The "manner in which the transaction was negotiated" with the Yankton Tribe and "the tenor of legislative Reports presented to Congress" reveal a contemporaneous understanding that the proposed legislation modified the reservation. Id., at 471. In 1892, when the Commissioner of Indian Affairs appointed the Yankton Commission, he charged its members to "negotiate with the [Tribe] for the cession of their surplus lands" and noted that the funds exchanged for the "relinquishment" of those lands would provide a future income for the Tribe. Instructions to the Yankton Indian Commission (July 27, 1892), reprinted in App. 98-99. The negotiations themselves confirm the understanding that by surrendering its interest in the unallotted lands, the Tribe would alter the reservation's character. Commissioner J. C. Adams informed members of the Tribe that once surplus lands were sold to the "Great Father," the Tribe would "assist in making the laws which will govern [members of the Tribe] as citizens of the State and nation." Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. No. 27, at 48. In terms that strongly suggest a reconception of the reservation, Commissioner Cole admonished the Tribe:

> "This reservation alone proclaims the old time and the old conditions . . . [t]he tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement. "You were a great and powerful people when your abilities and energies were directed in harmony with the conditions which surrounded you, but the wave of civilization which swept over you found you unprepared for the new conditions and you became weak. . . . [Y]ou must accept the new life wholly. You must break down the barriers and invite the white man with all the elements of civilization, that your young men may have the same opportunities under the new conditions that your fathers had under the old."

Council of the Yankton Indians (Dec. 17, 1892), transcribed id., at 81.

Cole's vivid language and entreaty to "break down the barriers" are reminiscent of the "picturesque" statement that Congress would "pull up the nails" holding down the outside boundary of the Uintah Reservation, which we viewed as evidence of diminishment in Hagen, 510 U.S., at 417 .

Moreover, the Commissioners' report of the negotiations signaled their understanding that the cession of the surplus lands dissolved tribal governance of the 1858 reservation. They observed that "now that [members of the Tribe] have been allotted their lands in severalty and have sold their surplus land-the last property bond which assisted to hold them together in their tribal interest and estatetheir tribal interests may be considered a thing of the past." Report, at 19. And, in a March 1894 letter to the Chairman of the Senate Committee on Indian Affairs, several Yankton chiefs and members of the Tribe indicated that they concurred in such an interpretation of the agreement's impact. The letter urged congressional ratification of the agreement, explaining that the signatories "want[ed] the laws of the United States and the State that we live in to be recognized and observed," and that they did not view it

as desirable to "keep up the tribal relation . . . as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization." S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894).

The legislative history itself adds little because Congress considered the Siletz, Nez Perce, and Yankton surplus land sale agreements at the same time, but the few relevant references from the floor debates support a find ing of diminishment. Some members noted that the cessions would restore the surplus lands to the "public domain," see 53 Cong. Rec. 6425 (June 16, 1894) (remarks of Rep. McCrae); id. , at 6426 (remarks of Rep. Hermann), language that indicates congressional intent to diminish a reservation, see Hagen, supra , at 418; Solem , 465 U. S, at 475. That same phrase appears in the annual report of the Commissioner on Indian Affairs that was released in September 1894, just after congressional ratification of the agreement. See Annual Report of the Commissioner on Indian Affairs 26 (Sept. 14, 1894), excerpted in App. 450452 (noting that under the Siletz, Nez Perce, and Yankton agreements, "some 880,000 acres of land will be restored to the public domain").

Finally, the Presidential Proclamation opening the lands to settlement declared that the Tribe had "ceded, sold, relinquished, and conveyed to the United States, all [its] claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said tribe by the first article [of the 1858 Treaty]." Presidential Proclamation (May 16, 1895), reprinted in App. 453. This Court has described substantially similar language as "an unambiguous, contemporaneous, statement by the Nation's Chief Executive, of a perceived disestablishment." Rosebud , 430 U.S., at 602 -603.

B

Despite the apparent contemporaneous understanding that the 1894 Act diminished the reservation, in the years since, both Congress and the Executive Branch have described the reservation in contradictory terms and treated the region in an inconsistent manner. An 1896 statute, for example, refers to "homestead settlers upon the Yankton Indian Reservation," 29 Stat. 16, while in a Report included in the legislative history for that statute, the Commissioner of Indian Affairs discusses the "former" reservation, H. R. Rep. No. 100, 54th Cong., 1st Sess., 2 (1896). From the 1896 statutory reference to hearings on the Indian Gaming Regulatory Act nearly a century later, Congress has occasionally, though not invariably, referred to the "Yankton Sioux Reservation." 5

We have often observed, however, that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Philadelphia Nat. Bank, 374 U.S. 321, 348 -349 (1963). Likewise, the scores of administrative documents and maps marshaled by the parties to support or contradict diminishment have limited interpretive value. 6

We need not linger over whether the many references to the Yankton Reservation in legislative and administrative materials utilized a convenient geographical description or reflected a considered jurisdictional statement. The mixed record we are presented with "reveals no consistent, or even dominant, approach to the territory in question," and it "carries but little force" in light of the strong textual and contemporaneous evidence of diminishment. Rosebud , 430 U.S., at 605 , n. 27; see also Solem , 465 U.S., at 478 (finding subsequent treatment that was "rife with contradictions and inconsistencies" to be "of no help to either side").

C

"Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto , if not de jure , diminishment may have occurred." Id., at 471. This final consideration is the least compelling for a simple reason: Every surplus

land Act necessarily resulted in a surge of non-Indian settlement and degraded the "Indian character" of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation. See id., at 468-469. The fact that the Yankton population in the region promptly and drastically declined after the 1894 Act does, however, provide "one additional clue as to what Congress expected," id., at 472. Today, fewer than ten percent of the 1858 reserva tion lands are in Indian hands, non-Indians constitute over two-thirds of the population within the 1858 boundaries, and several municipalities inside those boundaries have been incorporated under South Dakota law. The opening of the tribal casino in 1991 apparently reversed the population trend; the tribal presence in the area has steadily increased in recent years, and the advent of gaming has stimulated the local economy. In addition, some acreage within the 1858 boundaries has reverted to tribal or trust land. See H. Hoover, Yankton Sioux Tribal Land History (1995), reprinted in App. 545-546. Nonetheless, the area remains "predominantly populated by non-Indians with only a few surviving pockets of Indian allotments," and those demographics signify a diminished reservation. Solem, supra , at 471, n. 12.

The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day, further reinforces our holding. As the Court of Appeals acknowledged, South Dakota "has quite consistently exercised various forms of governmental authority over the opened lands," 99 F. 3d, at 1455, and the "tribe presented no evidence that it has attempted until recently to exercise civil, regulatory, or criminal jurisdiction over nontrust lands." Id., at 1456. Finally, the Yankton Constitution, drafted in 1932 and amended in 1962, defines the Tribe's territory to include only those tribal lands within the 1858 boundaries "now owned" by the Tribe. Constitution and Bylaws of the Yankton Sioux Tribal Business and Claims Committee, Art. VI, §1.

IV

The allotment era has long since ended, and its guiding philosophy has been repudiated. Tribal communities struggled but endured, preserved their cultural roots, and remained, for the most part, near their historic lands. But despite the present-day understanding of a "governmentto-government relationship between the United States and each Indian tribe," see, e.g., 25 U.S.C. § 3601 we must give effect to Congress' intent in passing the 1894 Act. Here, as in DeCoteau , we believe that Congress spoke clearly, and although "[s]ome might wish [it] had spoken differently . . . we cannot remake history." 420 U.S., at 449 .

The 1894 Act contains the most certain statutory language, evincing Congress' intent to diminish the Yankton Sioux Reservation by providing for total cession and fixed compensation. Contemporaneous historical evidence supports that conclusion, and nothing in the ambiguous subsequent treatment of the region substantially controverts our reasoning. The conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common, caution us, however, to limit our holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation. We need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly decline to do so. Our holding in Hagen was similarly limited, as was the State Supreme Court's description of the Yankton reservation in Greger . See 510 U.S., at 421 ; State v. Greger , 559 N. W. 2d, at 867.

* * *

In sum, we hold that Congress diminished the Yankton Sioux Reservation in the 1894 Act, that the unallotted tracts no longer constitute Indian country, and thus that the State has primary jurisdiction over the waste site and other lands ceded under the Act. Accordingly, we reverse the judgment of the Court of Appeals for the Eighth Circuit and remand for further proceedings consistent with this opinion.

It is so ordered.

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## Footnotes

[ Footnote 1 ] The text of the agreement provides in relevant part: "Article I. "The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid. "Article II. "In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for. . . . . "Article VII. "In addition to the stipulations in the preceding articles, upon the ratification of this agreement by Congress, the United States shall pay to the Yankton tribe of Sioux Indians as follows: To each person whose name is signed to this agreement and to each other male member of the tribe who is eighteen years old or older at the date of this agreement, twenty dollars ($20) in one double eagle, struck in the year 1892 as a memorial of this agreement. . . . "Article VIII. "Such part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes. But all other lands included in this sale shall, immediately after the ratification of this agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual bona fide settlers only. . . . . "Article XV. "The claim of fifty-one Yankton Sioux Indians, who were employed as scouts by General Alf. Scully in 1864, for additional compensation at the rate of two hundred and twenty-five dollars ($225) each, aggregating the sum of eleven thousand four hundred and seventy-five dollars ($11,475) is hereby recognized as just, and within ninety days (90) after the ratification of this agreement by Congress the same shall be paid in lawful money of the United States to the said scouts or to their heirs. . . . . "Article XVII. "No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement. "Article XVIII. "Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858." 28 Stat. 314-318.

[ Footnote 2 ] In 1980, the Court of Claims concluded that the land ceded by the Tribe had a fair market value of $6.65 per acre, or $1,337,381.50, that the $600,000 paid pursuant to the 1892 agreement was "unconscionable and grossly inadequate," and that the Tribe was entitled to recover the difference. Yankton Sioux Tribe v. United States , 623 F. 2d 159, 178.

[ Footnote 3 ] The Waste District explains that it did not appeal because the District Court's decision allowed it to go forward with construction of the proposed landfill, but it filed a brief as a respondent supporting the petitioner State in this Court because "of the likelihood that the assertion of tribal jurisdiction will continue to affect the District in this or similar contexts." Brief for Respondent Southern Missouri Waste Management District 6, n. With respect to the particular issue of the landfill's liner, the Waste District's concerns appear academic. The EPA has waived the requirement of a

composite liner and has permitted construction to go forward with the compacted clay liner. See Yankton Sioux Tribe v. Environmental Protection Agency , 950 F. Supp. 1471, 1482 (SD 1996).

[ Footnote 4 ] See State v. Greger , 559 N. W. 2d 854 (S. D. 1997); see also State v. Thompson , 355 N. W. 2d 349, 350 (S. D. 1984); State v. Williamson , 87 S. D. 512, 515, 211 N. W. 2d 182, 184 (1973); Wood v. Jameson , 81 S. D. 12, 18-19, 130 N. W. 2d 95, 99 (1964).

[ Footnote 5 ] Hearings on Pub. L. 100-497, The Indian Gaming Regulatory Act of 1988, before the Subcommittee on Native American Affairs of the House Committee on Natural Resources, 103d Cong., 2d Sess., 1 (1994) (held, according to the record, at the Fort Randall Casino Hotel on the "Yankton Sioux Reservation"); see, e.g. , 143 Cong. Rec. S9616 (Sept. 18, 1997) (discussion of the Marty Indian School "located on the Yankton Sioux Reservation"); 135 Cong. Rec. 1656 (1989) (description of the Lake Andes-Wagner project, which irrigates "Indian-owned land located on the Yankton Sioux Reservation"). But see 35 Stat. 808 (referring to land "on the former Yankton Reservation").

[ Footnote 6 ] See, e.g. , Exec. Order No. 5173 (Aug. 9, 1929) (extending the trust period on the allotted lands "on the Yankton Sioux Reservation"); Exec. Order No. 2363 (Apr. 30, 1916) (same); Letter to Chairman, Committee on Indian Affairs, from Secretary of the Interior (Feb. 1, 1921), reprinted in App. 480 (stating that "Lake Andes is within the former Yankton-Sioux Indian Reservation"); Letter to Yankton Agency from the Commissioner of Indian Affairs (Aug. 20, 1930), reprinted in App. 481 (discussing lands "heretofore constituting a part of the reservation"); Bureau of the Census, U. S. Dept. of Commerce, Pub. No. 1990 CPH-1-43, p. 175 (1991), reprinted in App. 527 (listing population figures for the Yankton Reservation). The Tribe also highlights a 1941 opinion letter issued by Felix Cohen, then-acting Solicitor of the Department of the Interior, in which he concluded that the Yankton Reservation had not been altered by the 1894 Act because allotments were "scattered over all the reservation," and the Act was thus distinguishable from statutes that "ceded a definite part of the reservation and treated the remaining areas as a diminished reservation." See Letter of August 7, 1941, reprinted in 1 U. S. Dept. of Interior, Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1063, 1064 (1979). The letter has not been disavowed but was apparently ignored in subsequent determinations by the agency. A 1969 memorandum on tribal courts, for example, plainly stated that the 1894 Act "diminish[ed] the area over which the [Yankton] tribe might exercise its authority." Memorandum M-36783 from Associate Solicitor, Indian Affairs, to Commissioner of Indian Affairs 1 (Sept. 10, 1969), reprinted in App. 518.

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 118 S.Ct. 789 (1998)

Supreme Court of the United States

SOUTH DAKOTA, Petitioner,

v.

YANKTON SIOUX TRIBE et al.

**No. 96-1581.**

Decided Jan. 26, 1998.

Yankton Sioux Tribe brought declaratory judgment action to enforce right to regulate landfill site allegedly within exterior boundaries of reservation, over which the State of South Dakota claimed jurisdiction. The United States District Court for the District of South Dakota, Lawrence L. Piersol, J., 890 F.Supp. 878, ruled that site was still part of reservation, and State appealed. The Court of Appeals, Murphy, Circuit Judge, 99 F.3d 1439, affirmed. On certiorari, the Supreme Court, Justice O'Connor, held that land surplus act which ratified agreement pursuant to which unallotted reservation lands that were opened for settlement by non-Indians were ceded to the United States in return for payment of sum certain did not preserve opened tracts' reservation status, but resulted in diminishment of reservation, such that the State of South Dakota ultimately acquired primary jurisdiction over tracts in question, and waste site constructed on such nonreservation land was subject to environmental laws of South Dakota.

Reversed and remanded.

*Syllabus* [FN*]

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

The Yankton Sioux Reservation in South Dakota was established pursuant to an 1858 Treaty between the United States and the Yankton Tribe. Congress subsequently retreated from the reservation concept and passed the 1887 Dawes Act, which permitted the Government to allot tracts of tribal land to individual Indians and, with tribal consent, to open the remaining holdings to non-Indian settlement. In accordance with the Dawes Act, members of the respondent Tribe received individual allotments and the Government then negotiated with the Tribe for the cession of the remaining, unallotted reservation lands. An agreement reached in 1892 provided that the Tribe would "cede, sell, relinquish, and convey to the United States" all of its unallotted lands; in return, the Government agreed to pay the Tribe $600,000. Article XVIII of the agreement, a saving clause, stated that nothing in its terms "shall be construed to abrogate the [1858] treaty" and that "all provisions of the said treaty ... shall be in full force and effect, the same as though this agreement had not been made." Congress ratified the agreement in an 1894 statute, and non-Indians rapidly acquired the

ceded lands.

In this case, tribal, federal, and state officials disagree as to the environmental regulations applicable to a solid waste disposal facility that lies on unallotted, non-Indian fee land, but falls within the reservation's original 1858 boundaries. The Tribe and the Federal Government contend that the site remains part of the reservation and is therefore subject to federal environmental regulations, while petitioner State maintains that the 1894 divestiture of Indian property effected a diminishment of the Tribe's territory, such that the ceded lands no longer constitute "Indian country" under 18 U.S.C. § 1151(a), and the State now has primary jurisdiction over them. The District Court declined to enjoin construction of the landfill but granted the Tribe a declaratory judgment that the 1894 Act did not alter the 1858 reservation boundaries, and consequently that the waste site lies within an Indian reservation where federal environmental regulations apply. The Eighth Circuit affirmed.

*Held:* The 1894 Act's operative language and the circumstances surrounding its passage demonstrate that Congress intended to diminish the Yankton Reservation. Pp. 797-805.

a) States acquired primary jurisdiction over unallotted opened lands if the applicable surplus land Act freed those lands of their reservation status and thereby diminished the reservation boundaries, *Solem v. Bartlett,* 465 U.S. 463, 467, 104 S.Ct. 1161, 1164, 79 L.Ed.2d 443, but the entire opened area remained Indian country if the Act simply offered non-Indians the opportunity to purchase land within established reservation boundaries, *id.*, at 470, 104 S.Ct., at 1166. The touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose, see *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 615, 97 S.Ct. 1361, 1377, 51 L.Ed.2d 660, and Congress' intent to alter an Indian treaty's terms by diminishing a reservation must be "clear and plain," *United States v. Dion,* 476 U.S. 734, 738-739, 106 S.Ct. 2216, 2219-2220, 90 L.Ed.2d 767. The most probative evidence of congressional intent is the statutory language, but the Court will also consider the historical context surrounding the Act's passage, and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there. *Hagen v. Utah,* 510 U.S. 399, 411, 114 S.Ct. 958, 965, 127 L.Ed.2d 252. Ambiguities must be resolved in favor of the Indians, and the Court will not lightly find diminishment. *Ibid.* Pp. 797- 798.

(b) The plain language of the 1894 Act evinces congressional intent to diminish the reservation. Article I's "cession" language--the Tribe will "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands"--and Article II's "sum certain" language--whereby the United States pledges a fixed payment of $600,000 in return-- is "precisely suited" to terminating reservation status. See *DeCoteau v. District County Court for Tenth Judicial Dist.,* 420 U.S. 425, 445, 95 S. Ct. 1082, 1093, 43 L.Ed.2d 300. Indeed, when a surplus land Act contains both explicit cession language, evidencing "the present and total surrender of all tribal interests," and a provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises. See *Solem, supra,* at 470, 104 S.Ct., at 1166; see also *Hagen, supra,* at 411, 114 S.Ct., at 965. Pp. 798-799.

(c) The Court rejects the Tribe's argument that, because the 1894 Act's saving clause purported to conserve the 1858 Treaty, the existing reservation boundaries were maintained. Such a literal construction would eviscerate the 1892 agreement by impugning the entire sale. Rather, it seems most likely that the parties inserted Article XVIII, including both the general statement regarding the force of the 1858 Treaty and a particular provision ensuring that the "Yankton Indians shall continue to receive their annuities under [that treaty]," for the limited purpose of assuaging the Tribe's concerns about their entitlement to annuities.

Discussion of the annuities figured prominently in the negotiations that led to the 1892 agreement, but no mention was made of the preservation of the 1858 boundaries. Pp. 799-801.

d) Neither the 1894 Act's clause reserving sections of each township for schools nor its prohibition on liquor within the ceded lands supports the Tribe's position. The Court agrees with the State that the school sections clause reinforces the view that Congress intended to extinguish the reservation status of the unallotted land. See, *e.g., Rosebud, supra,* at 601, 97 S.Ct., at 1370; but see *Solem, supra,* at 474, 104 S.Ct., at 1168. Moreover, the most reasonable inference from the inclusion of the liquor prohibition is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country," where alcohol already had been banned. *Rosebud, supra,* at 613, 97 S.Ct., at 1376. Pp. 801-802.

(e) Although the Act's historical context and the area's subsequent treatment are not such compelling evidence that, standing alone, they would indicate diminishment, neither do they rebut the "almost insurmountable presumption" that arises from the statute's plain terms. The manner in which the Government negotiated the transaction with the Tribe and the tenor of the legislative reports presented to Congress reveal a contemporaneous understanding that the 1894 Act modified the reservation. See *Solem, supra,* at 471, 104 S. Ct., at 1166. The legislative history itself adds little because Congress considered several surplus land sale agreements at the same time, but the few relevant references from the floor debates support a finding of diminishment. In addition, the Presidential Proclamation opening the lands to settlement contains language indicating that the Nation's Chief Executive viewed the reservation boundaries as altered. See *Rosebud, supra,* at 602-603, 97 S.Ct., at 1371. Pp. 802-803.

(f) Despite the apparent contemporaneous understanding that the 1894 Act diminished the reservation, in the years since, both Congress and the Executive Branch have described the reservation in contradictory terms and treated the region in an inconsistent manner. The mixed record reveals no dominant approach, and it carries but little force in light of the strong textual and contemporaneous evidence of diminishment. *E.g., Rosebud, supra,* at 605, n. 27, 97 S.Ct., at 1372-1373, n. 27. Pp. 803-804.

(g) Demographic factors also signify diminishment: The Yankton population in the region promptly and drastically declined after the 1894 Act, and the area remains predominantly populated by non-Indians with only a few surviving pockets of Indian allotments. *Solem, supra,* at 471, and n. 12, 104 S.Ct., at 1166-1167, and n. 12. The Court's holding is further reinforced by the State's assumption of jurisdiction over the ceded territory almost immediately after the 1894 Act, and by the lack of evidence that the Tribe has attempted until recently to exercise jurisdiction over nontrust lands. 99 F.3d 1439, 1456. Finally, the Yankton Constitution, drafted in 1932 and amended in 1962, defines the Tribe's territory to include only those tribal lands within the 1858 boundaries "now owned" by the Tribe. Pp. 804-805.

(h) The conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common, caution the Court to limit its holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation. The Court need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly declines to do so. See, *e.g., Hagen, supra,* at 421, 114 S.Ct., at 970. P. 805.

99 F.3d 1439 (C.A.8 1996), reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Justice O'CONNOR delivered the opinion of the Court.

This case presents the question whether, in an 1894 statute that ratified an agreement for the sale of surplus tribal lands, Congress diminished the boundaries of the Yankton Sioux Reservation in South Dakota. The reservation was established pursuant to an 1858 Treaty between the United States and the Yankton Sioux Tribe. Subsequently, under the Indian General Allotment Act, Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. § 331 (Dawes Act), individual members of the Tribe received allotments of reservation land, and the Government then negotiated with the Tribe for the cession of the remaining, unallotted lands. The issue we confront illustrates the jurisdictional quandaries wrought by the allotment policy: We must decide whether a landfill constructed on non-Indian fee land that falls within the boundaries of the original Yankton Reservation remains subject to federal environmental regulations. If the divestiture of Indian property in 1894 effected a diminishment of Indian territory, then the ceded lands no longer constitute "Indian country" as defined by 18 U.S.C. § 1151(a), and the State now has primary jurisdiction over them. In light of the operative language of the 1894 Act, and the circumstances surrounding its passage, we hold that Congress intended to diminish the Yankton Reservation and consequently that the waste site is not in Indian country.

I

A

At the outset of the 19th century, the Yankton Sioux Tribe held exclusive dominion over 13 million acres of land between the Des Moines and Missouri Rivers, near the boundary that currently divides North and South Dakota. H. Hoover, The Yankton Sioux 25 (1988). In 1858, the Yanktons entered into a treaty with the United States renouncing their claim to more than 11 million acres of their aboriginal lands in the north-central plains. Treaty of Apr. 19, 1858, 11 Stat. 743. Pursuant to the agreement, the Tribe ceded

> "all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit--Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres." Art. I, *id.*, at 744.

The retained portion of the Tribe's lands, located in what is now the southeastern part of Charles Mix County, South Dakota, was later surveyed and determined to encompass 430,405 acres. See Letter from the Commissioner of Indian Affairs to the Secretary of the Interior (Dec. 9, 1893), reprinted in S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 5 (1894) (hereinafter Letter). In consideration for the cession of lands and release of claims, the United States pledged to protect the Yankton Tribe in their "quiet and peaceable possession" of this reservation and agreed that "[n]o white person," with narrow exceptions, would "be permitted to reside or make any settlement upon any part of the [reservation]." Arts. IV, X, 11 Stat. 744, 747. The Federal Government further promised to pay the Tribe, or expend for the benefit of members of the Tribe, $1.6 million over a 50-year period, and appropriated an additional $50,000 to aid the Tribe in its transition to the reservation through the purchase of livestock and agricultural implements, and the construction of houses, schools, and other buildings.

Not all of this assistance was forthcoming, and the Tribe experienced severe financial difficulties in the years that followed, compounded by weather cycles of drought and devastating floods. When war broke out between the United States and the Sioux Nation in 1862, the Yankton Tribe alone sided with the Federal Government, a decision that isolated it from the rest of the Sioux Federation and caused severe inner turmoil as well. The Tribe's difficulties coincided with a period of rapid growth in the United States' population, increasing westward migration, and ensuing demands from non-Indians to open Indian holdings throughout the Western States to settlement.

In response to these "familiar forces," *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 431, 95 S.Ct. 1082, 1086, 43 L.Ed.2d 300 (1975), Congress retreated from the reservation concept and began to dismantle the territories that it had previously set aside as permanent and exclusive homes for Indian tribes. See *Solem v. Bartlett*, 465 U.S. 463, 466, 104 S.Ct. 1161, 1163-1164, 79 L.Ed.2d 443 (1984). The pressure from westward-bound homesteaders, and the belief that the Indians would benefit from private property ownership, prompted passage of the Dawes Act in 1887, 24 Stat. 388. The Dawes Act permitted the Federal Government to allot tracts of tribal land to individual Indians and, with tribal consent, to open the remaining holdings to non-Indian settlement. Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers. See Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 428 (1934) (statement of D.S. Otis on the history of the allotment policy). With respect to the Yankton Reservation in particular, some Members of Congress speculated that "close contact with the frugal, moral, and industrious people who will settle [on the reservation] [would] stimulate individual effort and make [the Tribe's] progress much more rapid than heretofore." Report of the Senate Committee on Indian Affairs, S.Rep. No. 196, 53d Cong., 2d Sess., 1 (1894).

In accordance with the Dawes Act, each member of the Yankton Tribe received a 160-acre tract from the existing reservation, held in trust by the United States for 25 years. Members of the Tribe acquired parcels of land throughout the 1858 reservation, although many of the allotments were clustered in the southern part, near the Missouri River. By 1890, the allotting agent had apportioned 167,325 acres of reservation land, 95,000 additional acres were subsequently allotted under the Act of February 28, 1891, 26 Stat. 795, and a small amount of acreage was reserved for government and religious purposes. The surplus amounted to approximately 168,000 acres of unallotted lands. See Letter, at 5.

In 1892, the Secretary of the Interior dispatched a three-member Yankton Indian Commission to Greenwood, South Dakota, to negotiate for the acquisition of these surplus lands. See Act of July 13, 1892, 27 Stat. 137 (appropriating funds to enable the Secretary to "negotiate with any Indians for the surrender of portions of their respective reservations"). When the Commissioners arrived on the reservation in October 1892, they informed the Tribe that they had been sent by the "Great Father" to discuss the cession of "this land that [members of the Tribe] hold in common," Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. No. 27, at 48, and they abruptly encountered opposition to the sale from traditionalist tribal leaders. See Report of the Yankton Indian Commission (Mar. 31, 1893), reprinted in S. Exec. Doc. No. 27, at 9-11 (hereinafter Report). In the lengthy negotiations that followed, members of the Tribe raised concerns about the suggested price per acre, the preservation of their annuities under the 1858 Treaty, and other outstanding claims against the United States, but they did not discuss the future boundaries of the reservation. Once the Commissioners garnered a measure of support for the sale of the unallotted lands, they submitted a proposed agreement to the Tribe. [FN1]

Article I of the agreement provided that the Tribe would "cede, sell, relinquish, and convey to the United

States" all of the unallotted lands on the reservation. Pursuant to Article II, the United States agreed to compensate the Tribe in a single payment of $600,000, which amounted to $3.60 per acre. [FN2] Much of the agreement focused on the payment and disposition of that sum. Article VII further provided that all the signatories and adult male members of the Tribe would receive a $20 gold piece to commemorate the agreement. Some members of the Tribe also sought unpaid wages from their service as scouts in the Sioux War, and in Article XV, the United States recognized their claim. The saving clause in Article XVIII, the core of the current disagreement between the parties to this case, stated that nothing in the agreement's terms "shall be construed to abrogate the treaty [of 1858]" and that "all provisions of the said treaty ... shall be in full force and effect, the same as though this agreement had not been made."

By March 1893, the Commissioners had collected signatures from 255 of the 458 male members of the Tribe eligible to vote, and thus obtained the requisite majority endorsement. The Yankton Indian Commission filed its report in May 1893, but congressional consideration was delayed by an investigation into allegations of fraud in the procurement of signatures. On August 15, 1894, Congress finally ratified the 1892 agreement, together with similar surplus land sale agreements between the United States and the Siletz and Nez Perce Tribes. Act of Aug. 15, 1894, 28 Stat. 286. The 1894 Act incorporated the 1892 agreement in its entirety and appropriated the necessary funds to compensate the Tribe for the ceded lands, to satisfy the claims for scout pay, and to award the commemorative $20 gold pieces. Congress also prescribed the punishment for violating a liquor prohibition included in the agreement and reserved certain sections in each township for common-school purposes. *Ibid.*

President Cleveland issued a proclamation opening the ceded lands to settlement as of May 21, 1895, and non-Indians rapidly acquired them. By the turn of the century, 90 percent of the unallotted tracts had been settled. See *Yankton Sioux Tribe v. United States,* 224 Ct.Cl. 62, 623 F.2d 159, 171 (1980). A majority of the individual allotments granted to members of the Tribe also were subsequently conveyed in fee by the members to non-Indians. Today, the total Indian holdings in the region consist of approximately 30,000 acres of allotted land and 6,000 acres of tribal land. Indian Reservations: A State and Federal Handbook 260 (1986).

Although formally repudiated with the passage of the Indian Reorganization Act in 1934, 48 Stat. 984, 25 U. S.C. § 461, the policy favoring assimilation of Indian tribes through the allotment of reservation land left behind a lasting legacy. The conflict between the modern-day approach to tribal self-determination and the assimilation impetus of the allotment era has engendered "a spate of jurisdictional disputes between state and federal officials as to which sovereign has authority over lands that were opened by the [surplus land] Acts and have since passed out of Indian ownership." *Solem,* 465 U.S., at 467, 104 S.Ct., at 1164.

B

We confront such a dispute in the instant case, in which tribal, federal, and state officials disagree as to the environmental regulations applicable to a proposed waste site. In February 1992, several South Dakota counties formed the Southern Missouri Recycling and Waste Management District (hereinafter Waste District) for the purpose of constructing a municipal solid waste disposal facility. The Waste District acquired the site for the landfill, which falls within the 1858 boundaries of the Yankton Sioux Reservation, in fee from a non-Indian. The predicate for the parties' claims in this case is that the waste site lies on land ceded in the 1894 Act, and the record supports that assumption.

In the Tribe's complaint, the proposed landfill is described as "the south one-half north one-quarter (S 1/2 N

1/4 ) Section 6, Township 96 North, Range 65 West (S6, T96N, R65W) of the Fifth Principal Meridan [sic], Charles Mix County, South Dakota." App. 24. That description corresponds to the account of a tract of land deeded to Lars K. Langeland under the Homestead Act in 1904. See App. to Brief for Respondent Southern Missouri Waste Management District 1a-2a. Because all of the land allotted to individual Indians on the Yankton Reservation was inalienable, pursuant to the Dawes Act, during a 25- year trust period, the tract acquired by a homesteader in 1904 and currently owned by the Waste District must consist of unallotted land ceded in the 1894 Act. (The Dawes Act was amended in 1906 by the Burke Act, 34 Stat. 182, 25 U.S.C. § 349, which permitted the issuance of some fee-simple patents before the expiration of the 25-year trust period, but the restrictions on alienation remained in place as of 1904.)

When the Waste District sought a state permit for the landfill, the Yankton Tribe intervened and objected on environmental grounds, arguing that the proposed compacted clay liner was inadequate to prevent leakage. After an administrative hearing in December 1993, the State Board of Minerals and the Environment granted the solid waste permit, finding that South Dakota regulations did not require the installation of the synthetic composite liner the Tribe had requested. The Sixth Judicial Circuit affirmed the Board's decision, and no appeal was taken to the State Supreme Court.

In September 1994, the Tribe filed suit in the Federal District Court for the District of South Dakota to enjoin construction of the landfill, and the Waste District joined South Dakota as a third party so that the State could defend its jurisdiction to grant the permit. The Tribe also sought a declaratory judgment that the permit did not comport with Federal Environmental Protection Agency (EPA) regulations mandating the installation of a composite liner in the landfill. See 40 C.F.R. § 258.40(b) (1997). The District Court held, in accordance with our decision in *South Dakota v. Bourland*, 508 U.S. 679, 692, 113 S.Ct. 2309, 2318, 124 L.Ed.2d 606 (1993), that the Tribe itself could not assert regulatory jurisdiction over the non-Indian activity on fee lands. Furthermore, because the Tribe did not establish that the landfill would compromise the "political integrity, the economic security, or the health or welfare of the tribe," the court concluded that the Tribe could not invoke its inherent sovereignty under the exceptions in *Montana v. United States*, 450 U.S. 544, 566, 101 S. Ct. 1245, 1258-1259, 67 L.Ed.2d 493 (1981). Accordingly, the court declined to enjoin the landfill project, a decision the Tribe does not appeal. The District Court also determined, however, that the 1894 Act did not diminish the exterior boundaries of the reservation as delineated in the 1858 Treaty between the United States and the Tribe, and consequently that the waste site lies within an Indian reservation where federal environmental regulations apply.

On appeal by the State, [FN3] a divided panel of the Court of Appeals for the Eighth Circuit agreed that "Congress intended by its 1894 Act that the Yankton Sioux sell their surplus land to the government, but not their governmental authority over it." 99 F.3d 1439, 1457 (1996). The court relied primarily on the saving clause in Article XVIII, reasoning that, given its "unusually expansive language," other sections of the 1894 Act "should be read narrowly to minimize any conflict with the 1858 treaty." *Id.*, at 1447. The court further concluded that neither the historical evidence nor the demographic development of the area could sustain a finding of diminishment. *Id.*, at 1457.

We granted certiorari to resolve a conflict between the decision of the Court of Appeals and a number of decisions of the South Dakota Supreme Court declaring that the reservation has been diminished. [FN4] 520 U.S. 1263, 117 S.Ct. 2430, 138 L.Ed.2d 192 (1997). We now reverse the Eighth Circuit's decision and hold that the unallotted lands ceded as a result of the 1894 Act did not retain reservation status.

II

States acquired primary jurisdiction over unallotted opened lands where "the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries." *Solem,* 465 U.S., at 467, 104 S.Ct., at 1164. In contrast, if a surplus land Act "simply offered non-Indians the opportunity to purchase land within established reservation boundaries," *id.,* at 470, 104 S.Ct., at 1166, then the entire opened area remained Indian country. Our touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose. See *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 615, 97 S.Ct. 1361, 1377, 51 L.Ed.2d 660 (1977). Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights. See, *e.g., Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). Accordingly, only Congress can alter the terms of an Indian treaty by diminishing a reservation, *United States v. Celestine,* 215 U.S. 278, 285, 30 S.Ct. 93, 94-95, 54 L.Ed. 195 (1909), and its intent to do so must be "clear and plain," *United States v. Dion,* 476 U.S. 734, 738-739, 106 S.Ct. 2216, 2219-2220, 90 L.Ed.2d 767 (1986).

Here, we must determine whether Congress intended by the 1894 Act to modify the reservation set aside for the Yankton Tribe in the 1858 Treaty. Our inquiry is informed by the understanding that, at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because "[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar," *Solem,* 465 U.S., at 468, 104 S.Ct., at 1164, and in part because Congress then assumed that the reservation system would fade over time. "Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Ibid.;* see also *Hagen,* 510 U.S. 399, 426, 114 S. Ct. 958, 973, 127 L.Ed.2d 252 (1994). (Blackmun, J., dissenting) ("As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen"). Thus, although "[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands," we have held that we will also consider "the historical context surrounding the passage of the surplus land Acts," and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there. *Id.,* at 411, 114 S.Ct., at 965. Throughout this inquiry, "we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment." *Ibid.*

A

Article I of the 1894 Act provides that the Tribe will "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation"; pursuant to Article II, the United States pledges a fixed payment of $600,000 in return. This "cession" and "sum certain" language is "precisely suited" to terminating reservation status. See *DeCoteau,* 420 U.S., at 445, 95 S.Ct., at 1093. Indeed, we have held that when a surplus land Act contains both explicit language of cession, evidencing "the present and total surrender of all tribal interests," and a provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises. *Solem, supra,* at 470, 104 S.Ct., at 1166; see also *Hagen, supra,* at 411, 114 S.Ct., at 965.

The terms of the 1894 Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau, supra,* at 445, 95 S.Ct., at 1093, and, as in *DeCoteau,* the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe. Moreover, the Act we construe here more clearly indicates diminishment than did the surplus land Act at issue in *Hagen,* which we concluded diminished reservation lands even though it provided only that "all the unallotted lands within said reservation shall be restored to the public domain." See 510 U.S., at 412, 114 S.Ct., at 966.

The 1894 Act is also readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries. In both *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355, 82 S.Ct. 424, 426-427, 7 L.Ed.2d 346 (1962), and *Mattz v. Arnett*, 412 U.S. 481, 501-502, 93 S.Ct. 2245, 2256-2257, 37 L.Ed.2d 92 (1973), we held that Acts declaring surplus land "subject to settlement, entry, and purchase," without more, did not evince congressional intent to diminish the reservations. Likewise, in *Solem*, we did not read a phrase authorizing the Secretary of the Interior to "sell and dispose" of surplus lands belonging to the Cheyenne River Sioux as language of cession. See 465 U.S., at 472, 104 S.Ct., at 1167. In contrast, the 1894 Act at issue here-a negotiated agreement providing for the total surrender of tribal claims in exchange for a fixed payment-bears the hallmarks of congressional intent to diminish a reservation.

B

The Yankton Tribe and the United States, appearing as *amicus* for the Tribe, rest their argument against diminishment primarily on the saving clause in Article XVIII of the 1894 Act. The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the existing reservation boundaries were maintained. The United States urges a similarly "holistic" construction of the agreement, which would presume that the parties intended to modify the 1858 Treaty only insofar as necessary to open the surplus lands for settlement, without fundamentally altering the treaty's terms.

Such a literal construction of the saving clause, as the South Dakota Supreme Court noted in *State v. Greger*, 559 N.W.2d 854, 863 (1997), would "impugn the entire sale." The unconditional relinquishment of the Tribe's territory for settlement by non-Indian homesteaders can by no means be reconciled with the central provisions of the 1858 Treaty, which recognized the reservation as the Tribe's "permanent" home and prohibited white settlement there. See *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 770, 105 S.Ct. 3420, 3430, 87 L.Ed.2d 542 (1985) (discounting a saving clause on the basis of a "glaring inconsistency" between the original treaty and the subsequent agreement). Moreover, the Government's contention that the Tribe intended to cede some property but maintain the entire reservation as its territory contradicts the common understanding of the time: that tribal ownership was a critical component of reservation status. See *Solem, supra*, at 468, 104 S.Ct., at 1164-1165. We "cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims." *Klamath, supra*, at 774, 105 S.Ct., at 3432 (internal quotation marks and citation omitted).

Rather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it a "sensible construction" that avoids this "absurd conclusion." See *United States v. Granderson*, 511 U.S. 39, 56, 114 S.Ct. 1259, 1268-1269, 127 L.Ed.2d 611 (1994) (internal quotation marks omitted). The most plausible interpretation of Article XVIII revolves around the annuities in the form of cash, guns, ammunition, food, and clothing that the Tribe was to receive in exchange for its aboriginal claims for 50 years after the 1858 Treaty. Along with the proposed sale price, these annuities and other unrealized Yankton claims dominated the 1892 negotiations between the Commissioners and the Tribe. The tribal historian testified, before the District Court, that the loss of their rations would have been "disastrous" to the Tribe, App. 589, and members of the Tribe clearly perceived a threat to the annuities. At a particularly tense point in the negotiations, when the tide seemed to turn in favor of forces opposing the sale, Commissioner John J. Cole warned:

"I want you to understand that you are absolutely dependent upon the Great Father to-day for a

> living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes. ... Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result? Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe." Council of the Yankton Indians (Dec. 10, 1892), transcribed in S. Exec. Doc. No. 27, at 74.

Given the Tribe's evident concern with reaffirmance of the Government's obligations under the 1858 Treaty, and the Commissioners' tendency to wield the payments as an inducement to sign the agreement, we conclude that the saving clause pertains to the continuance of annuities, not the 1858 borders.

The language in Article XVIII specifically ensuring that the "Yankton Indians shall continue to receive their annuities under the [1858 Treaty]" underscores the limited purpose and scope of the saving clause. It is true that the Court avoids interpreting statutes in a way that "renders some words altogether redundant." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574, 115 S.Ct. 1061, 1069, 131 L.Ed.2d 1 (1995). But in light of the fact that the record of the negotiations between the Commissioners and the Yankton Tribe contains no discussion of the preservation of the 1858 boundaries but many references to the Government's failure to fulfill earlier promises, see, *e.g.*, Council of the Yankton Indians (Dec. 3, 1892), transcribed in S. Exec. Doc. No. 27, at 54-55, it seems most likely that the parties inserted and understood Article XVIII, including both the general statement regarding the force of the 1858 Treaty and the particular provision that payments would continue as specified therein, to assuage the Tribes' concerns about their past claims and future entitlements.

Indeed, apart from the pledge to pay annuities, it is hard to identify any provision in the 1858 Treaty that the Tribe might have sought to preserve, other than those plainly inconsistent with or expressly included in the 1894 Act. The Government points to Article XI of the treaty, in which the Tribe agreed to submit for federal resolution "all matters of dispute and difficulty between themselves and other Indians," 11 Stat. 747, and urges us to extrapolate from this provision that the Tribe implicitly retained jurisdiction over internal matters, and from there to apply the standard canon of Indian law that "[o]nce powers of tribal self-government or other Indian rights are shown to exist, by treaty or otherwise, later federal action which might arguably abridge them is construed narrowly in favor of retaining Indian rights." F. Cohen, Handbook of Federal Indian Law 224 (1982) (hereinafter Cohen). But the treaty's reference to tribal authority is indirect, at best, and it does not persuade us to view the saving clause as an agreement to maintain exclusive tribal governance within the original reservation boundaries.

The Tribe further contends that because Article XVIII affirms that the 1858 Treaty will govern "the same as though [the 1892 agreement] had not been made," without reference to consistency between those agreements, it has more force than the standard saving clause. While the language of the saving clause is indeed unusual, we do not think it is meaningfully distinct from the saving clauses that have failed to move this Court to find that pre-existing treaties remain in effect under comparable circumstances. See, *e.g.*, *Klamath*, 473 U.S., at 769-770, 105 S.Ct., at 3429-3430; *Montana* , 450 U.S., at 548, 558- 559, 101 S.Ct., at 1254-1255 ; *Rosebud*, 430 U.S., at 623, 97 S.Ct., at 1381 (Marshall, J., dissenting). Furthermore, "it is a commonplace of statutory construction that the specific" cession and sum certain language in Articles I and II "governs the general" terms of the saving clause. See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157 (1992).

Finally, the Tribe argues that, at a minimum, the saving clause renders the statute equivocal, and that confronted with that ambiguity we must adopt the reading that favors the Tribe. See *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 122-123, 74 L.Ed. 478 (1930). The principle according to which ambiguities are resolved to the benefit of Indian tribes is not, however, "a license to disregard clear expressions of tribal and congressional intent." *DeCoteau*, 420 U.S., at 447, 95 S.Ct., at 1094; see also *South Carolina v. Catawba Tribe, Inc.*, 476 U.S. 498, 506, 106 S.Ct. 2039, 2044, 90 L.Ed.2d 490 (1986). In previous decisions, this Court has recognized that the precise cession and sum certain language contained in the 1894 Act plainly indicates diminishment, and a reasonable interpretation of the saving clause does not conflict with a like conclusion in this case.

C

Both the State and the Tribe seek support for their respective positions in two other provisions of the 1894 Act: a clause reserving sections of each township for schools and a prohibition on liquor within the ceded lands. Upon ratification, Congress added that "the sixteenth and thirty-sixth sections in each Congressional township ... shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." 28 Stat. 319. This "school sections clause" parallels the enabling Act admitting South Dakota to the Union, which grants the State sections 16 and 36 in every township for the support of common schools, but expressly exempts reservation land "until the reservation shall have been extinguished and such lands restored to ... the public domain." Act of Feb. 22, 1889, 25 Stat. 679. When considering a similar provision included in the Act ceding the Rosebud Sioux Reservation in South Dakota, the Court discerned congressional intent to diminish the reservation, "thereby making the sections available for disposition to the State of South Dakota for 'school sections.' " *Rosebud, supra,* at 601, 97 S.Ct., at 1370. The Tribe argues that the clause in the 1894 Act specifying the application of state law would be superfluous if Congress intended to diminish the reservation. As the Court stated in *DeCoteau*, however, "the natural inference would be that state law is to govern the manner in which the 16th and 36th sections are to be employed 'for common school purposes,' " which "implies nothing about the presence or absence of state civil and criminal jurisdiction over the remainder of the ceded lands." 420 U.S., at 446, n. 33, 95 S.Ct., at 1094, n. 33.

Although we agree with the State that the school sections clause reinforces the view that Congress intended to extinguish the reservation status of the unallotted land, a somewhat contradictory provision counsels against finding the reservation terminated. Article VIII of the 1894 Act reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes." In *Solem*, the Court noted with respect to virtually identical language that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." 465 U.S., at 474, 104 S.Ct., at 1168.

The State's position is more persuasively supported by the liquor prohibition included in Article XVII of the agreement. The provision prohibits the sale or offering of "intoxicating liquors" on "any of the lands by this agreement ceded and sold to the United States" or "any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty," 28 Stat. 318, thus signaling a jurisdictional distinction between reservation and ceded land. The Commissioners' report recommends that Congress "fix a penalty for the violation of this provision which will make it most effective in preventing the introduction of intoxicants within the limits of the reservation," Report, at 21, which could be read to suggest that ceded lands remained part of the reservation. We conclude, however, that "the most reasonable inference from the inclusion of this provision is that Congress was aware that the opened, unallotted areas would henceforth not be 'Indian country.' " *Rosebud, supra,* at 613, 97 S.Ct., at 1376. By 1892, Congress already

had enacted laws prohibiting alcohol on Indian reservations, see Cohen 306-307, and "[w]e assume that Congress is aware of existing law when it passes legislation," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 325, 112 L.Ed.2d 275 (1990). Furthermore, the Commissioner of Indian Affairs described the provision as prohibiting "the sale or disposition of intoxicants upon any of the lands *now* within the Yankton Reservation," Letter, at 6-7 (emphasis added), indicating that the lands would be severed from the reservation upon ratification of the agreement. In *Perrin v. United States*, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914), we implied that the lands conveyed by the 1894 Act lost their reservation status when we construed Article XVII as applying to "ceded lands formerly included in the Yankton Sioux Indian Reservation." *Id.*, at 480, 34 S.Ct., at 388. We now reaffirm that the terms of the 1894 Act, including both the explicit language of cession and the surrounding provisions, attest to Congress' intent to diminish the Yankton Reservation.

III

Although we perceive congressional intent to diminish the reservation in the plain statutory language, we also take note of the contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends. Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished. See *Solem*, 465 U.S., at 471, 104 S.Ct., at 1166-1167. In this case, although the context of the Act is not so compelling that, standing alone, it would indicate diminishment, neither does it rebut the "almost insurmountable presumption" that arises from the statute's plain terms. *Id.*, at 470, 104 S.Ct., at 1166.

A

The "manner in which the transaction was negotiated" with the Yankton Tribe and "the tenor of legislative Reports presented to Congress" reveal a contemporaneous understanding that the proposed legislation modified the reservation. *Id.*, at 471, 104 S.Ct., at 1166. In 1892, when the Commissioner of Indian Affairs appointed the Yankton Commission, he charged its members to "negotiate with the [Tribe] for the cession of their surplus lands" and noted that the funds exchanged for the "relinquishment" of those lands would provide a future income for the Tribe. Instructions to the Yankton Indian Commission (July 27, 1892), reprinted in App. 98-99. The negotiations themselves confirm the understanding that by surrendering its interest in the unallotted lands, the Tribe would alter the reservation's character. Commissioner J.C. Adams informed members of the Tribe that once surplus lands were sold to the "Great Father," the Tribe would "assist in making the laws which will govern [members of the Tribe] as citizens of the State and nation." Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. No. 27, at 48. In terms that strongly suggest a reconception of the reservation, Commissioner Cole admonished the Tribe:

> "This reservation alone proclaims the old time and the old conditions ... The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement.
>
> "You were a great and powerful people when your abilities and energies were directed in harmony with the conditions which surrounded you, but the wave of civilization which swept over you found you unprepared for the new conditions and you became weak. ... [Y]ou must accept the new life wholly. You must break down the barriers and invite the white man with all the elements of civilization, that your young men may have the same opportunities under

> the new conditions that your fathers had under the old." Council of the Yankton Indians (Dec. 17, 1892), transcribed *id.*, at 81.

Cole's vivid language and entreaty to "break down the barriers" are reminiscent of the "picturesque" statement that Congress would "pull up the nails" holding down the outside boundary of the Uintah Reservation, which we viewed as evidence of diminishment in *Hagen*, 510 U.S., at 417, 114 S.Ct., at 968-969.

Moreover, the Commissioners' report of the negotiations signaled their understanding that the cession of the surplus lands dissolved tribal governance of the 1858 reservation. They observed that "now that [members of the Tribe] have been allotted their lands in severalty and have sold their surplus land-the last property bond which assisted to hold them together in their tribal interest and estate-their tribal interests may be considered a thing of the past." Report, at 19. And, in a March 1894 letter to the Chairman of the Senate Committee on Indian Affairs, several Yankton chiefs and members of the Tribe indicated that they concurred in such an interpretation of the agreement's impact. The letter urged congressional ratification of the agreement, explaining that the signatories "want[ed] the laws of the United States and the State that we live in to be recognized and observed," and that they did not view it as desirable to "keep up the tribal relation ... as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization." S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894).

The legislative history itself adds little because Congress considered the Siletz, Nez Perce, and Yankton surplus land sale agreements at the same time, but the few relevant references from the floor debates support a finding of diminishment. Some members noted that the cessions would restore the surplus lands to the "public domain," see 53 Cong. Rec. 6425 (1894) (remarks of Rep. McCrae); *id.*, at 6426 (remarks of Rep. Hermann), language that indicates congressional intent to diminish a reservation, see *Hagen, supra*, at 418, 114 S.Ct., at 969; *Solem*, 465 U.S., at 475, 104 S.Ct., at 1168-1169. That same phrase appears in the annual report of the Commissioner on Indian Affairs that was released in September 1894, just after congressional ratification of the agreement. See Annual Report of the Commissioner on Indian Affairs 26 (Sept. 14, 1894), excerpted in App. 450-452 (noting that under the Siletz, Nez Perce, and Yankton agreements, "some 880,000 acres of land will be restored to the public domain").

Finally, the Presidential Proclamation opening the lands to settlement declared that the Tribe had "ceded, sold, relinquished, and conveyed to the United States, all [its] claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said tribe by the first article [of the 1858 Treaty]." Presidential Proclamation (May 16, 1895), reprinted in App. 453. This Court has described substantially similar language as "an unambiguous, contemporaneous, statement by the Nation's Chief Executive, of a perceived disestablishment." *Rosebud*, 430 U.S., at 602-603, 97 S.Ct., at 1371.

B

Despite the apparent contemporaneous understanding that the 1894 Act diminished the reservation, in the years since, both Congress and the Executive Branch have described the reservation in contradictory terms and treated the region in an inconsistent manner. An 1896 statute, for example, refers to "homestead settlers upon the Yankton Indian Reservation," 29 Stat. 16, while in a Report included in the legislative history for that statute, the Commissioner of Indian Affairs discusses the "former" reservation, H.R.Rep. No. 100, 54th Cong., 1st Sess., 2 (1896). From the 1896 statutory reference to hearings on the Indian Gaming Regulatory Act nearly a century later, Congress has occasionally, though not invariably, referred to the "Yankton Sioux Reservation." [FN5] We have often observed, however, that "the views of a subsequent Congress form a

hazardous basis for inferring the intent of an earlier one." *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 348-349, 83 S.Ct. 1715, 1733, 10 L.Ed.2d 915 (1963). Likewise, the scores of administrative documents and maps marshaled by the parties to support or contradict diminishment have limited interpretive value. [FN6] We need not linger over whether the many references to the Yankton Reservation in legislative and administrative materials utilized a convenient geographical description or reflected a considered jurisdictional statement. The mixed record we are presented with "reveals no consistent, or even dominant, approach to the territory in question," and it "carries but little force" in light of the strong textual and contemporaneous evidence of diminishment. *Rosebud, supra*, at 605, n. 27, 97 S.Ct., at 1373, n. 27; see also *Solem*, 465 U.S., at 478, 104 S.Ct., at 1170 (finding subsequent treatment that was "rife with contradictions and inconsistencies" to be "of no help to either side").

The Tribe also highlights a 1941 opinion letter issued by Felix Cohen, then-acting Solicitor of the Department of the Interior, in which he concluded that the Yankton Reservation had not been altered by the 1894 Act because allotments were "scattered over all the reservation," and the Act was thus distinguishable from statutes that "ceded a definite part of the reservation and treated the remaining areas as a diminished reservation." See Letter of Aug. 7, 1941, reprinted in 1 U.S. Dept. of Interior, Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1063, 1064 (1979). The letter has not been disavowed but was apparently ignored in subsequent determinations by the agency. A 1969 memorandum on tribal courts, for example, plainly stated that the 1894 Act "diminish[ed] the area over which the [Yankton] tribe might exercise its authority." Memorandum M-36783 from Associate Solicitor, Indian Affairs, to Commissioner of Indian Affairs 1 (Sept. 10, 1969), reprinted in App. 518.

C

"Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Id.*, at 471, 104 S.Ct., at 1166. This final consideration is the least compelling for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the "Indian character" of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation. See *id.*, at 468-469, 104 S.Ct., at 1164-1164. The fact that the Yankton population in the region promptly and drastically declined after the 1894 Act does, however, provide "one additional clue as to what Congress expected," *id.*, at 472, 104 S.Ct., at 1167. Today, fewer than 10 percent of the 1858 reservation lands are in Indian hands, non- Indians constitute over two-thirds of the population within the 1858 boundaries, and several municipalities inside those boundaries have been incorporated under South Dakota law. The opening of the tribal casino in 1991 apparently reversed the population trend; the tribal presence in the area has steadily increased in recent years, and the advent of gaming has stimulated the local economy. In addition, some acreage within the 1858 boundaries has reverted to tribal or trust land. See H. Hoover, Yankton Sioux Tribal Land History (1995), reprinted in App. 545-546. Nonetheless, the area remains "predominantly populated by non-Indians with only a few surviving pockets of Indian allotments," and those demographics signify a diminished reservation. *Solem, supra*, at 471, n. 12, 104 S.Ct., at 1167, n. 12.

The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day, further reinforces our holding. As the Court of Appeals acknowledged, South Dakota "has quite consistently exercised various forms of governmental authority over the opened lands," 99 F.3d, at 1455, and the "tribe presented no evidence that it has attempted until recently to exercise civil, regulatory, or criminal jurisdiction over nontrust lands." *Id.*, at 1456. Finally, the Yankton Constitution, drafted in 1932 and amended in 1962, defines the Tribe's territory to include only those tribal lands within the 1858 boundaries "now owned" by the Tribe. Constitution and Bylaws of the Yankton Sioux

Tribal Business and Claims Committee, Art. VI, § 1.

IV

The allotment era has long since ended, and its guiding philosophy has been repudiated. Tribal communities struggled but endured, preserved their cultural roots, and remained, for the most part, near their historic lands. But despite the present-day understanding of a "government-to-government relationship between the United States and each Indian tribe," see, *e.g.*, 25 U.S.C. § 3601, we must give effect to Congress' intent in passing the 1894 Act. Here, as in *DeCoteau*, we believe that Congress spoke clearly, and although "[s]ome might wish [it] had spoken differently, ... we cannot remake history." 420 U.S., at 449, 95 S.Ct., at 1095.

The 1894 Act contains the most certain statutory language, evincing Congress' intent to diminish the Yankton Sioux Reservation by providing for total cession and fixed compensation. Contemporaneous historical evidence supports that conclusion, and nothing in the ambiguous subsequent treatment of the region substantially controverts our reasoning. The conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common, caution us, however, to limit our holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation. We need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly decline to do so. Our holding in *Hagen* was similarly limited, as was the State Supreme Court's description of the Yankton reservation in *Greger*. See 510 U.S., at 421, 114 S.Ct., at 970; *State v. Greger*, 559 N.W.2d, at 867.

* * *

In sum, we hold that Congress diminished the Yankton Sioux Reservation in the 1894 Act, that the unallotted tracts no longer constitute Indian country, and thus that the State has primary jurisdiction over the waste site and other lands ceded under the Act. Accordingly, we reverse the judgment of the Court of Appeals for the Eighth Circuit and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

Footnotes:

FN1. The text of the agreement provides in relevant part:

"Article I.

"The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

"Article II.

"In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred

thousand dollars ($600,000), as hereinbefore provided for.

. . . . .

"Article VII.

"In addition to the stipulations in the preceding articles, upon the ratification of this agreement by Congress, the United States shall pay to the Yankton tribe of Sioux Indians as follows: To each person whose name is signed to this agreement and to each other male member of the tribe who is eighteen years old or older at the date of this agreement, twenty dollars ($20) in one double eagle, struck in the year 1892 as a memorial of this agreement....

"Article VIII.

"Such part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes. But all other lands included in this sale shall, immediately after the ratification of this agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual bona fide settlers only.

. . . . .

"Article XV.

"The claim of fifty-one Yankton Sioux Indians, who were employed as scouts by General Alf. Sully in 1864, for additional compensation at the rate of two hundred and twenty-five dollars ($225) each, aggregating the sum of eleven thousand four hundred and seventy-five dollars ($11,475) is hereby recognized as just, and within ninety days (90) after the ratification of this agreement by Congress the same shall be paid in lawful money of the United States to the said scouts or to their heirs.

. . . . .

"Article XVII.

"No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

"Article XVIII.

"Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by

Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858." 28 Stat. 314-318.

FN2. In 1980, the Court of Claims concluded that the land ceded by the Tribe had a fair market value of $6.65 per acre, or $1,337,381.50, that the $600,000 paid pursuant to the 1892 agreement was "unconscionable and grossly inadequate," and that the Tribe was entitled to recover the difference. *Yankton Sioux Tribe v. United States,* 224 Ct.Cl. 62, 623 F.2d 159, 178.

FN3. The Waste District explains that it did not appeal because the District Court's decision allowed it to go forward with construction of the proposed landfill, but it filed a brief as a respondent supporting the petitioner State in this Court because "of the likelihood that the assertion of tribal jurisdiction will continue to affect the District in this or similar contexts." Brief for Respondent Southern Missouri Waste Management District 6, n. 6. With respect to the particular issue of the landfill's liner, the Waste District's concerns appear academic. The EPA has waived the requirement of a composite liner and has permitted construction to go forward with the compacted clay liner. See *Yankton Sioux Tribe v. Environmental Protection Agency,* 950 F.Supp. 1471, 1482 (D.S.D. 1996).

FN4. See *State v. Greger,* 559 N.W.2d 854 (S.D.1997); see also *State v. Thompson,* 355 N.W.2d 349, 350 (S. D.1984); *State v. Williamson,* 87 S.D. 512, 515, 211 N.W.2d 182, 184 (1973); *Wood v. Jameson,* 81 S.D. 12, 18-19, 130 N.W.2d 95, 99 (1964).

FN5. Hearings on Pub.L. 100-497, The Indian Gaming Regulatory Act of 1988, before the Subcommittee on Native American Affairs of the House Committee on Natural Resources, 103d Cong., 2d Sess., 1 (1994) (held, according to the record, at the Fort Randall Casino Hotel on the "Yankton Sioux Reservation"); see, *e. g.,* 143 Cong. Rec. S9616 (Sept. 18, 1997) (discussion of the Marty Indian School "located on the Yankton Sioux Reservation"); 135 Cong. Rec. 1656 (1989) (description of the Lake Andes-Wagner project, which irrigates "Indian-owned land located on the Yankton Sioux Reservation"). But see 35 Stat. 808 (referring to land "on the former Yankton Reservation").

FN6. See, *e.g.,* Exec. Order No. 5173 (Aug. 9, 1929) (extending the trust period on the allotted lands "on the Yankton Sioux Reservation"); Exec. Order No. 2363 (Apr. 30, 1916) (same); Letter to Chairman, Committee on Indian Affairs, from Secretary of the Interior (Feb. 1, 1921), reprinted in App. 480 (stating that "Lake Andes is within the former Yankton-Sioux Indian Reservation"); Letter to Yankton Agency from the Commissioner of Indian Affairs (Aug. 20, 1930), reprinted in App. 481 (discussing lands "heretofore constituting a part of the reservation"); Bureau of the Census, U.S. Dept. of Commerce, Pub. No. 1990 CPH-1-43, p. 175 (1991), reprinted in App. 527 (listing population figures for the Yankton Reservation).



# § 3512. Public protection

*How Current is This?*

**(a)** Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter if—

**(1)** the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or

**(2)** the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

**(b)** The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

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44 U.S.C.A. § 3512 **UNITED STATES CODE ANNOTATED**

**TITLE 44. PUBLIC PRINTING AND DOCUMENTS**

**CHAPTER 35--COORDINATION OF FEDERAL INFORMATION POLICY**

**SUBCHAPTER I--FEDERAL INFORMATION POLICY**



Current through P.L. 107-11, approved 5-28-01

§ 3512. Public protection

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**(1)** the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or

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**(b)** The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

CREDIT(S)

2001 Electronic Update

(Added Pub.L. 104-13, § 2, May 22, 1995, 109 Stat. 181, and amended Pub.L. 106- 398, § 1 [Div. A, Title X, § 1064(b)], Oct. 30, 2000, 114 Stat. 1654, 1654-___.)

<General Materials (GM) - References, Annotations, or Tables>

## HISTORICAL AND STATUTORY NOTES

### Revision Notes and Legislative Reports

1995 Acts. House Report No. 104-37 and House Conference Report No. 104-99, see 1995 U.S. Code Cong. and Adm. News, p. 164.

2000 Acts. House Conference Report No. 106-945 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 1516.

### Amendments

2000 Amendments. Pub.L. 106-398 [Div. A, Title I, § 1064(b)], struck out "chapter" and inserted "subchapter" wherever appearing.

### Effective and Applicability Provisions

2000 Acts. Pub.L. 106-398, § 1 [Div. A, Title X, § 1065], Oct. 30, 2000, 114 Stat. 1654, 1654-___, provided that the amendment to this section by Pub.L. 106-398, § 1, [Div. A, Title X, Subtitle G [§§ 1061 to 1065]], Oct. 30, 2000, 114 Stat. 1654, 1654-___, shall take effect 30 days after Oct. 30, 2000. See note set out under section 3531 of this title.

1995 Acts. Section effective Oct. 1, 1995, except as otherwise provided, see section 4 of Pub.L. 104-13, set out as a note under section 3501 of this title.

### Prior Provisions

A prior section 3512, added Pub.L. 96-511, § 2(a), Dec. 11, 1980, 94 Stat. 2822, relating to public protection, was omitted in the general revision of this chapter by Pub.L. 104-13.

Another prior section 3512, added Pub.L. 93-153, Title IV, § 409(b), Nov. 16, 1973, 87 Stat. 593, which related to information for independent regulatory agencies, was omitted in the general revision of this chapter by section 2(a) of Pub.L. 96-511.

### Delayed Application of 1995 Revision

Pursuant to section 4(c) of Pub.L. 104-13, set out as a note under section 3501 of this title, prior section 3512, as in effect on September 30, 1995, shall continue to apply to the collection of information for which there is in effect on September 30, 1995, a control number issued by the Office of Management and Budget under this chapter, and shall continue so to apply until the earlier of (1) the first renewal or modification of that collection of information after September 30, 1995, or (2) the expiration of its control number after September 30, 1995.

Prior section 3512, as in effect on September 30, 1995, reads as follows:

"Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter."

## CROSS REFERENCES

Administrative remedies for false claims and statements, provisions of this section not superceded, see 31 USCA § 3811.

Disclosure to Federal agency of disaggregated information obtained in accordance with this section, see 15 USCA § 57b-2.

## LIBRARY REFERENCES

American Digest System

Records k13.

Key Number System Topic No. 326.

United States k41, 57.

Key Number System Topic No. 393.

Encyclopedias

Records, see C.J.S. § 32.

United States, see C.J.S. §§ 41, 74.

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**1/2. Retroactive effect**

Paperwork Reduction Act (PRA) amendment that requires agencies and courts to entertain PRA arguments that would otherwise have been barred either by statute of limitations or by proponent's failure to have made argument at earlier stage was not applied in impermissibly retroactive manner when Federal Communications Commission (FCC) permitted cellular telephone license applicant to raise PRA issue that FCC had previously dismissed as time-barred without ruling on merits; amendment governed only conduct of litigation after its effective date and did nothing to reopen matters litigated before that date. Saco River Cellular, Inc. v. F.C.C., C.A.D.C.1998, 133 F.3d 25, 328 U.S.App.D.C. 162, rehearing denied, certiorari denied 119 S.Ct. 47, 525 U. S. 813, 142 L.Ed.2d 37.

**1. Information collection requests within section**

Federal Communications Commission (FCC) regulation which required that applicant for cellular telephone license demonstrate firm financial commitment was "collection of information" within meaning of Paperwork Reduction Act (PRA) section which required Office of Management and Budget (OMB) approval for collection of information, even though FCC regulation required tentative selectee not merely to provide information about but actually to obtain firm financial commitment. Saco River Cellular, Inc. v. F.C.C., C.A.

D.C.1998, 133 F.3d 25, 328 U.S.App.D.C. 162, rehearing denied, certiorari denied 119 S.Ct. 47, 525 U.S. 813, 142 L.Ed.2d 37.

Plan of operations required to be filed in connection with obtaining permit for mining activities was an "information collection request" within meaning of Paperwork Reduction Act and since plan of operations filing requirement lacked current control number as required by Act, holders of unpatented mining claims could not be convicted for failing to file plan of operations with the Forest Service. U.S. v. Smith, C.A.9 (Alaska) 1989, 866 F.2d 1092.

Instruction booklets are not "information collection requests" under Paperwork Reduction Act provision forbidding agency from collecting information or subjecting any person to penalty for failing to provide information without first obtaining control number from Office of Management and Budget (OMB); control numbers do not have to be on booklets since booklets are merely publications designed to assist taxpayers to complete tax forms and tax forms themselves display control numbers, and therefore, fact that booklets did not have numbers did not prevent IRS from subjecting taxpayers to penalty for tax evasion and failure to file tax return. U.S. v. Stiner, D.Kan.1991, 765 F.Supp. 663, affirmed 952 F.2d 1401.

**2. Information for investigative purposes**

Prosecution for evading federal income taxes was not barred by provision of Paperwork Reduction Act stating that no person shall be subject to any penalty for failing to maintain or provide information to any agency if information collection request involved does not display current control number assigned by Director of Office of Management and Budget (OMB), even though Treasury Regulation stating where income tax returns must be filed does not have OMB control number. U.S. v. Neff, C.A.11 (Fla.) 1992, 954 F.2d 698.

Tax forms, particularly Form 1040, are information collection requests subject to prescriptions of Paperwork Reduction Act. U.S. v. Schweitzer, D.Mont.1991, 775 F.Supp. 1355.

Provision of Paperwork Reduction Act, which prohibits penalty for failing to maintain or provide information to an agency if information collection request was made after December 31, 1981, and does not display current control number, applied only to administrative penalties for failure to comply with information request not conforming to Act's requirements and did not apply to prosecution for tax evasion. U. S. v. Karlin, D.Kan.1991, 762 F.Supp. 911.

Summonses of Internal Revenue Service on form 2039 which were served upon corporations pursuant to investigation of corporate president's tax liability were issued pursuant to investigation of "specific individual" and, therefore, were exempt from requirements of Paperwork Reduction Act that control number be stamped by Office of Management and Budget, or that request contain statement that no control number is needed. U.S. v. Particle Data, Inc., N.D.Ill.1986, 634 F.Supp. 272.

That Internal Revenue Service forms did not contain an Office of Management and Budget number on them did not violate this section requiring the affixation of an Office of Management and Budget number to any "information collection request," as this chapter does not apply to collection of information during conduct of an administrative action or investigation involving an agency against specific individuals or entities. Cameron v. I.R.S., N.D.Ind.1984, 593 F.Supp. 1540, affirmed 773 F.2d 126.

**3. Internal Revenue Service forms**

Paperwork Reduction Act (PRA) is not applicable to Internal Revenue Service (IRS) instruction booklets, which assist taxpayers in filling out 1040 tax form, and thus PRA did not preclude district court from penalizing taxpayer who failed to file federal tax returns for five years; pursuant to PRA, government information request forms must display current Office of Management and Budget control number, and instruction booklet assists taxpayer in filling out return form, but does not independently request information from taxpayer. U.S. v. Ryan, C.A.7 (Ill.) 1992, 969 F.2d 238.

Paperwork Reduction Act did not apply to statutory requirement of filing tax returns, but only to forms themselves, which, in prosecution for willful failure to file tax returns, contained appropriate numbers; thus, defendant's counsel's failure to raise implications of Act did not constitute ineffective assistance of counsel. U.S. v. Wunder, C.A.6 (Ohio) 1990, 919 F.2d 34.

Fact that Internal Revenue Service (IRS) summons were issued on IRS Form 2039 without Office of Management and Budget (OMB) control number, as allegedly required by Paperwork Reduction Act, was not valid basis for quashing summons. Faber v. U.S., W.D.Mich.1999, 69 F.Supp.2d 965.

**4. False information**

Statute providing that no person shall be subjected to any penalty for failing to maintain information if the collection request does not contain a Paperwork Reduction Act control number does not protect an individual against prosecution for making false statements on government forms. U.S. v. Sasser, C.A.10 (Okla.) 1992, 974 F.2d 1544, certiorari denied 113 S.Ct. 1063, 506 U.S. 1085, 122 L.Ed.2d 368.

Paperwork Reduction Act section providing that no person shall be subject to penalty for failing to maintain or provide information to agency if information collection request does not display current control number did not protect from prosecution a defendant for knowingly making false writing containing materially false statement and using visa knowing same to have been procured by means of false statement arising out of his failure to indicate on his visa application form that he had two convictions for assault in Japan. U.S. v. Matsumoto, D.Hawai'i 1991, 756 F.Supp. 1361.

**5. Defenses--Generally**

A miner could not be subject to a penalty for constructing a road on National Forest Service land without authorization or an approved operations plan where the Forest Service failed to comply with the Paperwork Reduction Act when it required the miner to file an operations plan. U.S. v. Hatch, C.A.9 (Nev.) 1990, 919 F.2d 1394.

**6. ---- Time to assert**

A defendant charged with unlawfully and knowingly constructing a road on National Forest Service land without authorization or an approved operations plan could raise the information's failure to charge an offense at any time during the pendency of the proceedings; the defendant could not be subject to a penalty because the Forest Service failed to comply with the Paperwork Reduction Act. U.S. v. Hatch, C.A.9 (Nev.) 1990,

919 F.2d 1394.

**7. Remedies**

Paperwork Reduction Act section providing that no person shall be subject to penalty for failing to maintain or provide information to agency if information collection request does not display current control number does not render "bootleg" forms of no legal force or effect and does not afford a remedy for government misconduct akin to remedy afforded by exclusionary rule. U.S. v. Matsumoto, D.Hawai'i 1991, 756 F.Supp. 1361.

**8. Expiration date of forms**

Even if Paperwork Reduction Act requires an expiration date, designation of year "1981" on income tax form 1040 was sufficient to satisfy the Act's requirement. Salberg v. U.S., C.A.7 (Ill.) 1992, 969 F.2d 379.

Although public protection provision of Paperwork Reduction Act (PRA) requires control numbers on information collection requests to be current, there is no explicit requirement in PRA that forms must display expiration date. U.S. v. Burdett, E.D.N.Y.1991, 768 F.Supp. 409.

**9. Control numbers**

A defendant's tax evasion conviction would not be overturned on basis that relevant Internal Revenue Service (IRS) regulations and instruction books did not display Office of Management and Budget (OMB) control numbers as allegedly required by the Paperwork Reduction Act; defendant was convicted of violating a statute, rather than any requirement in a regulation or instruction book. Salberg v. U.S., C.A.7 (Ill.) 1992, 969 F.2d 379.

Government's failure to include "OMB" number on Internal Revenue Service (IRS) summons as required under Paperwork Reduction Act of 1908 was not serious violation of Act, caused no harm to tax protestor who received summons, and did not allow tax protestor to ignore summons. U.S. v. Stoecklin, M.D.Fla.1994, 848 F.Supp. 1521.

Section of the Paperwork Reduction Act stating that "no person shall be subject to any penalty" for failure to satisfy an agency's information request that "does not display a current control number assigned" by the Office of Management and Budget (OMB) does not waive the government's sovereign immunity to allow suits for money damages by private citizens who feel unduly burdened or penalized by the government's failure to comply with the Act. Pacific Nat. Cellular v. U.S., Fed.Cl.1998, 41 Fed.Cl. 20.

**10. Standing**

Importer of aircraft parts lacked standing to claim that government violated Paperwork Reduction Act by sending questionnaire to importer's customers without first obtaining approval from Office of Management and Budget; information request had not been directed to importer. Wag-Aero, Inc. v. U.S., E.D.Wis.1993, 837 F.Supp. 1479, affirmed 35 F.3d 569, rehearing denied.

**11. Penalties**

Paperwork Reduction Act (PRA) does not operate to preclude penalties when a reporting obligation is required by statute rather than by regulation. Gossner Foods, Inc. v. Environmental Protection Agency, D. Utah 1996, 918 F.Supp. 359.

**12. Collection of information**

Failure of cover letter from regional office for veterans benefits, which accompanied returned application form for disability benefits that was not complete, to display valid control number did not violate Paperwork Reduction Act; letter was not "collection of information" within meaning of Act because it did not contain questions posed to applicant, and application enclosed with letter, which posed questions, displayed valid control number. Fleshman v. West, C.A.Fed.1998, 138 F.3d 1429, certiorari denied 119 S.Ct. 371, 525 U.S. 947, 42 L.Ed.2d 307.

**13. Private right of action**

Prospective employee could not maintain claim under Paperwork Reduction Act against hospital based on hospital's failure to hire employee after he refused to provide his social security number, since the Act did not authorize private right of action, but instead authorized its protections to be used as a defense. Sutton v. Providence St. Joseph Medical Center, C.A.9 (Cal.) 1999, 192 F.3d 826.

44 U.S.C.A. § 3512

44 USCA § 3512

END OF DOCUMENT

Evans v. Gore, 253 U.S. 245, 40 S.Ct. 550 (1920)

Supreme Court of the United States

EVANS

v.

GORE, Acting Collector of Internal Revenue.

**No. 654.**

Decided June 1, 1920.

In Error to the District Court of the United States for the Western District of Kentucky.

Action by Walter Evans against J. Rogers Gore, Acting Collector, etc. Judgment for defendant (262 Fed. 550), and plaintiff brings error. Reversed.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is an action to recover money paid under protest as a tax alleged to be forbidden by the Constitution.

The plaintiff is the United States District Judge for the Western District of Kentucky, and holds that office under an appointment by the President made in 1899 with the advice and consent of the Senate. The tax which he calls in question was levied under the act of February 24, 1919, c. 18, 40 Stat. 1062, on his net income for the year 1918, as computed under that act. His compensation or salary as District Judge was included in the computation. Had it been excluded he would not have called on to pay any income tax for that year. The inclusion was in obedience to a provision in section 213 (Comp. St. Ann. Supp. 1919, § 6336 1/8 ff), requiring the computation to embrace all gains, profits, income and the like, 'including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States [and others] * * * the compensation received as such.' Whether he could be subjected to such a tax in respect of his salary, consistently with the Constitution, is the matter in issue. If it be resolved against the tax he will be entitled to recover what he paid; otherwise his action must fail. It did fail in the District Court. 262 Fed. 550.

The Constitution establishes three great co-ordinate departments of the national government--the legislative, the executive, and the judicial--and distributes among them the powers confided to that government by the people. Each department is dealt with in a separate article, the legislative in the first, the executive in the second and the judicial in the third. Our present concern is chiefly with the third article. It defines the judicial power, vests it in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish, and declares:

'The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their

continuance in office.'

The plaintiff insists that the provision in section 213 which subjects him to a tax in respect of his compensation as a judge by its necessary operation and effect diminishes that compensation and therefore is repugnant to the constitutional limitation just quoted.

Stated in its broadest aspect, the contention involves the power to tax the compensation of federal judges in general, and also the salary of the President, as to which the Constitution (article 2, § 1, cl. 6) contains a similar limitation. Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us; and this although each member has been paying the tax in respect of his salary voluntarily and in regular course. But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go. He brought the case here in due course, the government joined him in asking an early determination of the question involved, and both have been heard at the bar and through printed briefs. In this situation, the only course open to us is to consider and decide the cause--a conclusion supported by precedents reaching back many years. Moreover, it appears that, when this taxing provision was adopted, Congress regarded it as of uncertain constitutionality and both contemplated and intended that the question should be settled by us in a case like this. [FN1]

With what purpose does the Constitution provide that the compensation of the judges 'shall not be diminished during their continuance in office?' Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminution, such as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole? Or, does it mean that the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?

The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, the legislative, the executive, and the judicial, in separate departments, each relatively independent of the others; and it was recognized that without this independence--if it was not made both real and enduring--the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative.

The particular need for making the judiciary independent was elaborately pointed out by Alexander Hamilton in the Federalist, No. 78, from which we excerpt the following:

> 'The executive not only dispenses the honors, but holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. * * * This simple view of the matter suggests several important

> consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.'
>
> 'The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.'

At a later period John Marshall, whose rich experience as lawyer, legislator, and Chief Justice enabled him to speak as no one else could, tersely said (Debates Va. Conv. 1829-1831, pp. 616, 619):

> 'Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The judicial department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? * * * I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary.'

More recently the need for this independence was illustrated by Mr. Wilson, now the President, in the following admirable statement:

> 'It is also necessary that there should be a judiciary endowed with substantial and independent powers and secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the administrative heads of the government.
>
> 'Indeed there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts. Our definition of liberty is that it is the best practicable adjustment between the powers of the government and the privileges of the individual.'
>
> 'Our courts are the balance wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some nonpolitical forum in which those understandings can be impartially debated and determined. That forum our courts supply.

> There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it adjudged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty.'

Constitutional Government in the United States, pp. 17, 142.

Conscious of the nature and scope of the power being vested in the national courts, recognizing that they would be charged with responsibilities more delicate and important than any ever before confided to judicial tribunals, and appreciating that they were to be, in the words of George Washington, [FN2] 'the keystone of our political fabric,' the convention with unusual accord incorporated in the Constitution the provision that the judges 'shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.' Can there be any doubt that the two things thus coupled in place-- the clause in respect of tenure during good behavior and that in respect of an undiminishable compensation--were equally coupled in purpose? And is it not plain that their purpose was to invest the judges with an independence in keeping with the delicacy and importance of their task and with the imperative need for its impartial and fearless performance? Mr. Hamilton said in explanation and support of the provision (Federalist, No. 79):

> 'Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. * * * In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*. * * * The enlightened friends of good government in every state have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. * * * This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the Constitutions of any of the states in regard to their own judges.'

The several commentators on the Constitution have adopted and reiterated this view, [FN3] Judge Story adding:

> 'Without this provision [as to an undiminishable compensation], the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery'

and Chancellor Kent observing:

> 'It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private

> business for the duties of that important station.'

These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds.

Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle. Here the plaintiff was paid the full compensation, but was subjected to an involuntary obligation to pay back a part, and the obligation was promptly enforced. Of what avail to him was the part which was paid with one hand and then taken back with the other? Was he not placed in practically the same situation as if it had been withheld in the first instance? Only by subordinating substance to mere form could it be held that his compensation was not diminished. Of course, the conclusion that it was diminished is the natural one. This is illustrated in Dobbins v. Commissioners of Erie County, 16 Pet. 435, 450, 10 L. Ed. 1022, which involved a tax charged under a law of Pennsylvania against a revenue officer of the United States who was a citizen and resident of that state. The tax was adjusted or proportioned to his compensation, and the state court sustained it. Erie County Com'rs v. Dobbins, 7 Watts (Pa.) 513. In reversing that decision, this court, after showing that the compensation had been fixed by a law of Congress said:

> 'Does not a tax, then, by a state upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entireties? It certainly has such an effect; and any law of a state imposing such a tax cannot be constitutional.'

But it is urged that what the plaintiff was made to pay back was an income tax, and that a like tax was exacted or others engaged in private employment.

If the tax in respect of his compensation be prohibited, it can find no justification in the taxation of other income as to which there is no prohibition; for, of course, doing what the Constitution permits gives no license to do what it prohibits.

The prohibition is general, contains no excepting words, and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise--that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries.

True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here recognize and sustain, is well settled. In Collector v. Day, 11 Wall. 113, 20 L. Ed. 122, it was held that Congress could not impose an income tax in respect of the salary of a judge of a state court; in Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 585, 601, 652, 653, 15 Sup. Ct. 673, 39 L. Ed.

759, it was held--the full court agreeing on this point--that Congress was without power to impose such a tax in respect of interest received from bonds issued by a state or any of its counties or municipalities; and in United States v. Railroad Co., 17 Wall. 322, 21 L. Ed. 597, there was a like holding as to municipal revenues derived by the city of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none; but all recognize and gave effect to a prohibition implied from the independence of the states within their own spheres.

When we consider, as was done in those cases, what is comprehended in the congressional power to tax--where its exertion is not directly or impliedly interdicted--it becomes additionally manifest that the prohibition now under discussion was intended to embrace and prevent diminution through the exertion of that power; for, as this court repeatedly has held, the power to tax carries with it 'the power to embarrass and destroy'; may be applied to every object within its range 'in such measure as Congress may determine'; enables that body 'to select one calling and omit another, to tax one class of property and to forbear to tax another'; and may be applied in different ways to different objects so long as there is 'geographical uniformity' in the duties, imposts and excises imposed. McCulloch v. Marland, 4 Wheat. 316, 431, 4 L. Ed. 579; Pacific Insurance Co. v. Soule, 7 Wall. 433, 443, 19 L. Ed. 95; Austin v. The Aldermen, 7 Wall. 694, 699, 19 L. Ed. 224; Veazie Bank v. Fenno, 8 Wall. 533, 541, 548, 19 L. Ed. 482; Knowlton v. Moore, 178 U. S. 41, 92, 106, 20 Sup. Ct. 747, 44 L. Ed. 969; Treat v. White, 181 U. S. 264, 268, 269, 21 Sup. Ct. 611, 45 L. Ed. 853; McCray v. United States, 195 U. S. 27, 61, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; Flint v. Stone Tracy Co., 220 U. S. 107, 158, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Billings v. United States, 232 U. S. 261, 282, 34 Sup. Ct. 421, 58 L. Ed. 596; Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 24-26, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414. Is it not therefore morally certain that the discerning statesmen who framed the Constitution and were so sedulously bent on securing the independence of the judiciary intended to protect the compensation of the judges from assault and diminution in the name or form of a tax? Could not the purpose of the prohibition be wholly thwarted if this avenue of attack were left open? Certainly there is nothing in the words of the prohibition indicating that it is directed against one legislative power and not another; and in our opinion due regard for its spirit and principle requires that it be taken as directed against them all.

This view finds support in rulings in Pennsylvania, Louisiana, and North Carolina, made under like constitutional restrictions, Commonwealth ex rel. v. Mann. 5 Watts & S. (Pa.) 403, 415, et seq.; [FN4] New Orleans v. Lea, 14 La. Ann. 197; 48 N. C. Appendix; N. C. Public Documents 1899, Doc. No. 8, p. 95; In re Taxation of Salaries of Judges, 131 N. C. 692, 42 S. E. 970; Purnell v. Page, 133 N. C. 125, 45 S. E. 534; and has strong sanction in the actual practice of the government, to which we now advert.

No attempt was made to tax the compensation of federal judges prior to 1862. A statute of that year, chapter 119, § 86, 12 Stat. 472, with its amendments, subjected the salaries of all civil officers of the United States to an income tax of 3 per cent. and was construed by the revenue officers as including the compensation of the President and the judges. Chief Justice Taney, the head of the judiciary, wrote to the Secretary of the Treasury a letter of protest (157 U. S. 701), based on the prohibition we are considering, and in the course of the letter said:

'The act in question, as you interpret it, diminishes the compensation of every judge three per cent. and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the Legislature.

'The judiciary is one of the three great departments of the government, created and established by the

Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

'Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.

'Upon these grounds I regard an act of Congress retaining in the Treasury a portion of the compensation of the judges, as unconstitutional and void.'

The collection of the tax proceeded, and, at the suggestion of the Chief Justice, this court ordered his protest spread on its records. In 1869 the Secretary of the Treasury referred the question to the Attorney General (Judge Hoar), and that officer rendered an opinion in substantial accord with Chief Justice Taney's protest, and also advised that the tax on the President's compensation was likewise invalid. 13 Op. A. G. 161. The tax on the compensation of the President and the judges was then discontinued, and the amounts theretofore collected were all refunded--a part through administrative channels and a part through the action of the Court of Claims and ensuing appropriations by Congress. Wayne v. United States, 26 Ct. Cl. 274; chapter 311, 27 Stat. 306. Thus the Secretary of the Treasury, the accounting officers, the Court of Claims and Congress accepted and gave effect to the view expressed by the Attorney General. In the Income Tax Act of 1894, c. 349, § 27 et seq., 28 Stat. 509, nothing was said about the compensation of the judges; but Mr. Justice Field regarded it as included and gave that as one reason for joining in the decision holding the act unconstitutional. 157 U. S. 604-606, 15 Sup. Ct. 673, 39 L. Ed. 759. On the rehearing the Attorney General (Mr. Olney) frankly said in his brief:

> 'There has never been a doubt since the opinion of Attorney General Hoar that the salaries of the President and judges were exempt.'

The income tax acts of 1913, 1916, and 1917 (chapter 16, 38 Stat. 168; chapter 463, 39 Stat. 758, § 4 [Comp. St. § 6336d] chapter 63, 40 Stat. 329 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336d]) severally excepted the compensation of the judges then in office--also that of the President for the then current term. In short, during a period of more than 120 years there was but a single real attempt to tax the judges in respect of their compensation, and that attempt soon was disapproved and pronounced untenable by the concurring action of judicial, executive and legislative officers. And so it is apparent that in the actual practice of the government the prohibition has been construed as embracing and preventing diminution by taxation.

Does the Sixteenth Amendment authorize and support this tax and the attendant diminution; that is to say, does it bring within the taxing powers subjects theretofore excepted? The court below answered in the negative; and counsel for the government say:

'It is not, in view of recent decisions, contended that this amendment rendered anything taxable as income that was not so taxable before.'

We might rest the matter here, but it seems better that our view and the reasons therefor be stated in this opinion, even if there be some repetition of what recently has been said in other cases.

Preliminarily we observe that, unless there be some real conflict between the Sixteenth Amendment and the prohibition, in article 3, section 1, making the compensation of the judges undiminishable, effect must be given to the latter as well as to the former; and also that a purpose to depart from or imperil a constitutional principle so widely esteemed and so vital to our system of government as the independence of the judiciary is not lightly to be assumed.

In Knowlton v. Moore, supra, 178 U. S. 95, 20 Sup. Ct. 768, 44 L. Ed. 969, this court said:

> 'The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning.'

This sound rule is as applicable to the amendments as to the provisions of the original Constitution.

Let us turn then to the circumstances in which this amendment was proposed and ratified and to the controversy it was intended to settle. By the Constitution all direct taxes were required to be apportioned among the several states according to their population, as ascertained by a census or enumeration (article 1, § 2, cl. 3, and section 9, cl. 4), but no such requirement was imposed as to other taxes. And apart from capitation taxes, with which we now are not concerned, no rule was given for determining what taxes were direct and therefore to be apportioned, or what were indirect and not within that requirement. Controversy ensued and ultimately centered around the right classification of income from taxable real estate and from investments in taxable personal property. The matter then came before this court in Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; Id., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108, and the decision when announced disclosed that the same differences in opinion existing elsewhere were shared by the members of the court, five, the controlling number, regarding a tax on such income as in effect a direct tax on the property from which it arose, and therefore as requiring apportionment, and four regarding it as indirect and not to be apportioned. Much of the law then under consideration had been framed according to the latter view, and because of this and the adjudged inseparability of other portions the entire law was held invalid. Afterwards, to enable Congress to reach all taxable income more conveniently and effectively than would be possible as to much of it if an apportionment among the states were essential, the Sixteenth Amendment was proposed and ratified. In other words, the purpose of the amendment was to eliminate all occasion for such an apportionment because of the source from which the income came,--a change in no wise affecting the power to tax but only the mode of exercising it. The message of the President [FN5] recommending the adoption by Congress of a joint resolution proposing the amendment, the debates [FN6] on the resolution by which it was proposed, and the public appeals [FN7]--corresponding to those in the Federalist--made to secure its ratification leave no doubt on this point. And that the proponents of the amendment in drafting it lucidly and aptly expressed this as its object is shown by its words:

> 'The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.'

True, Gov. Hughes, of New York, in a message laying the amendment before the Legislature of that state for

ratification or rejection, expressed some apprehension lest it might be construed as extending the taxing power to income not taxable before; but his message promptly brought forth from statesmen who participated in proposing the amendment such convincing expositions of its purpose, [FN8] as here stated, that the apprehension was effectively dispelled and ratification followed.

Thus the genesis and words of the amendment unite in showing that it does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the states of taxes laid on income, whether derived from one source or another. [FN9] And we have so held in other cases.

In Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 17, 18, 36 Sup. Ct. 236, 241 (60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414), where the purpose and effect of the amendment were first drawn in question, the Chief Justice reviewed at length the legislative and judicial action which prompted its adoption and then, referring to its text and speaking for a unanimous court, said:

> 'It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense--an authority already possessed and never questioned--or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed in the light of the history which we have given and of the decision in the Pollock Case and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock Case was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the amendment provides that income taxes, from whatever source the income was derived, shall not be subject to the regulation of apportionment.'

What was there said was reaffirmed and applied in Stanton v. Baltic Mining Co., 240 U. S. 103, 112, 113, 36 Sup. Ct. 278, 60 L. Ed. 546, and Peck & Co. v. Lowe, 247 U. S. 165, 172, 38 Sup. Ct. 432, 62 L. Ed. 1049, and in Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, decided at the present term, we again held, citing the prior cases, that the amendment 'did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income.'

After further consideration, we adhere to that view and accordingly hold that the Sixteenth Amendment does not authorize or support the tax in question.

Apart from his salary, a federal judge is as much within the taxing power as other men are. If he has a home or other property, it may be taxed just as if it belonged to another. If he has an income other than his salary, it also may be taxed in the same way. And, speaking generally, his duties and obligations as a citizen are not different from those of his neighbors. But for the common good--to render him, in the words of John Marshall, 'perfectly and completely independent, with nothing to influence or control him but God and his conscience'--his compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support.

The court below concluded that the compensation was not diminished, and regarded this as inferable from our decisions in Peck & Co. v. Lowe, 247 U. S. 165, 174-175, 38 Sup. Ct. 432, 62 L. Ed. 1049, and United States Glue Co. v. Oak Creek, 247 U. S. 321, 329, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748. We think neither case tends to support that view. Each related to a business, one to exportation, the other to interstate commerce, which the taxing power--of Congress in one case, of a state in the other--was restrained from directly burdening; and the holding in both was that an income tax laid, not on the gross receipts, but on the net proceeds remaining after all expenses were paid and losses adjusted, did not directly burden the business, but only indirectly and remotely affected it. Here the Constitution expressly forbids diminution of the judge's compensation, meaning, as we have shown, diminution by taxation as well as otherwise. The taxing act directs that the compensation--the full sum, with no deduction for expenses--be included in computing the net income, on which the tax is laid. If the compensation be the only income, the tax falls on it alone; and, if there be other income, the inclusion of the compensation augments the tax accordingly. In either event the compensation suffers a diminution to the extent that it is taxed.

We conclude that the tax was imposed contrary to the constitutional prohibition, and so must be adjudged invalid.

Judgment reversed.

Mr. Justice HOLMES dissenting.

This is an action brought by the plaintiff in error against an acting Collector of Internal Revenue to recover a portion of the income tax paid by the former. The ground of the suit is that the plaintiff is entitled to deduct from the total of his net income six thousand dollars, being the amount of his salary as a judge of the District Court of the United States. The Act of February 24, 1919, c. 18, § 210, 40 Stat. 1057, 1062 (Comp. St. Ann. Supp. 1919, § 6336 1/8 e), taxes the net income of every individual, and section 213, p. 1065, requires the compensation received by the judges of the United States to be included in the gross income from which the net income is to computed. This was done by the plaintiff in error and the tax was paid under protest. He contends that the requirement mentioned and the tax, to the extent that it was enhanced by consideration of the plaintiff's salary, are contrary to article 3, section 1, of the Constitution, which provides that the compensation of the judges shall not be diminished during their continuance in office. Upon demurrer judgment was entered for the defendant, and the case comes here upon the single question of the validity of the abovementioned provisions of the act.

The decision below seems to me to have been right for two distinct reasons: that this tax would have been valid under the original Constitution, and that if not so, it was made lawful by the Sixteenth Amendment. In the first place I think that the clause protecting the compensation of judges has no reference to a case like this. The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground, as it was put by Hamilton in the Federalist (No. 79) that 'a power over a man's subsistence amounts to a power over his will.' That is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends.

I see equally little in the letter of the clause to indicate the intent supposed. The tax on net incomes is a tax on

the balance of a mutual account in which there always are some and may be many items on both sides. It seems to me that it cannot be affected by an inquiry into the source from which the items more or less remotely are derived. Obviously there is some point at which the immunity of a judge's salary stops, or to put it in the language of the clause, a point at which it could not be said that his compensation was diminished by a charge. If he bought a house the fact that a part or the whole of the price had been paid from his compensation as judge would not exempt the house. So if he bought bonds. Yet in such cases the advantages of his salary would be diminished. Even if the house or bonds were bought with other money the same would be true, since the money would not have been free for such an application if he had not used his salary to satisfy other more peremptory needs. At some point, I repeat, money received as salary loses its specific character as such. Money held in trust loses its identity by being mingled with the general funds of the owner. I see no reason why the same should not be true of a salary. But I do not think that the result could be avoided by keeping the salary distinct. I think that the moment the salary is received, whether kept distinct or not, it becomes part of the general income of the owner, and is mingled with the rest, in theory of law, as an item in the mutual account with the United States. I see no greater reason for exempting the recipients while they still have income as income than when they have invested it in a house or bond.

The decisions heretofore reached by this Court seem to me to justify my conclusion. In Peck & Co. v. Lowe, 247 U. S. 165, 38 Sup. Ct. 432, 62 L. Ed. 1049, a tax was levied by Congress upon the income of the plaintiff corporation. More than two-thirds of the income were derived from exports and the Constitution in terms prohibits any tax on articles exported from any state. By construction it had been held to create 'a freedom from any tax which directly burdens the exportation.' Fairbanks v. United States, 181 U. S. 283, 293, 21 Sup. Ct. 648, 652 (45 L. Ed. 862). The prohibition was unequivocal and express, not merely an inference as in the present case. Yet it was held unanimously that the tax was valid. 'It is not laid on income from exportation * * * in a discriminative way, but just as it is laid on other income. * * * There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied * * * after the recipient of the income is free to use it as he chooses. Thus what is taxed-- the net income--is as far removed from exportation as are articles intended for export before the exportation begins.' 247 U. S. 174, 175, 38 Sup. Ct. 434, 62 L. Ed. 1049. All this applies with even greater force when, as I have observed, the Constitution has no words that forbid a tax. In United States Glue Co. v. Oak Creek, 247 U. S. 321, 329, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748, the same principle was affirmed as to interstate commerce and it was said that if there was no discrimination against such commerce the tax constituted one of the ordinary burdens of government from which parties were not exempted because they happened to be engaged in commerce among the States.

A second and independent reason why this tax appears to me valid is that, even if I am wrong as to the scope of the original document, the Sixteenth Amendment justifies the tax, whatever would have been the law before it was applied. By that amendment Congress is given power to 'collect taxes on incomes from whatever source derived.' It is true that it goes on 'without apportionment among the several States, and without regard to any census or enumeration,' and this shows the particular difficulty that led to it. But the only cause of that difficulty was an attempt to trace income to its source, and it seems to me that the Amendment was intended to put an end to the cause and not merely to obviate a single result. I do not see how judges can claim an abatement of their income tax on the ground that an item in their gross income is salary, when the power is given expressly to tax incomes from whatever source derived.

Mr. Justice BRANDEIS concurs in this opinion.

Footnotes:

FN1 See House Report, No. 767, p. 29 65th Cong., 2d Sess.; Senate Report, No. 617, p. 6, 65th Cong. 3d Sess. And see Cong. Record vol. 56, p. 10370, where the Chairman of the House Committee, in asking the adoption of the provision, said: 'I wish to say, Mr. Chairman, that while there is considerable doubt as to the constitutionality of taxing * * * federal judges' or the President's salaries, * * * we cannot settle it; we have not the power to settle it. No power in the world can settle it except the Supreme Court of the United States. Let us raise it, as we have done, and let it be tested, and it can only be done by some one protesting his tax and taking an appeal to the Supreme Court.' And again: 'I think really that every man who has a doubt about this can very well vote for it and take the advice of the gentleman from Pennsylvania [Mr. Graham], which was sound then and is sound now, that this question ought to be raised by Congress, the only power that can raise it, in order that it may be tested in the Supreme Court, the only power that can decide it.'

FN2 Sparks' Washington, vol. 10, pp. 35, 36.

FN3 2 Story, § 1628; 1 Kent's Com.; 1 Wilson's Works, 410, 411; 2 Tucker, § 364; Miller, 340-343; 1 Carson's Supreme Court, 6.

FN4 The tax condemned was levied under a provision, in a general revenue law, charging a tax of 2 per cent. 'upon all salaries and emoluments of office, created or held by or under the Constitution or laws of this commonwealth, and by or under any incorporation, institution or company incorporated by the said commonwealth, where such salaries or emoluments exceed two hundred dollars.' Act No. 232, § 2, Penn. Laws 1840, p. 613; Act No. 117, § 9, Penn. Laws 1841, p. 310.

FN5 Cong. Rec. vol. 44, p. 3344.

FN6 Cong. Rec. vol. 44, pp. 1568-1570, 3377, 3900, 4067, 4105-4107, 4108-4121, 4389-4441.

FN7 Cong. Rec. vol. 45 pp. 1694-1699, 2245-2247, 2539, 2540.

FN8 Cong. Rec., vol. 45, pp. 1694-1699, 2245-2247, 2539-2540.

FN9 In passing the income tax law of 1919 Congress refused to treat interest received from bonds issued by a state or any of its counties or municipalities as within the taxing power, Cong. Rec. vol. 57, pp. 553, 774-777, 2988; chapter 18, § 213, 40 Stat. 1065; and in the regulations issued under that law the administrative officers recognize that the salaries and emoluments of the officers of a state and its political subdivisions are not taxable by the United States. Reg. 45, published 1920, pp. 47, 313.

O'Malley v. Woodrough, 307 U.S. 277, 59 S.Ct. 838 (1939)

Supreme Court of the United States

O'MALLEY

v.

WOODROUGH et ux.

**No. 810.**

May 22, 1939

On Appeal from the District Court of the United States for the District of Nebraska.

Action by Joseph W. Woodrough and wife against George W. O'Malley, individually and as collector of internal revenue, to recover back income taxes. From an adverse judgment the defendant appeals.

Reversed.

Mr. Justice BUTLER dissenting.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The case is here under Section 2 of the Act of August 24, 1937, 50 Stat. 751, 752, 28 U.S.C.A. § 349a, as a direct appeal from a judgment of a district court whose 'decision was against the constitutionality' of an Act of Congress. The suit below, an action at law to recover a tax on income claimed to have been illegally exacted, was disposed of upon the pleadings and turned on the single question now before us, to wit: Is the provision of Section 22 of the Revenue Act of 1932, 47 Stat. 169, 178, reenacted by Section 22(a) of the Revenue Act of 1936, 49 Stat. 1648, 1657, 26 U.S.C.A. § 22(a), constitutional insofar as it included in the 'gross income', on the basis of which taxes were to be paid, the compensation of 'judges of courts of the United States taking office after June 6, 1932'.

That this is the sole issue will emerge from a simple statement of the facts and of the governing legislation. Joseph W. Woodrough was appointed a United States circuit judge on April 12, 1933, and qualified as such on May 1, 1933. For the calendar year of 1936 a joint income tax return of Judge Woodrough and his wife disclosed his judicial salary of $12,500, but claimed it to be constitutionally immune from taxation. Since it was not included in 'gross income' no tax was payable. Subsequently a deficiency of $631.60 was assessed on the basis of that item, which, with interest, was paid under protest. Claim for refund having been rejected, the present suit was brought, and judgment went against the Collector. The assessment of the present tax was technically under the Act of 1936, but that Act merely carried forward the provisions of the Act of 1932, for the inclusion of compensation of 'judges of courts of the United States taking office after June 6, 1932' which had been similarly incorporated in the Revenue Act of 1934, 48 Stat. 680, 686, 687, 26 U.S.C.A. § 22(a).

Therefore, the power of Congress to include Judge Woodrough's salary as a circuit judge in his 'gross income' must be judged on the basis of the validity of Section 22 of the Revenue Act of 1932, and not as though that power had been originally asserted by the Revenue Act of 1936. For it was the Act of June 6, 1932 that gave notice to all judges thereafter to be appointed, of the new Congressional policy to include the judicial salaries of such judges in the assessment of income taxes. The fact that Judge Woodrough before he became a circuit judge and prior to June 6, 1932, had been a district judge is wholly irrelevant to the matter in issue. The two offices have different statutory origins, are filled by separate nominations and confirmations, and enjoy different emoluments. A new appointee to a circuit court of appeals occupies a new office no less when he is taken from the district bench than when he is drawn from the bar.

By means of Section 22 of the Revenue Act of 1932, Congress sought to avoid, at least in part, the consequences of Evans v. Gore, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519. That case, decided on June 1, 1920, ruled for the first time that a provision requiring the compensation received by the judges of the United States to be included in the 'gross income' from which the net income is to be computed, although merely part of a taxing measure of general, non-discriminatory application to all earners of incomes, is contrary to Article III, § 1 of the Constitution, U.S.C.A., which provides that the 'Compensation' of the 'Judges' 'shall not be diminished during their Continuance in Office.' See also the separate opinion of Mr. Justice Field in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 586, 604 et seq., 15 S.Ct. 673, 691, 698, 39 L.Ed. 759. To be sure, in a letter to Secretary Chase, Chief Justice Taney expressed similar views. [FN1] In doing so, he merely gave his extra-judicial opinion asserting at the same time that the question could not be adjudicated. [FN2] Chief Justice Taney's vigorous views were shared by Attorney General Hoar. [FN3] Thereafter, both the Treasury Department [FN4] and Congress [FN5] acted upon this construction of the Constitution. However, the meaning which Evans v. Gore, supra, imputed to the history which explains Article III, § 1 was contrary to the way in which it was read by other English-speaking courts. [FN6] The decision met wide and steadily growing disfavor from legal scholarship and professional opinion. [FN7] Evans v. Gore, supra, itself was rejected by most of the courts before whom the matter came after that decision. [FN8]

Having regard to these circumstances, the question immediately before us is whether Congress exceeded its constitutional power in providing that United States judges appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected. Thereby, of course, Congress has committed itself to the position that a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1 of the Constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1. [FN9] To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

After this case came here, Congress, by Section 3 of the Public Salary Tax Act of 1939, amended Section 22 (a) so as to make it applicable to 'judges of courts of the United States who took office on or before June 6, 1932 ' [FN10] That Section, however, is not now before us. But to the extent that what the Court now says is inconsistent with what was said in Miles v. Graham, 268 U.S. 501, 45 S.Ct. 601, 69 L.Ed. 1067, the latter cannot survive.

Judgment reversed.

Mr. Justice McREYNOLDS did not hear the argument in this cause and took no part in its consideration or decision.

Mr. Justice BUTLER, dissenting.

Concretely, the question is whether, by exacting from United States circuit judge Joseph W. Woodrough and his wife $631.60 in the form of income tax on his salary of $12,500 for 1936, the government diminished the compensation for his services theretofore fixed by Congress. That item excluded, they had no taxable income. The judge's monthly pay was $1,041.66. The tax took at the monthly rate of $52.63.

The material details may be given briefly.

April 12, 1933, Judge Woodrough was appointed judge of the United States circuit court of appeals for the eighth circuit. He qualified May 1, 1933. Congress had by the Act of December 13, 1926, [FN1] enacted that 'To each of the circuit judges the sum of $12,500 per year' shall be paid as compensation. Since May 1, 1933, appellee has received the specified pay. The Revenue Act of June 6, 1932, applicable only to taxable years beginning after December 31, 1931, contained a provision declaring that in the case of judges taking office after that date 'the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such * * * judges are hereby amended accordingly.' [FN2] The Revenue Act of 1934, [FN3] applicable only to taxable years beginning after December 31, 1933, and that of 1936, [FN4] applicable only to taxable years beginning after December 31, 1935, contain the same language as that just quoted from the Act of 1932.

Judge Woodrough and his wife made a joint income tax return for 1936; it disclosed his salary but claimed it was not subject to the tax. The commissioner held the item taxable and made a deficiency assessment of $631.60 Plaintiffs paid under protest and filed claim for refund; it was denied. Claiming the tax that they were so compelled to pay diminished the judge's compensation and that therefore § 22(a) of the Act of 1936 violates § 1, Art. III, of the Constitution, U.S.C.A., plaintiffs sued to recover the amount of the tax. The collector moved to dismiss. The court held the Act unconstitutional, overruled the motion and, defendant having elected not to plead further, gave plaintiffs judgment as prayed. Defendant appealed. [FN5]

Article III, § 1, declares: 'The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.'

It safeguards the independence of the judiciary. The abuse against which it was intended to be a barrier is included in the list of reasons for our Declaration of Independence. 'The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States * * * He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.--He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.'

Alexander Hamilton, explaining the reasons for and the purpose of § 1 of Art. III, said:

> 'The Executive not only dispenses the honors, but holds the sword of the community. The

> legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment * * *
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> 'This simple view of the matter * * * proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks * * *.
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> 'The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no expost-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing * * *.' (The Federalist, No. 78.)
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> 'Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support * * * In the general course of human nature, a power over a man's subsistence amounts to a power over his will * * * The enlightened friends to good government in every State, have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that permanent salaries should be established for the judges, but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite * * * This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges.' (The Federalist, No. 79.)

Mr. Justice Story declared that 'Without this provision, the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery * * *.' 2 Story, § 1628. Chancellor Kent said: 'The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station. The constitution of the United States, on this subject, was an improvement upon all our previously existing constitutions.' 1 Kent Com. 294.

The first judicial construction of the clause was by the circuit court of the District of Columbia in 1803 in the case of United States v. More. [FN6] The opinion was written by Judge Cranch. The court sustained a demurrer to an indictment charging that More, a justice of the peace, under color of his office, exacted an illegal fee, 12 cents, for giving judgment upon a warrant for a small debt. The issue was whether an Act of Congress abolishing fees of justices of the peace in the District of Columbia could affect those who accepted their commissions while the fees were legally annexed to the office. The court said: 'The 3d article of the

constitution provides for the independence of the judges of the courts of the United States, by certain regulations; one of which is, that they shall receive, at stated times, a compensation for their services, which shall not be diminished during their continuance in office. The act of Congress of 27th of February, 1801, which constitutes the office of justices of the peace * * * ascertains the compensation which they shall have for their services in holding their courts * * *. This compensation is given in the form of fees, payable when the services are rendered. * * * that his (the justice's) compensation shall not be diminished during his continuance in office, seems to follow as a necessary consequence from the provisions of the constitution. * * * if his compensation has once been fixed by law, a subsequent law for diminishing that compensation (a fortiori for abolishing it) cannot affect that justice of the peace during his continuance in office; * * *.'

The first attempt to tax compensation of federal judges was during the Civil War. Section 86 of the Act of July 1, 1862, [FN7] levied 'on all salaries of officers, or payments to persons in the * * * service of the United States * * * when exceeding the rate of six hundred dollars per annum, a duty of three per centum on the excess above the said six hundred dollars', and directed disbursing officers to deduct and withhold the duty. These general provisions were construed by the revenue officers to comprehend the compensation of the President and the judges of the United States. By letter of February 16, 1863, Mr. Chief Justice Taney protested to the Secretary of the Treasury In the course of his letter, [FN8] he said:

> 'The act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.
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> 'The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.
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> 'Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments. * * *
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> 'Having been honored with the highest judicial station under the Constitution, I feel it to be more especially my duty to uphold and maintain the constitutional rights of that department of the government, and not by any act or word of mine, leave it to be supposed that I acquiesce in a measure that displaces it from the independent position assigned it by the statesmen who framed the Constitution; and in order to guard against any such inference, I present to you this respectful but firm and decided remonstrance against the authority you have exercised under this act of Congress, and request you to place this protest upon the public files of your office as the evidence that I have done everything in my power to preserve and maintain the Judicial Department in the position and rank in the government which the Constitution has assigned to it.'

The letter of the Chief Justice was not answered and, at his request, the Court, May 10, 1863, ordered the letter entered on its records. In 1869, the Secretary of the Treasury requested the opinion of Attorney General Ebenezer Rockwood Hoar as to the constitutionality of the Act construed to extend to judges' salaries. He rendered an opinion in substantial accord with the views expressed in Chief Justice Taney's protest. 13 Op. Attys.Gen. 161. Accordingly, the tax on the compensation of the President and of judges was discontinued and the amounts theretofore collected from them were refunded--some through administrative channels; others through action of the court of claims and ensuing appropriations by Congress. See Wayne v. United States, 26 Ct.Cl. 274, 290; 27 Stat. 306.

In 1889, Mr. Justice Miller, a member of the Court since 1862, said: [FN9]

> 'The Constitution of the United States has placed several limitations upon the general power (of taxation), and * * * some of them are implied. One of its provisions is that neither the President of the United States (Art. II, sec. 1, par. 6), nor a judge of the Supreme or inferior courts (Art. III, sec. 1), shall have his salary diminished during the period for which he shall have been elected, or during his continuance in office. It is very clear that when Congress, during the late (Civil) war, levied an income tax, and placed it as well upon the salaries of the President and the judges of the courts as those of other people, that it was a diminution of them to just that extent.'

Although the Income Tax Act of 1894 said nothing about the compensation of the judges, Mr. Justice Field construed § 33 [FN10] to tax that compensation and assigned that ground among others for joining in the decision that the Act was unconstitutional. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 604- 606, 15 S.Ct. 673, 698, 699, 39 L.Ed. 759. Mr. Justice Field, who was confirmed the day this Court ordered Chief Justice Taney's letter entered on its records, had taken his place upon this bench at the beginning of the following term. His opinion recited the facts of that incident and quoted extensively from the letter, which was printed as an appendix to the volume of the reports containing the opinions in the Pollock case. 157 U.S. 701, 15 S.Ct. ix. The Justice ended his discussion of the matter by stating his belief, based on information, that the opinion of Attorney General Hoar had been followed ever since without question by the Treasury. And, upon reargument of the cause, Attorney General Olney said in his brief: 'There has never been a doubt since the opinion of Attorney General Hoar that the salaries of the President and judges were exempt.'

The Revenue Acts of 1913 [FN11] and 1916 [FN12], being the first two after adoption of the Sixteenth Amendment, U.S.C.A.Const., expressly excluded from gross income the compensation of judges then in office. But after this country engaged in the World War, the Revenue Act of 1918, approved February 24, 1919, defined gross income to include 'in the case of the President * * * (and) the judges of the Supreme and inferior courts * * * the compensation received as such.' [FN13] The reports of the congressional committees having the measure in charge indicate that the Congress was in doubt as to the constitutional validity of that provision and intended to have the question decided by the courts. [FN14] The question was raised and presented for decision in Evans v. Gore, 253 U.S. 245, 40 S.Ct. 550, 551, 64 L.Ed. 887, 11 A.L.R. 519. The Collector included the salary for 1918 of Judge Evans, appointed before enactment of the taxing statute, in gross income. Had it been excluded, he would have had no taxable income. He paid the tax and brought suit to recover the amount so exacted. The United States district court for the western district of Kentucky held him not entitled to recover. But, after argument by eminent counsel including the Solicitor General, this Court held that the clause declaring that compensation of judges 'shall not be diminished during their continuance in office' prevents diminution by taxation and that it has been so construed in the actual practice of the government.

For the purpose of disclosing the reasons for and true meaning of the clause forbidding diminution of compensation of judges, the opinion of the Court, written by Mr. Justice Van Devanter, brought forward statements of Alexander Hamilton, Chief Justice Marshall, Justice Story, Chancellor Kent, Chief Justice Taney, Justice Field, Attorneys General Hoar and Olney and others. sess., p. 29; Sen.Rept. No. 617, 65th 10370.

Speaking for the Court, he said:

> 'With what purpose does the Constitution provide that the compensation of the judges 'shall not be diminished during their continuance in office'? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminution, such as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole? Or, does it mean that the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?
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> '* * * The primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds.
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> 'Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle. Here the plaintiff was paid the full compensation, but was subjected to an involuntary obligation to pay back a part, and the obligation was promptly enforced. Of what avail to him was the part which was paid with one hand and then taken back with the other? Was he not placed in practically the same situation as if it had been withheld in the first instance? Only by subordinating substance to mere form could it be held that his compensation was not diminished. * * *
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> 'The prohibition is general, contains no excepting words, and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise--that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries. * * *
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> 'When we consider * * * what is comprehended in the congressional power to tax--where its

> exertion is not directly or impliedly interdicted--it becomes additionally manifest that the prohibition now under discussion was intended to embrace and prevent diminution through the exertion of that power; for, as this court repeatedly has held, the power to tax carries with it 'the power to embarrass and destroy'; may be applied to every object within its range 'in such measure as Congress may determine'; enables that body 'to select one thing and omit another, to tax one class of property and to forebear to tax another'; and may be applied in different ways to different objects so long as there is 'geographical uniformity' in the duties, imposts and excises imposed. (Citing.) Is it not therefore morally certain that the discerning statesmen who framed the Constitution and were so sedulously bent on securing the independence of the judiciary intended to protect the compensation of the judges from assault and diminution in the name or form of a tax? Could not the purpose of the prohibition be wholly thwarted if this avenue of attack were left open? Certainly there is nothing in the words of the prohibition indicating that it is directed against one legislative power and not another; and in our opinion due regard for its spirit and principle requires that it be taken as directed against them all.'

Mr. Justice Holmes wrote a dissenting opinion, in which Mr. Justice Brandeis joined. With that expression his opposition to the decision ended. Two years later, in Gillespie v. Oklahoma, 257 U.S. 501, 42 S.Ct. 171, 66 L.Ed. 338, writing for the Court, invalidating a state tax upon net income of a lessee from sales of his share of oil and gas received under leases of restricted Indian land, he said (257 U.S. page 505, 42 S.Ct. page 172, 66 L.Ed. 338): 'In cases where the principal is absolutely immune from interference an inquiry is allowed into the sources from which net income is derived and if a part of it comes from such a source the tax is pro tanto void, Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759; Id., 158 U. S. 601, 15 S.Ct. 912, 39 L.Ed. 1108; a rule lately illustrated by Evans v. Gore * * *' And in that case he relied on the truth, as put by Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, 431, 4 L.Ed. 579, that 'the power to tax involves the power to destroy.' He quoted (257 U.S. page 505, 42 S.Ct. page 172, 66 L.Ed. 338) with approval from Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U.S. 522, 36 S.Ct. 453, 60 L. Ed. 779, the statement of the opinion (240 U.S. page 530, 36 S.Ct. page 456, 60 L.Ed. 779) that "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." [FN15]

At another place in that concurrence, the writer stated: 'The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions. But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. * * * The arguments upon which M'Culloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579, rested * * * have been distorted by sterile refinements unrelated to fairs. These refinements derived authority from an unfortunate remark in the opinion in M'Culloch v. Maryland. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' * * * The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes's pen: 'The power to tax is not the power to destroy while this Court sits'. Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 223, 48 S.Ct. 451, 453, 72 L.Ed. 857, 56 A.L.R. 583 (dissent).'

But, in the Gillespie case, Mr. Justice Holmes, speaking for the Court, had definitely applied the doctrine that the power to tax does involve the power to destroy.

In the Panhandle case neither the Court, nor indeed another justice dissenting, was impressed by 'The power to tax is not the power to destroy while this Court sits.' The statement is vague and may be read to imply a

power that this Court never possessed. If taken to mean that we are empowered to regulate or to limit the exertion by Congress of its power of taxation, it justly may be regarded as hyperbole; if taken to mean that this Court has power to prevent imposition by Congress of taxes laid to discourage, to destroy, or to protect, then it is in the teeth of the law. See, e.g., Veazie Bank v. Fenno, 8 Wall. 533, 548, 19 L.Ed. 482; McCray v. United States, 195 U.S. 27, 53 et seq., 24 S.Ct. 769, 775, 49 L.Ed. 78; Magnano Co. v. Hamilton, 292 U.S. 40, 44 et seq., 54 S.Ct. 599, 601, 78 L.Ed. 1109; Cincinnati Soap Co. v. United States, 301 U.S. 308, 57 S.Ct. 764, 81 L.Ed. 1122.

Miles v. Graham, 1925, 268 U.S. 501, 45 S.Ct. 601, 602, 69 L.Ed. 1067, held invalid § 213(a), Revenue Act of 1918, (condemned in Evans v. Gore) when applied to compensation of Judge Graham, appointed after its enactment. Mr. Justice Holmes joined in the decision. Mr. Justice Brandeis merely noted dissent.

In the course of the opinion, we said:

> 'Does the circumstance that defendant in error's appointment came after the taxing act require a different view concerning his right to exemption? The answer depends upon the import of the word 'compensation' in the constitutional provision.
>
> 'The words and history of the clause indicate that the purpose was to impose upon Congress the duty definitely to declare what sum shall be received by each judge out of the public funds and the times for payment. When this duty has been complied with, the amount specified becomes the compensation which is protected against diminution during his continuance in office.
>
> '* * * The compensation fixed by law when defendant in error assumed his official duties was $7,500 per annum, and to exact a tax in respect of this would diminish it within the plain rule of Evans v. Gore.
>
> 'The taxing Act became a law (February 24, 1919) prior to the statute prescribing salaries for judges of the Court of Claims (approved February 25, 1919), but if the dates were reversed it would be impossible to construe the former as an amendment which reduced salaries by the amount of the tax imposed. No judge is required to pay a definite percentage of his salary, but all are commanded to return, as a part of 'gross income,' 'the compensation received as such' from the United States. From the 'gross income' various deductions and credits are allowed, as for interest paid, contributions or gifts made, personal exemptions varying with family relations, etc., and upon the net result assessment is made. The plain purpose was to require all judges to return their compensation as an item of 'gross income,' and to tax this as other salaries. This is forbidden by the Constitution.
>
> 'The power of Congress definitely to fix the compensation to be received at stated intervals by judges thereafter appointed is clear. It is equally clear, we think, that there is no power to tax a judge of a court of the United States on account of the salary prescribed for him by law.'

In O'Donoghue v. United States, 1933, 289 U.S. 516, 53 S.Ct. 740, 741, 77 L.Ed. 1356, we construed the Act of June 30, 1932 [FN16] reducing the salaries of all judges 'except judges whose compensation may not, under the Constitution, be diminished during their continuance in office.' We there held that the supreme court and court of appeals of the District of Columbia were constitutional courts and therefore that the judges

of those courts were excepted from the salary reduction. We cited the authorities, adopted the reasoning, and reaffirmed the conclusions on which rest the Court's judgments in Evans v. Gore, supra, and Miles v. Graham, supra. And see Booth v. United States, 291 U.S. 339, 54 S.Ct. 379, 78 L.Ed. 836.

Evidently the Court intends to destroy the decision in Evans v. Gore, supra. Without suggesting that there is any distinction between that case and Miles v. Graham, supra, it declares that the latter 'cannot survive.' But the decision of today fails to deal with, much less to detract from the reasoning of those cases. The opinion would imply that the letter of Chief Justice Taney to the Secretary of the Treasury, and the separate opinion of Mr. Justice Field in the Pollock case were treated as having weight as judicial decisions. But nowhere has that ever been suggested. However, all who are familiar with our judicial history know that entitled to great respect are the reasoned conclusions of these eminent American jurists as to the true intent and meaning of the Constitution of the United States. And similarly worthy of attention are the opinions of the Attorneys General and other public officials following the reasoning of Chief Justice Taney.

Now the Court cites, as if entitled to prevail against those well- sustained opinions and the deliberate judgments of this Court, opposing views-- if indeed upon examination they reasonably may be so deemed--of English speaking judges in foreign countries.

It refers, footnote 6, to the decision of the Privy Council in Judges v. Attorney-General of Saskatchewan, 1937, 2 D.L.R. 209, construing income tax statutes of Saskatchewan. Neither the Dominion nor the Province has any law forbidding diminution of compensation of judges while in office and that decision has nothing to do with the question before us. The Australian and South African cases cited, footnotes 6 and 8, involved construction of income tax statutes under constitutions or charters created by legislative enactments and subject to authoritative interpretation or change by the local or British Parliament. They shed no light upon the issue in this case.

The opinion claims no support from any state court decision. The one it cites, footnote 8, that of the Maryland Court of Appeals in Gordy v. Dennis, 5 A.2d 69, held that under a clause in the Constitution of Maryland like that in Art. III, § 1, the compensation of state judges may not be taxed.

The opinion also cites, footnote 7, selected gainsaying writings of professors,--some are lawyers and some are not--but without specification of or reference to the reasons upon which their views rest. And in addition it cites notes published in law reviews, some signed and some not; presumably the latter were prepared by law students.

The suggestion that, as citizens, judges are not immune from taxation begs the question here presented. The Constitution itself puts judges in a separate class, declaring that at stated times they shall receive for their services compensation which 'shall not be diminished.' And so their salaries are distinguished from income of others. The immunity extends only to compensation for their services. No question of comparison or reasonableness is involved.

Admittedly the Court now repudiates its earlier decisions upon the point here in issue. The provision defining tenure and providing for undiminishable compensation was adopted with unusual accord. There has been unanimity of opinion that, because in comparison with the legislative and executive the judicial department is weak, its independence is essential to our system of government. These safeguards go far to insure that independence. And, from the beginning, statesmen and jurists have agreed that the clause forbids diminution of judges' compensation by any form of legislation. The clause in question is plain: no exception is

expressed; none may be implied. Its unqualified command should be given effect.

For one convinced that the judgment now given is wrong, it is impossible to acquiesce or merely to note dissent. And so this opinion is written to indicate the grounds of opposition and to evidence regret that another landmark has been removed.

I am of opinion that the judgment of the district court should be affirmed.

Footnotes:

FN1 The letter was written on February 16, 1863, and will be found in 157 U.S. 701.

FN2 '* * * I should not have troubled you with this letter, if there was any mode by which the question could be decided in a judicial proceeding. But all of the judges of the courts of the United States have an interest in the question, and could not therefore with propriety undertake to hear and decide it.' 157 U.S. at page 702.

FN3 13 Op.Attys.Gen. 161; but see the opinion of Attorney General Palmer, 31 Op.Attys.Gen. 475.

FN4 See Mr. Justice Field, concurring, in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 588, 606, 607, 15 S.Ct. 673, 692, 699, 39 L.Ed. 759.

FN5 See Wayne v. United States, 26 Ct.Cl. 274; Act of July 28, 1892, c. 311, 27 Stat. 306.

FN6 See Judgments in Cooper v. Commissioner of Income Tax, 4 Comm.L.R. 1304, construing Section 17 of the Queensland Constitution Act of 1867 which prohibited 'any reduction or diminution of the salary of a Judge during his Term of office'; also, Judges v. Attorney-General for Saskatchewan, 1937, 2 D.L.R. 209, construing Section 96 of the British North America Act, 1867, that 'The Salaries * * * of the Judges * * * shall be fixed and provided by the Parliament of Canada' in connection with the Income Tax Act, 1932, of Saskatchewan.

FN7 See Clark, Further Limitations Upon Federal Income Taxation, 30 Yale L.J. ; Corwin, Constitutional Law in 1919-1920, 15 Am.Pol.Sci.Rev. 635, 641-644; Fellman, Diminution of Judicial Salaries, 24 Iowa L. Rev. 89; Lowndes, Taxing Income of Federal Judiciary, 19 Va.L.Rev. 153; Powell, Constitutional Law in 1919-1920, 19 Mich.L.Rev. 117-118; Powell, The Sixteenth Amendment and Income from State Securities, National Income Tax Magazine (July 1923) 5-6; 20 Col.L.Rev. 794; 43 Harv.L.Rev. 318; 20 Ill.L.Rev. 376; 45 L.Q.Rev. 291; 7 Va.L.Rev. 69; 3 U. of Chi.L.Rev. 141.

FN8 The cases, pro and con, are collected in the recent dissenting opinion by Chief Judge Bond of the Court of Appeals of Maryland in Gordy v. Dennis, 5 A.2d 69, 82. Particular attention should be called to the decision of the Supreme Court of South Africa, Krause v. Commissioner for Inland Revenue, (1929), So.Afr. R. (A.D.) 286, construing Section 100 of the South Africa Act, which had taken over the identical clause from Article III, Section 1, of our Constitution.

FN9 The provisions regarding security of salary had their source in the Act of Settlement of 1700, 12 & 13 Will. III, c. 2, Sec. III, and the Act of 1760, 1 Geo. III, c. 23. See Holdsworth, The Constitutional Position of

the Judges, 48 L.Q.Rev. 25; 2 Holdsworth, The History of English Law, 559-64; 6 id. 234, 514.

FN10 Public No. 32, 76th Cong., 1st Sess., c. 59, 26 U.S.C.A. § 22(a). Section 209 of the same statute, 26 U. S.C.A. § 22 note, however, provides that 'In the case of the judges of the Supreme Court, and of the inferior courts of the United States created under article III of the Constitution, who took office on or before June 6, 1932, the compensation received as such shall not be subject income tax under the Revenue Act of 1938 or any prior revenue Act.'

Dissent:

FN1 c. 6, 44 Stat. 919, 28 U.S.C.A. § 213.

FN2 § 22(a), c. 209, 47 Stat. 169, 26 U.S.C.A. § 22(a).

FN3 § 22(a), c. 277, 48 Stat. 680, 26 U.S.C.A. § 22(a).

FN4 § 22(a), c. 690, 49 Stat. 1648, 26 U.S.C.A. § 22(a).

FN5 Act of August 24, 1937, § 2, c. 754, 50 Stat. 752, 28 U.S.C.A. § 349a.

FN6 The opinion is set forth in a footnote at page 160 et seq., of 3 Cranch, 2 L.Ed. 397.

FN7 c. 119, 12 Stat. 472.

FN8 Printed in 157 U.S. at page 701.

FN9 Miller on the Constitution of the United States, p. 247.

FN10 Section 33, 28 Stat. 557, in terms was much like § 86 of the Act of 1862; it levied 'on all salaries of officers, or payments * * * to persons in the service of the United States, * * * when exceeding the rate of four thousand dollars per annum, a tax of two per centum on the excess above the said four thousand dollars' and made it the duty of disbursing officers to deduct and withhold the tax.

FN11 § 2B, 38 Stat. 168.

FN12 § 4, 39 Stat. 759.

FN13 § 213(a), 40 Stat. 1065.

FN14 H.Rept. No. 767, 65th Cong., 2d sess , p. 29; Sen.Rept. No. 617, 65th Cong., 3d sess., p. 6; 56 Cong. Rec., p. 10370

FN15 Gillespie v. Oklahoma is one of the decisions subjected to condemnatory comment in the concurring opinion in Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 59 S.Ct. 595, 603, 83 L.Ed. 927, 120 A.L.R.

1466, October Term, 1938. It is there said: 'A succession of decisions (Gillespie v. Oklahoma is the first cited) thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount.'

FN16 §§ 106, 107, 47 Stat. 401, 402.

United States v. Hatter, ___ U.S ___, 121 S.Ct. 1782 (2001)

Supreme Court of the United States

UNITED STATES, Petitioner,

v.

Terry J. HATTER, Jr., Judge, United States District Court for the Central

District of California, et al.

**No. 99-1978.**

Decided May 21, 2001.

Article III judges brought action against United States, challenging withholding of Social Security taxes from judicial salaries as violative of Compensation Clause. The United States Claims Court, 21 Cl.Ct. 786, dismissed action on jurisdictional grounds. The Court of Appeals, Federal Circuit, 953 F.2d 626, reversed and remanded. On remand, additional judges joined lawsuit and also contested withholding of Medicare tax. The Court of Federal Claims, 31 Fed.Cl. 436, granted judgment for government. The Court of Appeals, 64 F.3d 647, reversed and remanded with instructions, finding withholding of taxes unconstitutional. Petition for writ of certiorari was denied by the Supreme Court for lack of quorum of six Justices. On remand, the Court of Federal Claims, James T. Turner, J., 38 Fed.Cl. 166, entered judgment after finding Medicare claims time-barred. The Court of Appeals, 185 F.3d 1356, reversed and remanded, and on petition for rehearing en banc, the Court of Appeals, Plager, Circuit Judge, 203 F.3d 795, held that continuing claim doctrine applied to judges' damages claims. Government petitioned for certiorari. The Supreme Court, Justice Breyer, held that: (1) law of case doctrine did not prevent consideration of Compensation Clause issue by virtue of earlier denial of certiorari due to lack of quorum; (2) Compensation Clause does not forbid Congress from applying generally applicable, nondiscriminatory tax to salaries of federal judges, whether or not they were appointed before enactment of the tax, overruling *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887; (3) Compensation Clause prevented the Government from collecting Social Security taxes, but not Medicare taxes, from federal judges who held office before Congress extended those taxes to federal employees; and (4) Compensation Clause violation with respect to Social Security taxes was not cured by subsequent pay increase for federal judges in amount greater than newly imposed Social Security taxes.

Affirmed in part, reversed in part, and remanded.

Justices Stevens and O'Connor did not participate in the case.

Justice Scalia filed opinion concurring in part and dissenting in part.

Justice Thomas filed opinion concurring in judgment in part and dissenting in part.

Syllabus [FN*]

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

In 1982, Congress extended Medicare to federal employees. That new law meant, *inter alia*, that then-sitting federal judges, like all other federal employees and most other citizens, began to have Medicare taxes withheld from their salaries. In 1983, Congress required all newly hired federal employees to participate in Social Security and permitted, without requiring, about 96% of the then-currently employed federal employees to participate in that program. The remaining 4%--a class consisting of the President, other high-level Government employees, and all federal judges--were required to participate, except that those who contributed to a "covered" retirement program could modify their participation in a manner that left their total payroll deduction for retirement and Social Security unchanged, in effect allowing them to avoid any additional financial obligation as a result of joining Social Security. A "covered" program was defined to include any retirement system to which an employee had to contribute, which did not encompass the noncontributory pension system for federal judges, whose financial obligations (and payroll deductions) therefore had to increase. A number of federal judges appointed before 1983 filed this suit, arguing that the 1983 law violated the Compensation Clause, which guarantees federal judges a "Compensation, which shall not be diminished during their Continuance in Office," U.S. Const., Art. III, § 1. Initially, the Court of Federal Claims ruled against the judges, but the Federal Circuit reversed. On certiorari, because some Justices were disqualified and this Court failed to find a quorum, the Federal Circuit's judgment was affirmed "with the same effect as upon affirmance by an equally divided court." 519 U.S. 801, 117 S.Ct. 39, 136 L. Ed.2d 3. On remand, the Court of Federal Claims found that the judges' Medicare claims were time barred and that a 1984 judicial salary increase promptly cured any violation, making damages minimal. The Federal Circuit reversed, holding that the Compensation Clause prevented the Government from collecting Medicare and Social Security taxes from the judges and that the violation was not cured by the 1984 pay increase.

*Held:*

1. The Compensation Clause prevents the Government from collecting Social Security taxes, but not Medicare taxes, from federal judges who held office before Congress extended those taxes to federal employees. Pp. 1789-1796.

(a) The Court rejects the judges' claim that the "law of the case" doctrine now prevents consideration of the Compensation Clause because an affirmance by an equally divided Court is conclusive and binding upon the parties. *United States v. Pink*, 315 U.S. 203, 216, 62 S.Ct. 552, 86 L.Ed. 796, on which the judges rely, concerned an earlier case in which the Court heard oral argument and apparently considered the merits before affirming by an equally divided Court. The law of the case doctrine presumes a hearing on the merits. See, *e.g., Quern v. Jordan*, 440 U.S. 332, 347, n. 18, 99 S.Ct. 1139, 59 L.Ed.2d 358. When this case previously was here, due to absence of a quorum, the Court could not consider either the merits or whether to consider those merits through a grant of certiorari. This fact, along with the obvious difficulty of finding other equivalent substitute forums, convinces the Court that *Pink* does not control here. Pp. 1789-1790.

(b) Although the Compensation Clause prohibits taxation that singles out judges for specially unfavorable treatment, it does not forbid Congress to enact a law imposing a nondiscriminatory tax (including an increase in rates or a change in conditions) upon judges and other citizens. See *O'Malley v. Woodrough*, 307 U.S. 277, 282, 59 S.Ct. 838, 83 L.Ed. 1289. Insofar as *Evans v. Gore*, 253 U.S. 245, 255, 40 S.Ct. 550, 64 L.Ed.

887, holds to the contrary, that case is overruled. See *O'Malley, supra,* at 283, 59 S.Ct. 838. There is no good reason why a judge should not share the tax burdens borne by all citizens. See *Evans, supra,* at 265, 267, 40 S.Ct. 550 (Holmes, J., dissenting); *O'Malley, supra,* at 281-283, 59 S.Ct. 838. Although Congress cannot *directly* reduce judicial salaries even as part of an equitable effort to reduce *all* Government salaries, a tax law, unlike a law mandating a salary reduction, affects compensation indirectly, not directly. See *United States v. Will,* 449 U.S. 200, 226, 101 S.Ct. 471, 66 L.Ed.2d 392. And those prophylactic considerations that may justify an absolute rule forbidding direct salary reductions are absent here, where indirect taxation is at issue. In practice, the likelihood that a nondiscriminatory tax represents a disguised legislative effort to influence the judicial will is virtually nonexistent. Hence the potential threats to judicial independence that underlie the Compensation Clause, see *Evans, supra,* at 251-252, 40 S.Ct. 550, cannot justify a special judicial exemption from a commonly shared tax, not even as a preventive measure to counter those threats. Because the Medicare tax is nondiscriminatory, the Federal Circuit erred in finding its application to federal judges unconstitutional. Pp. 1790-1793.

(c) However, because the special retroactivity-related Social Security rules enacted in 1983 effectively singled out then-sitting federal judges for unfavorable treatment, the Compensation Clause forbids the application of the Social Security tax to those judges. Four features of the law, taken together, lead to the conclusion that it discriminates in a manner the Clause forbids. First, the statutory history, context, purpose, and language indicate that the category of "federal employees" is the appropriate class against which the asserted discrimination must be measured. Second, the practical upshot of defining "covered" system in the way the law did was to permit nearly every then-current federal employee, but not federal judges, to avoid the newly imposed obligation to pay Social Security taxes. Third, the new law imposed a substantial cost on federal judges with little or no expectation of substantial benefit for most of them. Inclusion meant a deduction of about $2,000 per year, whereas 95% of the then-active judges had already qualified for Social Security (due to private sector employment) before becoming judges. And participation would benefit only the minority of judges who had not worked the quarters necessary to be fully insured under Social Security. Fourth, the Government's sole justification for the statutory distinction between judges and other high-level federal employees--*i.e.,* equalizing the financial burdens imposed by the noncontributory judicial retirement system and the contributory system to which the other employees belonged--is unsound because such equalization takes place not by offering all current federal employees (including judges) the same opportunities but by employing a statutory disadvantage which offsets an advantage related to those protections afforded judges by the Clause, and because the two systems are not equalized with any precision. Thus, the 1983 law is very different from the nondiscriminatory tax upheld in *O'Malley, supra,* at 282, 59 S.Ct. 838. The Government's additional arguments--that Article III protects judges only against a reduction in stated salary, not against indirect measures that only reduce take-home pay; that there is no evidence here that Congress singled out judges for special treatment in order to intimidate, influence, or punish them; and that the law disfavored not only judges but also the President and other high-ranking federal employees--are unconvincing. Pp. 1793-1796.

2. The Compensation Clause violation was not cured by the 1984 pay increase for federal judges. The context in which that increase took place reveals nothing to suggest that it was intended to make whole the losses sustained by the pre-1983 judges. Rather, everything in the record suggests that the increase was meant to halt a slide in purchasing power resulting from continued and unadjusted-for inflation. Although a circumstance-specific approach is more complex than the Government's proposed automatic approach, whereby a later salary increase would terminate a Compensation Clause violation regardless of the increase's purpose, there is no reason why such relief as damages or an exemption from Social Security would prove unworkable. *Will, supra,* distinguished. Pp. 1796-1797.

203 F.3d 795, affirmed in part, reversed in part, and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, SOUTER, and GINSBURG, JJ., joined, and in which SCALIA, J., joined as to Parts I, II, and V. SCALIA, J., filed an opinion concurring in part and dissenting in part. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part. STEVENS, J., and O'CONNOR, J., took no part in the consideration or decision of the case.

Justice BREYER delivered the opinion of the Court.

The Constitution's Compensation Clause guarantees federal judges a "Compensation, which shall not be diminished during their Continuance in Office." U.S. Const., Art. III, § 1. The Court of Appeals for the Federal Circuit held that this Clause prevents the Government from collecting certain Medicare and Social Security taxes from a small number of federal judges who held office nearly 20 years ago--before Congress extended the taxes to federal employees in the early 1980's.

In our view, the Clause does not prevent Congress from imposing a "non- discriminatory tax laid generally" upon judges and other citizens, *O'Malley v. Woodrough*, 307 U.S. 277, 282, 59 S.Ct. 838, 83 L.Ed. 1289 (1939), but it does prohibit taxation that singles out judges for specially unfavorable treatment. Consequently, unlike the Court of Appeals, we conclude that Congress may apply the Medicare tax--a nondiscriminatory tax--to then-sitting federal judges. The special retroactivity-related Social Security rules that Congress enacted in 1984, however, effectively singled out then-sitting federal judges for unfavorable treatment. Hence, like the Court of Appeals, we conclude that the Clause forbids the application of the Social Security tax to those judges.

I

A

The Medicare law before us is straightforward. In 1965, Congress created a Federal Medicare "hospital insurance" program and tied its financing to Social Security. See Social Security Amendments of 1965, 79 Stat. 291. The Medicare law required most American workers (whom Social Security covered) to pay an additional Medicare tax. But it did not require Federal Government employees (whom Social Security did not cover) to pay that tax. See 26 U.S.C. §§ 3121(b)(5), (6) (1982 ed.).

In 1982, Congress, believing that "[f]ederal workers should bear a more equitable share of the costs of financing the benefits to which many of them eventually became entitled," S.Rep. No. 97-494, pt. 1, p. 378 (1982), U.S.Code Cong. & Admin.News 1982 pp. 781, 1109, extended both Medicare eligibility and Medicare taxes to all currently employed federal employees as well as to all newly hired federal employees, Tax Equity and Fiscal Responsibility Act of 1982, § 278, 96 Stat. 559-563. That new law meant that (as of January 1, 1983) all federal judges, like all other federal employees and most other citizens, would have to contribute between 1.30% and 1.45% of their federal salaries to Medicare's hospital insurance system. See 26 U.S.C. §§ 3101(b)(4)-(6).

The Social Security law before us is more complex. In 1935, Congress created the Social Security

program. See Social Security Act, 49 Stat. 620. For nearly 50 years, that program covered employees in the private sector, but it did not cover Government employees. See 26 U.S.C. §§ 3121(b)(5), (6) (1982 ed.) (excluding federal employees); § 3121(b)(7) (excluding state employees). In 1981, a National Commission on Social Security Reform, convened by the President and chaired by Alan Greenspan, noting the need for "action ... to strengthen the financial status" of Social Security, recommended that Congress extend the program to cover Federal, but not state or local, Government employees. Report of the National Commission on Social Security Reform 2-1, 2-7 (Jan.1983). In particular, the Commission recommended that Congress *require* all incoming federal employees (those hired after January 1, 1984) to enter the Social Security system and to pay Social Security taxes. *Id.*, at 2-7. The Commission emphasized that "present Federal employees will *not* be affected by this recommendation." *Id.*, at 2-8.

In 1983, Congress enacted the Commission's recommendation into law (effective January 1, 1984) with an important exception. See Social Security Amendments of 1983, § 101(b)(1), 97 Stat. 69 (amending 26 U.S. C. §§ 3121(b)(5), (6)). As the Commission had recommended, Congress *required* all newly hired federal employees to participate in the Social Security program. It also *permitted,* without requiring, almost all (about 96%) then-currently employed federal employees to participate.

Contrary to the Commission's recommendation, however, the law added an exception. That exception seemed to restrict the freedom of choice of the remaining 4% of all current employees. This class consisted of the President, Vice President, high-level Executive Branch employees, Members of Congress, a few other Legislative Branch employees, and all federal judges. See 42 U.S.C. §§ 410(a)(5)(C)-(G); see also H.R. Rep. No. 98-25, p. 39 (1983), U.S.Code Cong. & Admin.News 1983 pp. 143, 180; H.R. Conf. Rep. No. 98-542, p. 13 (1983), U.S.Code Cong. & Admin.News 1983 pp. 1619, 1628 (noting that for these current federal employees "the rules are being changed in the middle of the game"). The new law seemed to *require* this class of current federal employees to enter into the Social Security program, see 42 U.S.C. §§ 410(a)(5)(C)-(G). But, as to almost all of these employees, the new law imposed no additional financial obligation or burden.

That is because the new law then created an exception to the exception, see Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, §§ 203(a)(2), 208, 97 Stat. 1107, 1111 (codified at note following 5 U.S.C. § 8331). The exception to the exception said that any member of this small class of current high-level officials (4% of all then-current employees) who contributed to a "covered" retirement program nonetheless could choose to modify their participation in a manner that left their total payroll deduction--for retirement and Social Security--unchanged. A "covered" employee paying 7% of salary to a "covered" program could continue to pay that 7% and no more, in effect avoiding any additional financial obligation as a result of joining Social Security.

The exception to the exception defined a "covered" program to include the Civil Service Retirement and Disability System--a program long available to almost all federal employees--as well as any other retirement system to which an employee must contribute. §§ 203(a)(2)(A), (D). The definition of "covered" program, however, did not encompass the pension system for federal judges--a system that is noncontributory in respect to a judge (but contributory in respect to a spouse).

The upshot is that the 1983 law was specifically aimed at extending Social Security to federal employees. It left about 96% of those who were currently employed free to choose not to participate in Social Security, thereby avoiding any increased financial obligation. It required the remaining 4% to participate in Social Security while freeing them of any added financial obligation (or additional payroll deduction) so long as

they previously had participated in other contributory retirement programs. But it left those who could not participate in a contributory program without a choice. Their financial obligations (and payroll deductions) had to increase. And this last mentioned group consisted almost exclusively of federal judges.

B

This litigation began in 1989, when eight federal judges, all appointed before 1983, sued the Government for "compensation" in the United States Claims Court. They argued that the 1983 law, in requiring them to pay Social Security taxes, violated the Compensation Clause. Initially, the Claims Court ruled against the judges on jurisdictional grounds. 21 Cl.Ct. 786 (1990). The Court of Appeals reversed. 953 F.2d 626 (C.A. Fed.1992). On remand, eight more judges joined the lawsuit. They contested the extension to judges of the Medicare tax as well.

The Court of Federal Claims held against the judges on the merits. 31 Fed.Cl. 436 (1994). The Federal Circuit reversed, ordering summary judgment for the judges as to liability. 64 F.3d 647 (1995). The Government petitioned this Court for writ of certiorari. Some Members of this Court were disqualified from hearing the matter, and we failed to find a quorum of six Justices. See 28 U.S.C. § 1. Consequently, the Court of Appeals' judgment was affirmed "with the same effect as upon affirmance by an equally divided court." 519 U.S. 801, 117 S.Ct. 39, 136 L.Ed.2d 3 (1996); see 28 U.S.C. § 2109.

On remand from the Court of Appeals, the Court of Federal Claims found (a) that the 6-year statute of limitations, see 28 U.S.C. §§ 2401(a), 2501, barred some claims, including all Medicare claims; and (b) that, in any event, a subsequently enacted judicial salary increase promptly cured any violation, making damages minimal. 38 Fed.Cl. 166 (1997). The Court of Appeals (eventually en banc) reversed both determinations. 203 F.3d 795 (C.A.Fed.2000).

The Government again petitioned for certiorari. It asked this Court to consider two questions:

(1) Whether Congress violated the Compensation Clause when it extended the Medicare and Social Security taxes to the salaries of sitting federal judges; and

(2) If so, whether any such violation ended when Congress subsequently increased the salaries of all federal judges by an amount greater than the new taxes.

Given the specific statutory provisions at issue and the passage of time, seven Members of this Court had (and now have) no financial stake in the outcome of this case. Consequently a quorum was, and is, available to consider the questions presented. And we granted the Government's petition for writ of certiorari.

II

At the outset, the judges claim that the "law of the case" doctrine prevents us from now considering the first question presented, namely, the scope of the Compensation Clause. They note that the Government presented that same question in its petition from the Court of Appeals' earlier ruling on liability. They point out that our earlier denial of that petition for lack of a quorum had the "same effect as" an "affirmance by an equally divided court," 28 U.S.C. § 2109. And they add that this Court has said that an affirmance by an equally divided Court is "conclusive and binding upon the parties as respects that controversy." *United States*

*v. Pink,* 315 U.S. 203, 216, 62 S.Ct. 552, 86 L.Ed. 796 (1942).

*Pink,* however, concerned a case, *United States v. Moscow Fire Ins. Co.,* 309 U.S. 624, 60 S.Ct. 725, 84 L.Ed. 986 (1940), in which this Court had heard oral argument and apparently considered the merits prior to concluding that affirmance by an equally divided Court was appropriate. The law of the case doctrine presumes a hearing on the merits. See, *e.g., Quern v. Jordan,* 440 U.S. 332, 347, n. 18, 99 S.Ct. 1139, 59 L. Ed.2d 358 (1979). This case does not involve a previous consideration of the merits. Indeed, when this case previously was before us, due to absence of a quorum, we could not consider either the merits or whether to consider those merits through grant of a writ of certiorari. This fact, along with the obvious difficulty of finding other equivalent substitute forums, convinces us that *Pink* 's statement does not control the outcome here, that the "law of the case" doctrine does not prevent our considering both issues presented, and that we should now proceed to decide them.

III

The Court of Appeals upheld the judges' claim of tax immunity upon the authority of *Evans v. Gore,* 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887 (1920). That case arose in 1919 when Judge Walter Evans challenged Congress' authority to include sitting federal judges within the scope of a federal income tax law that the Sixteenth Amendment had authorized a few years earlier. See Revenue Act of 1918, § 213, 40 Stat. 1065 (defining "gross income" to include judicial salaries). In *Evans* itself, the Court held that the Compensation Clause barred application of the tax to Evans, who had been appointed a judge before Congress enacted the tax. 253 U.S., at 264, 40 S.Ct. 550. A few years later the Court extended *Evans,* making clear that its rationale covered not only judges appointed before Congress enacted a tax but also judges whose appointments took place after the tax had become law. See *Miles v. Graham,* 268 U.S. 501, 509, 45 S.Ct. 601, 69 L.Ed. 1067 (1925).

Fourteen years after deciding *Miles,* this Court overruled *Miles.* *O'Malley v. Woodrough,* 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939). But, as the Court of Appeals noted, this Court did not expressly overrule *Evans* itself. 64 F.3d, at 650. The Court of Appeals added that, if "changes in judicial doctrine" had significantly undermined *Evans* ' holding, this "Court itself would have overruled the case." *Ibid.* Noting that this case is like *Evans* (involving judges appointed *before* enactment of the tax), not like *O'Malley* (involving judges appointed *after* enactment of the tax), the Court of Appeals held that *Evans* controlled the outcome. 64 F.3d, at 650. Hence application of both Medicare and Social Security taxes to these pre-enactment judges violated the Compensation Clause.

The Court of Appeals was correct in applying *Evans* to the instant case, given that "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); see also *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). Nonetheless, the court below, in effect, has invited us to reconsider *Evans.* We now overrule *Evans* insofar as it holds that the Compensation Clause forbids Congress to apply a generally applicable, nondiscriminatory tax to the salaries of federal judges, whether or not they were appointed before enactment of the tax.

The Court's opinion in *Evans* began by explaining why the Compensation Clause is constitutionally important, and we begin by reaffirming that explanation. As *Evans* points out, 253 U.S., at 251-252, 40 S.Ct. 550, the Compensation Clause, along with the Clause securing federal judges appointments "during good Behavior," U.S. Const., Art. III, § 1--the practical equivalent of life tenure--helps to guarantee what

Alexander Hamilton called the "complete independence of the courts of justice." The Federalist No. 78, p. 466 (C. Rossiter ed.1961). Hamilton thought these guarantees necessary because the Judiciary is "beyond comparison the weakest of the three" branches of government. *Id.*, at 465-466. It has "no influence over either the sword or the purse." *Id.*, at 465. It has "no direction either of the strength or of the wealth of the society." *Ibid.* It has "neither FORCE nor WILL but merely judgment." *Ibid.*

Hamilton's view, and that of many other Founders, was informed by firsthand experience of the harmful consequences brought about when a King of England "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence, ¶ 11. And Hamilton knew that "*a power over a man's subsistence amounts to a power over his will.*" The Federalist No. 79, at 472. For this reason, he observed, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." *Ibid.;* see also *id.*, No. 48, at 310 (J. Madison) ("[A]s the legislative department alone has access to the pockets of the people, and has ... full discretion ... over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former").

*Evans* properly added that these guarantees of compensation and life tenure exist, "not to benefit the judges," but "as a limitation imposed in the public interest." 253 U.S., at 253, 40 S.Ct. 550. They "promote the public weal," *id.*, at 248, 40 S.Ct. 550, in part by helping to induce "learned" men and women "to quit the lucrative pursuits" of the private sector, 1 J. Kent, Commentaries on American Law, but more importantly by helping to secure an independence of mind and spirit necessary if judges are "to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty," W. Wilson, Constitutional Government in the United States 143 (1911).

Chief Justice John Marshall pointed out why this protection is important. A judge may have to decide "between the Government and the man whom that Government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular." Proceedings and Debates of the Virginia State Convention, of 1829-1830, p. 616 (1830). A judge's decision may affect an individual's "property, his reputation, his life, his all." *Ibid.* In the "exercise of these duties," the judge must "observe the utmost fairness." *Ibid.* The judge must be "perfectly and completely independent, with nothing to influence or contro [l] him but God and his conscience." *Ibid.* The "greatest scourge ... ever inflicted," Marshall thought, "was an ignorant, a corrupt, or a dependent Judiciary." *Id.*, at 619.

Those who founded the Republic recognized the importance of these constitutional principles. See, *e.g.*, Wilson, Lectures on Law (1791), in 1 Works of James Wilson 363 (J. Andrews ed. 1896); (stating that judges should be "completely independent" in "their salaries, and in their offices"); McKean, Debate in Pennsylvania Ratifying Convention, Dec. 11, 1787, in 2 Debates on the Federal Constitution 539 (J. Elliot ed. 1836) (the security of undiminished compensation disposes judges to be "more easy and independent"); see also 1 Kent, *supra*, at ("permanent support" and the "tenure of their office" "is well calculated ... to give [judges] the requisite independence"). They are no less important today than in earlier times. And the fact that we overrule *Evans* does not, in our view, diminish their importance.

We also agree with *Evans* insofar as it holds that the Compensation Clause offers protections that extend beyond a legislative effort directly to diminish a judge's pay, say by ordering a lower salary. 253 U.S., at 254, 40 S.Ct. 550. Otherwise a legislature could circumvent even the most basic Compensation Clause protection by enacting a discriminatory tax law, for example, that precisely but indirectly achieved the forbidden effect.

Nonetheless, we disagree with *Evans*' application of Compensation Clause principles to the matter before it--a nondiscriminatory tax that treated judges the same way it treated other citizens. *Evans'* basic holding was that the Compensation Clause forbids such a tax because the Clause forbids "all diminution," including "taxation," "whether for one purpose or another." *Id.*, at 255, 40 S.Ct. 550. The Federal Circuit relied upon this holding. 64 F.3d, at 650. But, in our view, it is no longer sound law.

For one thing, the dissenters in *Evans* cast the majority's reasoning into doubt. Justice Holmes, joined by Justice Brandeis, wrote that the Compensation Clause offers "no reason for exonerating" a judge "from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge." *Evans*, 253 U. S., at 265, 40 S.Ct. 550. Holmes analogized the "diminution" that a tax might bring about to the burden that a state law might impose upon interstate commerce. If "there was no discrimination against such commerce the tax constituted one of the ordinary burdens of government from which parties were not exempted." *Id.*, at 267, 40 S.Ct. 550.

For another thing, this Court's subsequent law repudiated *Evans'* reasoning. In 1939, 14 years after *Miles* extended *Evans*' tax immunity to judges appointed after enactment of the tax, this Court retreated from that extension. See *O'Malley*, 307 U.S., at 283, 59 S.Ct. 838 (overruling *Miles* ). And in so doing the Court, in an opinion announced by Justice Frankfurter, adopted the reasoning of the *Evans* dissent. The Court said that the question was whether judges are immune "from the incidences of taxation to which everyone else within the defined classes ... is subjected." *Id.*, at 282, 59 S.Ct. 838. Holding that judges are not "immun[e] from sharing with their fellow citizens the material burden of the government," *ibid.*, the Court pointed out that the legal profession had criticized *Evans*' contrary conclusion, and that courts outside the United States had resolved similar matters differently, *id.*, at 281, 59 S.Ct. 838. And the Court concluded that "a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III." *Id.*, at 282, 59 S.Ct. 838. The Court conceded that *Miles* had reached the opposite conclusion, but it said that *Miles* "cannot survive." 307 U.S., at 283, 59 S. Ct. 838. Still later, this Court noted that "[b]ecause *Miles* relied on *Evans v. Gore, O'Malley* must also be read to undermine the reasoning of *Evans.*" *United States v. Will,* 449 U.S. 200, 227, n. 31, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980).

Finally, and most importantly, we believe that the reasoning of Justices Holmes and Brandeis, and of this Court in *O'Malley*, is correct. There is no good reason why a judge should not share the tax burdens borne by all citizens. We concede that this Court has held that the Legislature cannot *directly* reduce judicial salaries even as part of an equitable effort to reduce *all* Government salaries. See 449 U.S., at 226, 101 S.Ct. 471. But a tax law, unlike a law mandating a salary reduction, affects compensation indirectly, not directly. See *ibid.* (distinguishing between measures that directly and those that indirectly diminish judicial compensation). And those prophylactic considerations that may justify an absolute rule forbidding direct salary reductions are absent here, where indirect taxation is at issue. In practice, the likelihood that a nondiscriminatory tax represents a disguised legislative effort to influence the judicial will is virtually nonexistent. Hence the potential threats to judicial independence that underlie the Constitution's compensation guarantee cannot justify a special judicial exemption from a commonly shared tax, not even as a preventive measure to counter those threats.

For these reasons, we hold that the Compensation Clause does not forbid Congress to enact a law imposing a nondiscriminatory tax (including an increase in rates or a change in conditions) upon judges, whether those judges were appointed before or after the tax law in question was enacted or took effect. Insofar as *Evans*

holds to the contrary, that case, in *O'Malley's* words, "cannot survive." 307 U.S., at 283, 59 S.Ct. 838.

The Government points out that the Medicare tax is just such a nondiscriminatory tax. Neither the courts below, nor the federal judges here, argue to the contrary. Hence, insofar as the Court of Appeals found that application of the Medicare tax law to federal judges is unconstitutional, we reverse its decision.

IV

The Social Security tax is a different matter. Respondents argue that the 1983 law imposing that tax upon then-sitting judges violates the Compensation Clause, for it discriminates against judges in a manner forbidden by the Clause, even as interpreted in *O'Malley,* not *Evans.* Cf. *O'Malley*, *supra,* at 282, 59 S.Ct. 838 (stating question as whether judges are immune "from the incidences of taxation *to which everyone else within the defined classes* ... is subjected" (emphasis added)). After examining the statute's details, we agree with the judges that it does discriminate in a manner that the Clause forbids. Four features of the law, taken together, lead us to this conclusion.

First, federal employees had remained outside the Social Security system for nearly 50 years prior to the passage of the 1983 law. Congress enacted the law pursuant to the Social Security Commission's recommendation to bring those employees within the law. See *supra,* at 1788. And the law itself deals primarily with that subject. Thus, history, context, statutory purpose, and statutory language, taken together, indicate that the category of "federal employees" is the appropriate class against which we must measure the asserted discrimination.

Second, the law, as applied in practice, in effect imposed a new financial obligation upon sitting judges, but it did not impose a new financial burden upon any other group of (then) current federal employees. We have previously explained why that is so. See *supra,* at 1788-1789. The law required all newly hired federal employees to join Social Security and pay related taxes. It gave 96% of all current employees (employed as of January 1, 1984 or earlier) total freedom to enter, or not to enter, the system as they chose. It gave the remaining 4% of all current employees the freedom to maintain their pre-1984 payroll deductions, provided that they were currently enrolled in a "covered" system. And it defined "covered" system in a way that included virtually all of that 4%, except for federal judges. See *supra,* at 1788. The practical upshot is that the law permitted nearly every current federal employee, but not federal judges, to avoid the newly imposed financial obligation.

Third, the law, by including sitting judges in the system, adversely affected most of them. Inclusion meant a requirement to pay a tax of about $2,000 per year, deducted from a monthly salary check. App. 49. At the same time, 95% of the then-active judges had already qualified for Social Security (due to private sector employment) before becoming judges. See *id.,* at 115. And participation in Social Security as judges would benefit only a minority. See *id.,* at 116-119 (reviewing examples of individual judges and demonstrating that participation in Social Security primarily would benefit the minority of judges who had not worked the 40 quarters necessary to be fully insured). The new law imposed a substantial cost on federal judges with little or no expectation of substantial benefit for most of them.

Fourth, when measured against Compensation Clause objectives, the Government's justification for the statutory distinction (between judges, who do, and other federal employees, who do not, incur additional financial obligations) is unsound. The sole justification, according to the Government, is one of "equaliz [ing]" the retirement-related obligations that pre-1983 law imposed upon judges with the retirement-related

obligations that pre-1983 law imposed upon other current high-level federal employees. Brief for United States 40. Thus the Government says that the new financial burden imposed upon judges was meant to make up for the fact that the judicial retirement system is basically a noncontributory system, while the system to which other federal employees belonged was a contributory system. *Id.*, at 39-40; Reply Brief for United States 16.

This rationale, however, is the Government's and not necessarily that of Congress, which was silent on the matter. Cf. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U. S. 29, 50, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (expressing concern at crediting *post hoc* explanation of agency action).

More importantly, the judicial retirement system is noncontributory because it reflects the fact that the Constitution itself guarantees federal judges life tenure--thereby constitutionally permitting federal judges to draw a salary for life simply by continuing to serve. Cf. *Booth v. United States,* 291 U.S. 339, 352, 54 S.Ct. 379, 78 L.Ed. 836 (1934) (holding that Compensation Clause protects salary of judge who has retired). That fact means that a contributory system, in all likelihood, would not work. And, of course, as of 1982, the noncontributory pension salary benefits were themselves part of the judge's compensation. The 1983 statute consequently singles out judges for adverse treatment solely because of a feature required by the Constitution to preserve judicial independence. At the same time, the "equaliz[ation]" in question takes place not by offering all current federal employees (including judges) the same opportunities but by employing a statutory disadvantage which offsets a constitutionally guaranteed advantage. Hence, to accept the "justification" offered here is to permit, through similar reasoning, taxes which have the effect of weakening or eliminating those constitutional guarantees necessary to secure judicial independence, at least insofar as similar guarantees are not enjoyed by others. This point would be obvious were Congress, say, to deny some of the benefits of a tax reduction to those with constitutionally guaranteed life tenure to make up for the fact that other employees lack such tenure. Although the relationships here--among advantages and disadvantages--are less distant and more complex, the principle is similar.

Nor does the statute "equaliz[e]" with any precision. On the one hand, the then-current retirement system open to all federal employees except judges required a typical employee to contribute 7% to 8% of his or her annual salary. See generally 5 U.S.C. § 8334(a)(1). In return it provided a Member of Congress, for instance, with a pension that vested after five years and increased in value (by 2.5% of the Member's average salary) with each year of service to a maximum of 80% of salary, and covered both employee and survivors. See 5 U.S.C. §§ 8339, 8341. On the other hand, the judges' retirement system (based on life tenure) required no contribution for a judge who retired at age 65 (and who met certain service requirements) to receive full salary. But the right to receive that salary did not vest until retirement. The system provided nothing for a judge who left office before age 65. Nor did the law provide any coverage for a judge's survivors. Indeed, in 1984, a judge had to contribute 4.5% of annual salary to obtain a survivor's annuity, which increased in value by 1.25% of the judge's salary per year to a maximum of 40% of salary. 28 U.S.C. §§ 376(b), (*l* ) (1982 ed.).

These two systems were not equal either before or after Congress enacted the 1983 law. Before 1983, a typical married federal employee other than a judge had to contribute 7 to 8% of annual salary to receive benefits that were better in some respects (vesting period, spousal benefit) and worse in some respects (80% salary maximum) than his married judicial counterpart would receive in return for a 4.5% contribution. The 1983 law imposed an added 5.7% burden upon the judge, in return for which the typical judge received little, or no, financial benefit. Viewed purely in financial equalization terms, and as applied to typical judges, the new requirement seems to over-equalize, putting the typical married judge at a financial disadvantage--though perhaps it would produce greater equality when applied to other, less typical examples.

Taken together, these four characteristics reveal a law that is special--in its manner of singling out judges for disadvantageous treatment, in its justification as necessary to offset advantages related to constitutionally protected features of the judicial office, and in the degree of permissible legislative discretion that would have to underlie any determination that the legislation has "equalized" rather than gone too far. For these reasons the law before us is very different from the "non-discriminatory" tax that *O'Malley* upheld. 307 U.S., at 282, 59 S.Ct. 838. Were the Compensation Clause to permit Congress to enact a discriminatory law with these features, it would authorize the Legislature to diminish, or to equalize away, those very characteristics of the Judicial Branch that Article III guarantees-- characteristics which, as we have said, see *supra,* at 1791, the public needs to secure that judicial independence upon which its rights depend. We consequently conclude that the 1983 Social Security tax law discriminates against the Judicial Branch, in violation of the Compensation Clause.

The Government makes additional arguments in support of reversal. But we find them unconvincing. It suggests that Article III protects judges only against a reduction in stated salary, not against indirect measures that only reduce take-home pay. Brief for United States 28. In *O'Malley*, however, this Court, when upholding a "non-discriminatory" tax, strongly implied that the Compensation Clause would bar a discriminatory tax. 307 U.S., at 282, 59 S.Ct. 838. The commentators whose work *O'Malley* cited said so explicitly. See Fellman, The Diminution of Judicial Salaries, 24 Iowa L.Rev. 89, 99 (1938); see also Hall, Case Comment, 20 Ill. L.Rev. 376, 377 (1925); Corwin, Constitutional Law in 1919-1920, 14 Am. Pol. Sci. Rev. 635, 642 (1920). And in *Will,* the Court yet more strongly indicated that the Compensation Clause bars indirect efforts to reduce judges' salaries through taxes when those taxes discriminate. 449 U.S., at 226, 101 S.Ct. 471. Indeed, the Government itself "assume[s] that discriminatory taxation of judges would contravene fundamental principles underlying Article III, if not the [Compensation] Clause itself." Brief for United States 37, n. 27.

The Government also argues that there is no evidence here that Congress singled out judges for special treatment in order to intimidate, influence, or punish them. But this Court has never insisted upon such evidence. To require it is to invite legislative efforts that embody, but lack evidence of, some such intent, engendering suspicion among the branches and consequently undermining that mutual respect that the Constitution demands. Cf. Wilson, Lectures on Law, in 1 Works of James Wilson, at 364 (stating that judges "should be removed from the most distant apprehension of being affected, in their judicial character and capacity, by anything, except their own behavior and its consequences"). Nothing in the record discloses anything other than benign congressional motives. If the Compensation Clause is to offer meaningful protection, however, we cannot limit that protection to instances in which the Legislature manifests, say, direct hostility to the Judiciary.

Finally, the Government correctly points out that the law disfavored not only judges but also the President of the United States and certain Legislative Branch employees. As far as we can determine, however, all Legislative Branch employees were free to join a covered system, and the record provides us with no example of any current Legislative Branch employee who had failed to do so. See Tr. of Oral Arg. 16-17, 37-38. The President's pension is noncontributory. See note following 3 U.S.C. § 102. And the President himself, like the judges, is protected against diminution in his "[c]ompensation." See U.S. Const., Art. II, § 1. These facts may help establish congressional good faith. But, as we have said, we do not doubt that good faith. And we do not see why, otherwise, the separate and special example of that single individual, the President, should make a critical difference here.

We conclude that, insofar as the 1983 statute required then-sitting judges to join the Social Security System and pay Social Security taxes, that statute violates the Compensation Clause.

V

The second question presented is whether the

> "constitutional violation ended when Congress increased the statutory salaries of federal judges by an amount greater than the amount [of the Social Security] taxes deducted from respondents' judicial salaries." Pet. for Cert. (I).

The Government argues for an affirmative answer. It points to a statutory salary increase that all judges received in 1984. It says that this increase, subsequent to the imposition of Social Security taxes on judges' salaries, cured any earlier unconstitutional diminution of salaries in a lesser amount. Otherwise, if "Congress improperly reduced judges salaries from $140,000" per year "to $130,000" per year, the judges would be able to collect the amount of the improper reduction, here $10,000, forever--even if Congress cured the improper reduction by raising salaries $20,000, to $150,000, a year later. Reply Brief for United States 18. To avoid this consequence, the Government argues, we should simply look to the fact of a later salary increase "whether or not one of Congress's purposes in increasing the salaries" was "to terminate the constitutional violation." *Ibid.*

But how could we always decide whether a later salary increase terminates a constitutional violation without examining the purpose of that increase? Imagine a violation that affected only a few. To accept the Government's position would leave those few at a permanent salary disadvantage. If, for example, Congress reduced the salaries of one group of judges by 20%, a later increase of 30% applicable to all judges would leave the first group permanently 20% behind. And a pay cut that left those judges at a permanent disadvantage would perpetuate the very harm that the Compensation Clause seeks to prevent.

The Court of Appeals consequently examined the context in which the later pay increases took place in order to determine their relation to the earlier Compensation Clause violation. It found "nothing to suggest" that the later salary increase at issue here sought "to make whole the losses sustained by the pre-1983 judges." 185 F.3d, at 1362-1363. The Government presents no evidence to the contrary.

The relevant economic circumstances surrounding the 1984, and subsequent, salary increases include inflation sufficiently serious to erode the real value of judicial salaries and salary increases insufficient to maintain real salaries or real compensation parity with many other private-sector employees. See Report of 1989 Commission on Executive, Legislative, and Judicial Salaries, Hearings before the Senate Committee on Governmental Affairs, 101st Cong., 1st Sess., 12-13 (1989) (testimony of Lloyd Cutler regarding effect of inflation on judges' salaries since 1969). For instance, while consumer prices rose 363% between 1969 and 1999, salaries in the private sector rose 421%, and salaries for district judges rose 253%. See American Bar Association, Federal Judicial Pay Erosion 11 (Feb. 2001). These figures strongly suggest that the judicial salary increases simply reflected a congressional effort to restore both to judges and to Members of Congress themselves some, but not all, of the real compensation that inflation had eroded. Those salary increases amounted to a congressional effort to adjust judicial salaries to reflect "fluctuations in the value of money," The Federalist No. 79, at 473 (A. Hamilton)--the kind of adjustment that the Founders believed "may be requisite," McKean, Debate in Pennsylvania Ratifying Convention, Dec. 11, 1787, in 2 Debates on the Federal Constitution, at 539; see also Rosenn, The Constitutional Guaranty Against Diminution of Judicial

Compensation, 24 UCLA L.Rev. 308, 314-315 (1976).

We have found nothing to the contrary. And we therefore agree with the Court of Appeals' similar conclusion. 185 F.3d, at 1363 ("[E]verything in the record" suggests that the increase was meant to halt "the slide in purchasing power resulting from continued and unadjusted-for inflation").

The Government says that a circumstance-specific approach may prove difficult to administer. Brief for United States 43. And we concede that examining the circumstances in order to determine whether there is or is not a relation between an earlier violation and a later increase is more complex than the Government's proposed automatic approach. But we see no reason why such relief as damages or an exemption from Social Security would prove unworkable.

Finally, the Government looks to our decision in *Will* for support. In that case, federal judges challenged the constitutionality of certain legislative "freezes" that Congress had imposed upon earlier enacted Government-wide cost-of-living salary adjustments. The Court found a Compensation Clause violation in respect to the freeze for what was designated Year One (where Congress had rescinded an earlier-voted 4.8% salary increase). *Will*, 449 U.S., at 225-226, 101 S.Ct. 471. The Government points out that the *Will* Court "noted that Congress, later in that fiscal year, enacted a statutory increase in judges' salaries that exceeded the salaries that judges would have received" without the rescission. Brief for United States 41. And the Government adds that "it was unquestioned in *Will* " that the judges could not receive damages for the time subsequent to this later enactment. *Id.*, at 41-42.

The *Will* Year One example, however, shows only that, in the circumstances, and unlike the case before us, the later salary increase *was* related to the earlier salary diminishment. Regardless, the very fact that the matter was "unquestioned" in *Will* shows that it was not argued. See 449 U.S., at 206, n. 3, 101 S.Ct. 471 (noting that the judges' complaint sought relief for Year One's diminution only up to the moment of the subsequent salary increase). Hence the Court did not decide the matter now before us.

We conclude that later statutory salary increases did not cure the preceding unconstitutional harm.

VI

Insofar as the Court of Appeals found the application of Medicare taxes to the salaries of judges taking office before 1983 unconstitutional, its judgment is reversed. Insofar as that court found the application of Social Security taxes to the salaries of judges taking office before 1984 unconstitutional, its judgment is affirmed. We also affirm the Court of Appeals' determination that the 1984 salary increase received by federal judges did not cure the Compensation Clause violation. The case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Justice STEVENS and Justice O'CONNOR took no part in the consideration or decision of this case.

Justice SCALIA, concurring in part and dissenting in part.

I agree with the Court that extending the Social Security tax to sitting Article III judges in 1984 violated

Article III's Compensation Clause. I part paths with the Court on the issue of extending the Medicare tax to federal judges in 1983, which I think was also unconstitutional. [FN1]

I

As an initial matter, I think the Court is right in concluding that *Evans v. Gore,* 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887 (1920)--holding that new taxes of general applicability cannot be applied to sitting Article III judges--is no longer good law, and should be overruled. We went out of our way in *O'Malley v. Woodrough,* 307 U.S. 277, 280-281, 59 S.Ct. 838, 83 L.Ed. 1289 (1939), to catalog criticism of *Evans,* and subsequently recognized, in *United States v. Will,* 449 U.S. 200, 227, and n. 31, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980), that *O'Malley* had "undermine[d] the reasoning of *Evans.*" The Court's decision today simply recognizes what should be obvious: that *Evans* has not only been undermined, but has in fact collapsed.

II

My disagreement with the Court arises from its focus upon the issue of discrimination, which turns out to be dispositive with respect to the Medicare tax. The Court holds "that the Compensation Clause does not forbid Congress to enact a law imposing a nondiscriminatory tax ... upon judges, whether those judges were appointed before or after the tax law in question was enacted or took effect." *Ante,* at 1793. Since "the Medicare tax is just such a nondiscriminatory tax," the Court concludes that "application of [that] tax law to federal judges is [c]onstitutional." *Ibid.*

But we are dealing here with a "Compensation Clause," not a "Discrimination Clause." See U.S. Const., Art III, § 1 ("The Judges ... shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office"). As we have said, "the Constitution makes no exceptions for 'nondiscriminatory' reductions" in judicial compensation, *Will, supra,* at 226, 101 S.Ct. 471. A reduction in compensation is a reduction in compensation, even if all federal employees are subjected to the same cut. The discrimination criterion that the Court uses would make sense if the only purpose of the Compensation Clause were to prevent invidious (and possibly coercive) action against judges. But as the Court acknowledges, the Clause " 'promote[s] the public weal' ... by helping to induce 'learned' men and women to 'quit the lucrative pursuits' of the private sector," *ante,* at 1791 (quoting *Evans, supra,* at 248, 40 S.Ct. 550; 1 J. Kent, Commentaries on American Law at 294). That inducement would not exist if Congress could cut judicial salaries so long as it did not do so discriminatorily.

What the question comes down to, then, is (1) whether exemption from a certain tax can constitute part of a judge's "compensation," and (2) if so, whether exemption from the Medicare tax was part of the judges' compensation here. The answer to the more general question seems to me obviously yes. Surely the term "compensation" refers to the entire "package" of benefits--not just cash, but retirement benefits, medical care, *and exemption from taxation if that is part of the employment package.* It is simply unreasonable to think that "$150,000 a year tax-free" (if that was the bargain struck) is not higher compensation that "$150,000 a year subject to taxes." Ask the employees of the World Bank.

The more difficult question--though far from an insoluble one--is *when* an exemption from tax constitutes compensation. In most cases, the presence or absence of taxation upon wages, like the presence or absence of many other factors within the control of government--inflation, for example, or the rates charged by government-owned utilities, or import duties that increase consumer prices--affects the *value* of compensation, but is not an element of compensation itself. The Framers had this distinction well in mind.

Hamilton, for example, wrote that as a result of "the fluctuations in the value of money," "[i]t was ... necessary to leave it to the discretion of the legislature to vary its provisions" for judicial compensation. The Federalist No. 79, p. 473 (C. Rossiter, ed.1961); see also *Will, supra,* at 227, 101 S.Ct. 471 (the Constitution "placed faith in the integrity and sound judgment of the elected representatives to enact increases" in judicial salaries to account for inflation). Since Hamilton thought that the Compensation Clause "put it out of the power of [Congress] to change the condition of the individual [judge] for the worse," The Federalist No. 79, at 473, he obviously believed that inflation does not diminish compensation as that term is used in the Constitution.

This distinction between Government action affecting compensation and Government action affecting the *value* of compensation was the basis for our statement in *O'Malley,* 307 U.S., at 282, 59 S.Ct. 838, that "[t]o subject [judges] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government ...." I agree with the Court, therefore, that *Evans* was wrongly decided--not, however, because in *Evans* there was no discrimination, but because in *Evans* the universal application of the tax *demonstrated* that the Government was not reducing the compensation of its judges but was acting as sovereign rather than employer, imposing a general tax.

But just as it is clear that a federal employee's sharing of a tax-free status that all citizens enjoy is not compensation (and elimination of that tax-free status not a reduction in compensation), so also it is clear that a tax-free status conditioned on federal employment *is* compensation, and its elimination a reduction. The Court apparently acknowledges that if a tax is *imposed* on the basis of federal employment (an income tax, for example, payable only by federal judges) it would constitute a *reduction* in compensation. It is impossible to understand why a tax that is *suspended* on the basis of federal employment (an exemption from federal income tax for federal judges) does not constitute the *conferral* of compensation--in which case its elimination is a *reduction,* whether or not federal judges end up being taxed just like other citizens. Only converting the Compensation Clause into a Discrimination Clause can explain a contrary conclusion.

And this, of course, is what has been achieved by the targeted extension of the Medicare tax to federal employees who were previously exempt. It may well be that, in some abstract sense, they are not being "discriminated against," since they end up being taxed like other citizens; but this does not alter the fact that, since exemption from the tax was part of their employment package-- since they had an employment expectation of a preferential exemption from taxation--their *compensation* was being reduced. One of the benefits of being a federal judge (or any federal employee) had, prior to 1982, been an exemption from the Medicare tax. This benefit Congress took away, much as a private employer might terminate a contractual commitment to pay Medicare taxes on behalf of its employees. The latter would clearly be a cut in compensation, and so is the former. [FN2] Had Congress simply imposed the Medicare tax on its own employees (including judges) at the time it introduced that tax for other working people, no benefit of federal employment would have been reduced, because, with respect to the newly introduced tax, none had ever existed. But an extension to federal employees of a tax from which they had previously been exempt *by reason of their employment status* seems to me a flat- out reduction of federal employment compensation.

III

As should be clear from the above, though I agree with the Court that the extension of the Social Security tax to federal judges runs afoul of the Compensation Clause, I disagree with the Court's grounding of this holding on the discriminatory manner in which the extension occurred. In this part of its opinion, however, the

Court's antidiscrimination rationale is slightly different from that which appeared in its discussion of the Medicare tax. There, the focus was on discrimination compared with ordinary citizens; here, the focus is on discrimination vis-a-vis other federal employees. (As the Court explains, federal judges, unlike nearly all other federal employees, were not given the opportunity to opt out of paying the tax). On my analysis, it would not matter if every federal employee had been made subject to the Social Security tax along with judges, so long as one of the previous entitlements of their federal employment had been exemption from that tax. Federal judges, unlike all other federal employees except the President, see Art. II, § 1, cl. 7, cannot, consistent with the Constitution, have their compensation diminished. If this case involved salary cuts to pay for Social Security, rather than taxes to pay for Social Security, the irrelevance of whether other federal employees were covered by the operative legislation would be clear.

* * *

I join in the judgment that extension of the Social Security tax to sitting Article III judges was unconstitutional. I would affirm the Federal Circuit's holding that extension of the Medicare tax was unconstitutional as well.

Justice THOMAS, concurring in the judgment in part and dissenting in part.

I believe this Court was correct in *Evans v. Gore,* 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887 (1920), when it held that any tax that reduces a judge's net compensation violates Article III of the Constitution. Accordingly, I would affirm the judgment of the Court of Appeals in its entirety.

Footnotes:

FN2. As the Court explains, the purpose of the Medicare tax extension was to ensure that federal workers "bear a more equitable share of the costs of financing the benefits to which many of them eventually became entitled" by reason of their own or their spouses' private-sector employment. *Ante,* at 1787 (internal quotation marks and citation omitted). As with the Social Security tax, therefore, the Medicare tax aspect of this case does not present the situation in which a tax exemption has been eliminated in return for some other benefit, different in kind but equivalent in value. Cf. *ante,* at 1793 ("[P]articipation in Social Security as judges would benefit only a minority").

U.S. v. Farber, 630 F.2d 569 (8th Cir. 1980)

UNITED STATES of America, Appellee,
v.
Michael O. FARBER, Appellant.

No. 79-1815.
United States Court of Appeals,
Eighth Circuit.
Submitted May 19, 1980.
Decided July 10, 1980.
Order Denying Petition for Rehearing En Banc Aug. 25, 1980.
Rehearing Denied Aug. 25, 1980.

Mark W. Bennett, Allen, Babich & Bennett, Des Moines, Iowa, for appellant; Michael O. Farber, Spencer, Iowa, on brief pro se.

Amanda M. Dorr, Asst. U. S. Atty., Des Moines, Iowa, for appellee; Roxanne Barton Conlin, U. S. Atty., Des Moines, Iowa, on brief.

Before HENLEY and McMILLIAN, Circuit Judges, and ROY, District Judge. (FN*)

HENLEY, Circuit Judge.

Michael O. Farber appeals from the judgment and sentence of the district court (FN1) convicting him of willful failure to file an income tax return for tax year 1974, in violation of 26 U.S.C. § 7203. Appellant was sentenced to one year imprisonment with provision for release after service of one-third of this term. We affirm.

During 1974 Farber was employed as a salesman for the IMC Mint Corporation (IMC) of Salt Lake City, Utah. His employment with this corporation began in spring of 1973 and terminated when the organization was placed in receivership on June 21, 1974. According to uncontested evidence at trial, Farber received a total of $24,060.07 in commission paychecks from IMC in 1974.

However, due to the confused state of the corporation's records, he apparently did not receive a Form 1099 from either IMC or the receiver indicating his total commissions for 1974.

Appellant submitted a Form 1040 return for 1974, but allegedly because he lacked a Form 1099 from which to ascertain his income, he answered key entries with assertion of the fifth amendment. (FN2)

On appeal, both appellant pro se and retained counsel have submitted briefs. Our affirmance is based on careful review of each.

Farber contends first that the district court abused its discretion in admitting into evidence voluminous tax documents which could fairly be characterized as tax protester materials for years subsequent to 1974.

It is settled that evidence of other crimes or acts is admissible under Fed.R.Evid. 404(b) to show intent, plan, or absence of mistake, so long as four additional prerequisites are met, i. e., (1) a material issue has been raised; (2) the proffered evidence is relevant to that issue; (3) the evidence of other crimes is clear and convincing; and (4) the evidence relates to wrongdoing similar in kind and reasonably close in time to the charge at trial. United States v. Frederickson, 601 F.2d 1358, 1365 (8th Cir.), cert. denied, 444 U.S. 934, 100 S.Ct. 281, 62 L.Ed.2d 193 (1979) (and cases cited).

In the present case, the contested evidence was offered to show Farber's intent and willfulness in failing to file for tax year 1974. The evidence was clearly admissible under the first three prerequisites described above, and we cannot agree with appellant's contention that the materials fail to meet the fourth prerequisite in that they were dissimilar in kind and far removed in time from the crime charged. Although one of the documents (Form 1040 for 1975) was accepted as a return by the IRS, it was nevertheless similar to Farber's 1974 return in containing expressions of Farber's studied dissatisfaction with the income tax system. All of the contested documents were prepared and filed within three and one-half years of the return date for 1974. We have held that subsequent tax paying conduct is relevant to the issue of intent or willfulness in a prior year. United States v. Luttrell, 612 F.2d 396 (8th Cir. 1980); United States v. Bowman, 602 F.2d 160 (8th Cir. 1979).

Appellant next alleges that his failure to file was not willful in that he offered to refile for tax year 1974 if the government granted him immunity from

prosecution. We know of no relevant authority for the proposition that a taxpayer's failure to file is not willful when he asserts a willingness to refile contingent upon a grant of immunity.

The remaining and closer issues on appeal involve the trial court's jury instructions, which we consider under the plain error rule, Fed.R.Crim.P. 52(b), since appellant failed at trial to comply with the procedural mandates of Fed.R.Crim.P. 30 for objection to the court's instructions.

Appellant contends first that he relied in good faith on the advice of counsel and that the jury should have been instructed on this defense. Farber testified at trial that prior to filing his 1974 return, he consulted attorney William Drexler, whom he had heard speak at a tax protest seminar. Allegedly, it was Mr. Drexler who advised appellant to handle the problem of unascertainable income by filing a 259-page return.

At least one court has recognized in a tax evasion context that reliance on counsel is a defense to prosecution and that a defendant is entitled to an instruction on this defense. Bursten v. United States, 395 F.2d 976, 981-82 (5th Cir. 1968); accord, United States v. Mitchell, 495 F.2d 285, 288 (4th Cir. 1974) (prosecution under 26 U.S.C. § 7206 for false tax return). On the other hand, the Fifth Circuit has explained the limited scope of its ruling in Bursten by noting that a reliance defense is available where the defendant relied on "competent tax counsel" (emphasis in Fifth Circuit opinion) and that the defense may not be available in every case. United States v. Anderson, 577 F.2d 258, 260 (5th Cir. 1978), citing Bursten v. United States, supra.

Here, we are not convinced that appellant attempted to obtain competent legal advice. We note that Farber first became acquainted with Drexler at a tax protest seminar. According to his testimony, an unidentified person sitting next to him in the audience referred to Drexler as an attorney, and Farber thereafter assumed without further inquiry that Drexler was in fact licensed to practice law. Counsel at oral argument informed us that Drexler was disbarred prior to 1974. Nevertheless, when appellant encountered difficulty with his 1974 return, he decided to telephone Drexler in California rather than seek local legal counsel. It is apparent that appellant sought out Drexler because he agreed with Drexler's antitax sentiments, not because he sought competent legal advice. In these circumstances, we decline to find plain error in the trial court's failure to instruct the jury on a reliance defense.

Farber's final and somewhat troublesome contention is that the trial court

failed in its instructions to recognize his strongest defense, i. e., that he was unable to ascertain his income, that he consequently feared perjuring (FN3) himself, and that he claimed the fifth amendment on his Form 1040 in good faith. As appellant reminds us, a defendant cannot properly be convicted for an erroneous claim of fifth amendment privilege asserted in good faith, Garner v. United States, 424 U.S. 648, 663 and 663 n.18, 96 S.Ct. 1178, 1187, 47 L.Ed.2d 370 (1976); United States v. Schiff, 612 F.2d 73, 78 n.6 (2d Cir. 1979); United States v. Edelson, 604 F.2d 232, 234-36 (3d Cir. 1979); United States v. Johnson, 577 F.2d 1304, 1310-11 (5th Cir. 1978); Cooley v. United States, 501 F.2d 1249, 1253 n.4 (9th Cir. 1974), cert. denied, 419 U.S. 1123, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975), insofar as an assertion of this constitutional privilege may negate the element of willfulness required for conviction under 26 U.S.C. § 7203. (FN4) United States v. Edelson, supra, 604 F.2d at 235-36.

In addressing Farber's contention, we note at the outset that the allegedly objectionable jury instructions set out correct statements of the law. The court instructed that disagreement with the law is not a defense to prosecution under 26 U.S.C. § 7203, United States v. Pohlman, 522 F.2d 974, 976 (8th Cir. 1975) (en banc), cert. denied, 423 U.S. 1049, 96 S.Ct. 776, 46 L.Ed.2d 638 (1976), and that a good faith belief in the unconstitutionality of the tax laws is not a defense. (FN5) Hayward v. Day, 619 F.2d 716, 717 (8th Cir. 1980); United States v. Ware, 608 F.2d 400, 405 (10th Cir. 1979).

The court further instructed that a finding of willful failure to file was required for conviction, defining "willful" in language identical to that suggested in this court's en banc opinion in United States v. Pohlman, as a "voluntary, intentional violation of a known legal duty" (emphasis added). United States v. Pohlman, supra, 522 F.2d at 977, cited with approval in United States v. Pomponio, 429 U.S. 10, 12-13, 97 S.Ct. 22, 23-24, 50 L.Ed.2d 12 (1976). Implicitly, this instruction permitted conviction only if the jury believed that Farber knew of his duty to report income despite the difficulty he had encountered in ascertaining income figures. The jury apparently and with reason did not credit Farber's purported fear of perjury after hearing his cross-examination testimony that he did not attempt to straighten out his checkbook, he did not attempt to obtain records of his bank deposits, he did not attach an affidavit to his Form 1040 explaining his problem, and he did not comply with the IRS's suggestion that he pay half the estimated tax due.

We note also that the court's instructions expressly recognized appellant's fifth amendment argument. The jury was correctly informed that "under the fifth

amendment . . . a person has a right to refuse to answer a question if his truthful answer to the question would tend to expose him to criminal prosecution." United States v. Johnson, supra, 577 F.2d at 1310-1311 (5th Cir. 1978); United States v. Karsky, supra, 610 F.2d at 550 and 550 n.5 (8th Cir. 1979).

Appellant nevertheless contends that the benefit of this instruction was diluted by the further instruction that the fifth amendment privilege "does not permit a person to completely refuse to disclose on his income tax return any information relating to his income, and filing a 1040 form with a fifth amendment objection to income questions constitutes a failure to file the return." We find that this instruction on failure to file was reasonable where the taxpayer provided the IRS with insufficient information to calculate tax liability; see note 2, supra ; United States v. Johnson, supra, 577 F.2d at 1311; United States v. Irwin, 561 F.2d 198, 201 (10th Cir. 1977), cert. denied, 434 U.S. 1012, 98 S.Ct. 725, 54 L.Ed.2d 755 (1978); United States v. Daly, 481 F.2d 28, 29 (8th Cir.), cert. denied, 414 U.S. 1064, 94 S.Ct. 571, 38 L.Ed.2d 469 (1973), and where the instruction on failure to file did not predetermine the separate, hotly contested issue of whether Farber's failure to file was willful. As indicated, the district court instructed accurately on the element of willfulness, giving this matter over to the jury for its consideration.

It is perhaps true that in its jury instructions the court could have more precisely spelled out the relationship between willfulness as an element of the offense and assertion of a fifth amendment defense, with an instruction that willfulness may be negated by a reasonable though erroneous assertion of the fifth amendment in good faith. See, e. g., United States v. Edelson, supra, 604 F.2d at 235. However, the court's failure to give such an instruction was not, in our opinion, plain error, and we conclude that a new trial is not necessary to prevent a miscarriage of justice. Fed.R.Crim.P. 52(b); Tanner v. United States, 401 F.2d 281 (8th Cir. 1968), cert. denied, 393 U.S. 1109, 89 S.Ct. 922, 21 L.Ed.2d 806 (1969); Cross v. United States, 347 F.2d 327, 330 (8th Cir. 1965).

For the foregoing reasons, the judgment and sentence of the district court are affirmed.

ORDER DENYING PETITION FOR REHEARING EN BANC

The petition for rehearing en banc in the above entitled case is denied.

Lay, Chief Judge, joined by Heaney, Circuit Judge, would grant the petition for rehearing en banc for the following reasons:

We respectfully dissent from the denial of the petition for rehearing en banc in the above entitled case.

In Garner v. United States, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976), the Supreme Court stated that a defendant could not properly be convicted under 26 U.S.C. § 7203 for an erroneous claim of fifth amendment privilege asserted in good faith. Id. at 663 n. 18, 96 S.Ct. at 1187. An assertion of the fifth amendment privilege may negate the element of willfulness required for conviction under section 7203. United States v. Edelson, 604 F.2d 232, 234-36 (3d Cir. 1979). The panel recognized these principles, and stated that the district court "could have more precisely spelled out the relationship between willfulness as an element of the offense and assertion of a fifth amendment defense . . . ." Id. at 572-573. The problem with the district court's instructions is not merely imprecision, but is that the district court failed to relate the assertion of fifth amendment privilege to the element of willfulness. Under the instructions given, see id. at 573-574, the jury could have convicted the defendant for willful failure to file a return and yet believed that his assertion of fifth amendment privilege was in good faith. Garner would not admit such an inconsistent result. 424 U.S. at 663, 96 S.Ct. at 1187. An incorrect statement of the defendant's sole defense given to the jury by the instructions is plain error, requiring a reversal to assure the defendant a fair trial and a chance to present his defense. Cross v. United States, 347 F.2d 327, 330 (8th Cir. 1965).

The defense of a "good faith" assertion of fifth amendment privilege should be presented to and rejected by a jury before it convicts a defendant under section 7203, see Edelson, 604 F.2d at 236; United States v. Foster, No. 76-3733, slip op. at 3 (9th Cir., Dec. 30, 1977), except in one circumstance. The Supreme Court in United States v. Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927) held that the fifth amendment does not protect a taxpayer from prosecution for willfully refusing to make any return under the federal income tax laws. Id. at 263, 47 S.Ct. at 607. On page eight of its opinion, the panel refers to three circuit court opinions which hold that a claim of fifth amendment privilege is not a defense to a section 7203 prosecution where the defendant's return does not contain any financial information. United States v. Daly, 481 F.2d 28, 29 (8th Cir. 1973); United States v. Johnson, 577 F.2d 1304, 1311 (5th Cir. 1978); United States v. Irwin, 561 F.2d 198, 200 (10th Cir. 1977). The panel's opinion does not hold that the defendant's return contained no financial information. See Farber, at ---- n. 2. Rather, the panel stated that "the taxpayer provided the IRS with insufficient information to calculate tax liability." Id. at 8. It is unclear whether the panel equated insufficient

information with no information and, for that reason, determined that the issue of the good faith of the assertion of fifth amendment privilege need not be placed before the jury. If the panel determined that the financial information on defendant's return was so minimal as to be "tantamount to no filing at all," United States v. Brown, 600 F.2d 248, 251 (10th Cir. 1979), the panel should have held that there was no need to place the fifth amendment defense before the jury. In Brown the Tenth Circuit held that a tax protestor's return claiming $22.50 income was no return at all. Id. at 251-252. In the present case I would hold that a tax protestor's return claiming less than $100 income was no return at all and it was not error for the court to refuse to instruct the jury on the defense of good faith.

FN* The Honorable Elsijane Trimble Roy, United States District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

FN1. The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa.

FN2. Farber's 1974 Form 1040 reported $95.00 in income, as indicated on the Form 1099 from a previous employer. It contained no other financial information relating to income or deductions. On the line requesting information regarding income from sources other than wages, dividends and interest, appellant wrote "object. Fifth Amendment." The 259 page return included such information as the United States Constitution, a copy of the Declaration of Independence, photocopies of newspaper articles, and numerous other items. It was not accepted by the Internal Revenue Service because it lacked sufficient information for a determination of income tax liability.

> Appellant subsequently, in 1977 and 1978, filed two Forms 1040X attempting to amend the 1974 return, but these forms again contained numerous references to appellant's fifth amendment rights and were not accepted by the IRS.

FN3. Form 1040 requires that the taxpayer declare under penalty of perjury that the return is true, correct and complete to the best of his knowledge and belief.

FN4. 26 U.S.C. § 7203 provides in pertinent part:

> Any person required under this title to pay any estimated tax or tax, or required . . . to make a return . . . who willfully fails to pay such estimated tax or tax, (or) make such return . . . shall . . . be guilty of a misdemeanor.

FN5. We recognize that a more limited assertion of erroneous constitutional belief may be a defense. Specifically, a taxpayer's good faith but mistaken belief that the fifth amendment permits him to refuse to answer inquiries on a tax form may be a defense in a § 7203 prosecution. Garner v. United States, supra, 424 U.S. at 663 and 663 n.18, 96 S.Ct. at 1187; United States v. Schiff, supra, 612 F.2d at 78 n.6; United States v. Edelson, supra, 604 F.2d at 234-36; United States v. Johnson, supra, 577 F.2d at 1310-1311; United States v. Pohlman, supra, 522 F.2d at 977 n.2; Cooley v. United States, supra, 501 F.2d at 1253 n.4.

As the trial court instructed, good faith misunderstanding of the requirements of the law, as distinct from disagreement with it, may also be a defense insofar as misunderstanding can negate the element of willfulness required for conviction. 26 U.S.C. § 7203; United States v. Karsky, 610 F.2d 548, 550 n.4 (8th Cir. 1979), cert. denied, --- U.S. ----, 100 S.Ct. 1058, 62 L.Ed.2d 781 (1980); United States v. Pohlman, supra, 522 F.2d at 976.

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## 40.00 *TAX PROTESTORS*

## 40.00 *TAX PROTESTORS*

### 40.01 *GENERALLY*

Tax protestors have developed numerous schemes to evade their income taxes and frustrate the Internal Revenue Service under the guise of constitutional and other objections to the tax laws. These schemes range from a simple failure to file to use of warehouse banks to conceal financial transactions and harassment of government officials through Form 1099 schemes. These schemes give rise to charges under all the criminal tax statutes. **1** Thus, this section should be read in conjunction with those sections of the ***Manual*** treating the various substantive offenses in detail. *See* Sections 8.00 through 29.00, *supra.*

### 40.02 *FAILURE TO FILE -- 26 U.S.C. § 7203*

#### 40.02[1] ***Generally***

The most common method used by tax protestors is to simply not file a return, or to file a return that reports no financial information and may espouse tax protest rhetoric. Generally, withholding of income taxes by employers is also prevented. *See* Section 10.00, *supra.*

#### 40.02[2] ***What Constitutes a Return***

A Form 1040 must contain information relating to the taxpayer's income from which a tax can be computed to satisfy the requirements of the Internal Revenue Code. ***United States v. Porth***, 426 F.2d 519, 523 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970); ***United States v. Daly***, 481 F.2d 28, 29 (8th Cir.), *cert. denied*, 414 U.S. 1064 (1973). The Forms 1040 filed in ***Porth*** and ***Daly*** contained only the taxpayers' names and addresses, and references to various constitutional provisions which assertedly excused them from filing tax returns.

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**1** The Tax Division maintains a "Criminal Tax Protest Case Issues List" which tracks recurring issues in these prosecutions. The list is updated annually and contains more than 40 issues. The list is available on Juris in the Protest file within the tax file group. Prosecutors interested in obtaining a copy of the protest list should contact the Criminal Appeals and Tax Enforcement Policy Section of the Tax Division at (202) 514-5396.

Failure to file convictions in both cases were upheld, with the court in ***Porth*** saying:

> The return filed was completely devoid of information concerning his income as required by the regulations of the IRS. A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner.

***Porth***, 426 F.2d at 523 (citations omitted). *See also* ***United States v. Schiff***, 612 F.2d 73, 77 (2d Cir. 1979); ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir.), *cert. denied*, 457 U.S. 1125 (1982) (Form 1040 reflected only the amount withheld from earnings and no other dollar figure, with refund claimed); ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984); ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Green***, 757 F.2d 116, 121 (7th Cir. 1985); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Grabinski***, 727 F.2d 681, 686 (8th Cir. 1984); ***United States v. Kimball***, 925 F.2d 356, 357 (9th Cir. 1991) (*en banc*) (asterisks and no signature not a return); ***United States v. Crowhurst***, 629 F.2d 1297, 1300 (9th Cir.), *cert. denied*, 449 U.S. 1021 (1980); ***United States v. Stillhammer***, 706 F.2d 1072, 1075 (10th Cir. 1983) ("the test is whether the defendants' returns themselves furnished the required information for the IRS to make the computation and assessment, not whether the information was available elsewhere"); ***United States v. Vance***, 730 F.2d 736, 738 (11th Cir. 1984).

Forms 1040 which report only zeroes are not valid returns. ***United States v. Smith***, 618 F.2d 280, 281 (5th Cir.), *cert. denied*, 449 U.S. 868 (1980); ***Mosel***, 738 F.2d 157; ***United States v. Moore***, 627 F.2d 830, 835 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) ("when apparent that the defendant is not attempting to file forms accurately disclosing his income, he may be charged with failure to file a return"); ***United States v. Rickman***, 638 F.2d 182, 184 (10th Cir. 1980). *But* ***United States v. Long***, 618 F.2d 74, 75 (9th Cir. 1980) (zeros on Long's tax forms, unlike blanks, constituted information as to income from which a tax could be computed just as if the return had contained other numbers).

Similarly, courts have held that tax forms reporting nothing or small amounts in the blanks provided for income and expenses do not constitute legal returns within the meaning of the

*denied*, 480 U.S. 950 (1987); ***United States v. DeTar***, 832 F.2d 1110, 1113 (9th Cir. 1987); and cases cited above.

### 40.05 *SUBSCRIBING TO A FALSE RETURN -- 26 U.S.C. § 7206(1)*

False return charges, unlike evasion charges, do not require proof of a tax deficiency. The government may choose to prosecute a tax protestor under section 7206(1), rather than section 7201, when, for example, the evidence does not establish a substantial tax deficiency beyond a reasonable doubt, but the protestor's actions warrant a felony prosecution. Such a situation may exist in the charitable contribution, fifty percent deduction cases discussed in Section 40.08, *infra*. For a discussion of section 7206(1), *see* Section 12.00, *supra*.

### 40.06 *FALSE STATEMENT OR DOCUMENT -- 18 U.S.C. § 1001*

A violation of 18 U.S.C. § 1001 can be an appropriate substitute charge for 26 U.S.C. § 7206(1) when the false document in question lacks the required signature or the document is not made under penalties of perjury. A common scenario for such an application of section 1001 is where the protestor files an unsigned income tax return. Section 1001 also can be used when the individual has lied to the agents during the investigation. For a discussion of section 1001, *see* Section 24.00, *supra*.

### 40.07 *AIDING AND ASSISTING PREPARATION OF FALSE RETURNS -- 26 U.S.C. § 7206(2)*

Tax protestors who cause third parties to prepare and file false returns may be charged under 26 U.S.C. § 7206(2). *See* ***United States v. Holecek***, 739 F.2d 331 (8th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985) (return preparation); ***United States v. Kellogg***, 955 F.2d 1244, 1249 (9th Cir. 1992) (defendant assisted in preparation of returns filed by others); ***United States v. Condo***, 741 F.2d 238, 240 (9th Cir. 1984), *cert. denied*, 469 U.S. 1164 (1985) (preparation and mailing of false Forms W-4); ***United States v. Erickson***, 676 F.2d 408 (10th Cir.), *cert. denied*, 459 U.S. 853 (1982).

Providing advice and material to taxpayers, who in turn file false returns, is sufficient to sustain a section 7206(2) conviction. *See* ***United States v. Kelley***, 769 F.2d 215 (4th Cir. 1985).

## 40.11 *WILLFULNESS*

### 40.11[1] *Generally*

Willfulness in protestor cases involves the same underlying principles as it does in any criminal tax case. Accordingly, reference should be made to the discussion of willfulness in the Sections of the ***Manual*** pertaining to the other various tax offenses. *See* Section 8.06, *supra.*

Willfulness is the voluntary, intentional violation of a known legal duty. ***Cheek v. United States***, 498 U.S. 192, 201 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 360 (1973); ***United States v. Johnson***, 893 F.2d 451, 453 (1st Cir. 1990); ***United States v. Schiff***, 801 F.2d 108, 110 (2d Cir. 1986), *cert. denied*, 480 U.S. 272 (1987); ***United States v. Snyder***, 766 F.2d 167, 170-71 (4th Cir. 1985); ***United States v. Masat***, 948 F.2d 923, 931 (5th Cir. 1991); ***United States v. Sassak***, 881 F.2d 276, 280 (6th Cir. 1989); ***United States v. Benson***, 941 F.2d 598, 613 (7th Cir. 1991); ***United States v. Dykstra***, 991 F.2d 450, 453 (8th Cir. 1993); ***United States v. Kellogg***, 955 F.2d 1244, 1248 (9th Cir. 1992); ***United States v. Willie***, 941 F.2d 1384, 1392 (10th Cir. 1991). It has the same meaning in both the felony and misdemeanor statutes of the Internal Revenue Code. *See* Section 8.06[1], *supra.*

Proof of willfulness may be based totally on circumstantial evidence. ***United States v. Schiff***, 612 F.2d 73, 77-78 (2d Cir. 1979); ***Hellman v. United States*** 339 F.2d 36, 38 (5th Cir. 1964); ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Fingado***, 934 F.2d 1163, 1167 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991). Because proof of willfulness usually must be established by circumstantial evidence:

> [T]rial courts should follow a liberal policy in admitting evidence directed towards establishing the defendant's state of mind. No evidence which bears on this issue should be excluded unless it interjects tangential and confusing elements which clearly outweigh its relevance.

***United States v. Collorafi***, 876 F.2d 303, 305 (2d Cir. 1989).

Circumstantial evidence, in protestor cases, held competent to establish willfulness includes:

1. Tax protest activities and philosophies. ***United States v. Turano***, 802 F.2d 10, 11-12 (lst Cir. 1986); ***United States v. Eargle***, 921 F.2d 56, 58 (5th Cir. 1991); ***United States v. Grosshans***, 821 F.2d 1247, 1252 (6th Cir. 1987);

2. Filing of blatantly false W-4 forms in one year relevant to show willfulness and absence of mistake in filing false Schedule C forms in earlier years. ***United States v. Johnson***, 893 F.2d 451, 453 (1st Cir. 1990);

3. Prior taxpaying history, such as the prior filing of valid tax returns followed by the filing of a protest return and a letter from the Internal Revenue Service telling the defendant that his return "did not comply with tax laws and might subject him to criminal penalties." ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Daniel***, 956 F.2d 540, 543 (6th Cir. 1992); ***United States v. DeClue***, 899 F.2d 1465 (6th Cir. 1990); ***United States v. Green***, 757 F.2d 116, 123-24 (7th Cir. 1985); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Poschwatta***, 829 F.2d 1477, 1483 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988);

4. Subsequent taxpaying conduct. ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Richards***, 723 F.2d 646, 649 (8th Cir. 1983);

5. Filing false Forms W-4. ***United States v. Connor***, 898 F.2d 942, 945 (3d Cir. 1990), *cert. denied*, 110 S. Ct. 3284 (1990); ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Carpenter***, 776 F.2d 1291, 1295 (5th Cir. 1985); ***United States v. Ferguson***, 793 F.2d 828, 831 (7th Cir.), *cert. denied*, 479 U.S. 933 (1986); ***United States v. Schmitt***, 794 F.2d 555, 560 (10th Cir. 1986);

6. The amount of a defendant's gross income. ***United States v. Payne***, 800 F.2d 227 (10th Cir. 1986) [*i.e.*, the higher the defendant's gross income, the less

likely the defendant was unaware of the filing requirement and the more likely the defendant's failure was intentional rather than inadvertent];

7. Proof that knowledgeable persons warned the defendant of tax improprieties. ***United States v. Collorafi***, 876 F.2d 303, 305 (2d Cir. 1989); ***United States v. Dack***, 987 F.2d 1282, 1285 (7th Cir. 1993).

40.11[2] ***Good Faith Belief***

A defendant's conduct is not willful if the jury finds that the defendant's conduct resulted from "ignorance of the law or a claim that because of a misunderstanding of the law, he had a good faith belief that he was not violating any of the provisions of the tax laws." ***Cheek v. United States***, 498 U.S. 192, 202 (1991). Cheek claimed that he did not file tax returns because he believed that he was not a taxpayer within the tax laws, that wages are not income, that the Sixteenth Amendment did not authorize the taxation of individuals and that the Sixteenth Amendment was unenforceable. ***Cheek***, 498 U.S. at 195. The Court explained that:

> In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, *whether or not* the claimed belief is objectively reasonable.

***Cheek***, 498 U.S. at 202 (emphasis added). The Supreme Court held that the trial court's jury instructions that Cheek's good faith beliefs or misunderstanding of the law would have to be objectively reasonable to negate willfulness were erroneous with reference to Cheek's non-constitutional arguments, stating:

> It was therefore error to instruct the jury to disregard evidence of Cheek's understanding that, within the meaning of the tax laws, he was not a person required to file a return or pay income taxes and that wages are not taxable income, as incredible as such misunderstandings of and beliefs about the law might be.

***Cheek***, 498 U.S. at 203.

The trial court did not err, however, in instructing the jury not to consider Cheek's claims that the tax laws are unconstitutional:

> We thus hold that in a case like this, a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness, need not be heard by the jury, and if they are, an instruction to disregard them would be proper. For this purpose, it makes no difference whether the claims of invalidity are frivolous or have substance.

***Cheek***, 498 U.S. at 206. *See also* ***United States v. Saussy***, 802 F.2d 849, 853 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); ***United States v. Kraeger***, 711 F.2d 6, 7 (2d Cir. 1983); ***United States v. Burton***, 737 F.2d 439, 442 (5th Cir. 1984); ***United States v. Latham***, 754 F.2d 747, 751 (7th Cir. 1985); ***United States v. Moore***, 627 F.2d 830, 833 n.l (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); ***United States v. Karsky***, 610 F.2d 548, 550 (8th Cir. 1979), *cert. denied*, 444 U.S. 1092 (1980); ***United States v. Mueller***, 778 F.2d 539, 541 (9th Cir. 1985); ***United States v. Payne***, 800 F.2d 227 (10th Cir. 1986); ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir.), *cert. denied*, 459 U.S. 973 (1982).

The ***Cheek*** Court stated that a jury considering a good faith belief claim:

> would be free to consider any admissible evidence from any source showing that . . . [the taxpayer] was aware of his . . . [duties under the tax laws], including evidence showing his awareness of the Code or regulations, of court decisions rejecting his interpretations of the tax law, of authoritative rulings of the Internal Revenue Service, or any contents of the personal income tax return forms and accompanying instructions . . . .

***Cheek***, 498 U.S. at 202.

In determining whether a subjective good faith belief was held, a jury should not be precluded from considering the reasonableness of the taxpayer's interpretation of the law.

> [T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

***Cheek***, 498 U.S. at 203-04. After remand, the Seventh Circuit upheld Cheek's conviction, ***United States v. Cheek***, 3 F.3d 1057 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1055 (1994), finding that the trial court's instruction that the jury could "consider whether the defendant's stated belief about the tax statutes was reasonable as a factor in deciding whether he held that belief in good-faith" was proper. ***Cheek***, 3 F.3d at 1063. *See also* ***United States v. Becker***, 965 F.2d 383, 388 (7th Cir. 1992), *cert. denied*, 112 S. Ct. 1411 (1993); ***United States v. Powell***, 955 F.2d 1206, 1212 (9th Cir. 1992) (jury may consider "the reasonableness of the interpretation of the law in weighing the credibility" of defendants' subjective belief that they were not required to file tax returns).

Tax protestors often claim that their beliefs that they are not required to file returns or pay taxes are based upon a careful study of legal decisions, statutes, legal treatises, and the like, and seek to have such materials admitted into evidence. *See, e.g.*, ***United States v. Bonneau***, 970 F.2d 929, 931 (1st Cir. 1992); ***United States v. Willie***, 941 F.2d 1384, 1391 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1200 (1992). However, before such materials may be admitted, the taxpayer must lay a sufficient foundation of reliance. Nevertheless, the laying of such a foundation does not guarantee admissibility. Although legal and tax protestor materials upon which the defendant claims to have relied may be relevant to a good faith defense, there are competing interests which militate against the unrestricted admission of this type of evidence. The admission of such materials may confuse the jury as to the law, *see* ***United States v. Barnett***, 945 F.2d 1296, 1301 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1487 (1992); ***Willie***, 941 F.2d at 1395-97; ***United States v. Kraeger***, 711 F.2d 6, 7-8 (2d Cir. 1983); ***United States v. Stafford***, 983 F.2d 25, 28 n.14 (5th Cir. 1993); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Payne***, 978 F.2d 1177, 1181-82 (10th Cir. 1992), *cert. denied*, 112 S. Ct. 2441 (1993), and may assist a defendant who wishes to undermine the authority of the court and turn his trial into a tax protestor circus, *see* ***Willie***, 941 F.2d at 1395 & n.8. The exclusion of such materials from evidence does not prevent a defendant from conveying the core of his defense to the jury: the defendant may still testify as to his asserted beliefs and how he supposedly arrived at them. *See* ***Barnett***, 945 F.2d at 1301; ***United States v. Hairston***, 819 F.2d

> express beliefs and opinions; it does not give him the right to exclude beliefs and opinions from a jury properly concerned with his motivations for failing to file.

***Turano***, 802 F.2d at 12.

### 40.13 *FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION*

Tax protestors often submit tax returns on which they refuse to provide any financial information, asserting their Fifth Amendment right against self-incrimination. In ***United States v. Sullivan***, 274 U.S. 259 (1927), the Court held that the privilege against compulsory self-incrimination is not a defense to prosecution for failing to file a return at all. The Court indicated, however, that the privilege could be claimed against specific disclosures sought on a return, saying:

> If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all.

***Sullivan***, 274 U.S. at 263. *See also* ***Garner v. United States***, 424 U.S. 648, 650 (1976).

***Sullivan*** is frequently cited for the proposition that a taxpayer may not use the Fifth Amendment to justify the failure to file any return at all. *See, e.g.*, ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979); ***United States v. Wunder***, 919 F.2d 34, 37 (6th Cir. 1990); ***United States v. Dack***, 987 F.2d 1282, 1284 (7th Cir. 1993); ***United States v. Poschwatta***, 829 F.2d 1477, 1482 n. 3 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988); ***United States v. Leidendeker***, 779 F.2d 1417, 1418 (9th Cir. 1986); ***United States v. Stillhammer***, 706 F.2d 1072, 1076-77 (10th Cir. 1983); ***United States v. Lawson***, 670 F.2d 923, 927 (10th Cir. 1982) (cases cited); ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir.), *cert. denied*, 459 U.S. 973 (1982).

A taxpayer may refuse to answer specific questions or disclose specific information, if such disclosure would be incriminating. The courts have uniformly held, however, that disclosure of the type of routine financial information required on a tax return does not, in itself, incriminate an individual and does not violate one's Fifth Amendment right against self-incrimination. ***United States v. Schiff***, 612 F.2d 73, 77-83 (2d Cir. 1979); ***United States v. Edelson***, 604 F.2d

232, 234 (3d Cir. 1979); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir.), *cert. denied*, 457 U.S. 1125 (1982); ***United States v. Heise***, 709 F.2d 449, 451 (6th Cir.), *cert. denied*, 464 U.S. 918 (1983); ***United States v. Warner***, 830 F.2d 651, 653-54 (7th Cir. 1987); ***United States v. Drefke***, 707 F.2d 978, 982-83 (8th Cir.), *cert. denied*, 464 U.S. 942 (1983); ***United States v. Neff***, 615 F.2d 1235, 1238-41 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980); ***United States v. Irwin***, 561 F.2d 198, 201 (10th Cir.), *cert. denied*, 434 U.S. 1012 (1977). *See also* ***United States v. Green***, 757 F.2d 116 n.7 (7th Cir. 1985) (affirming use of jury instruction that reporting income from legitimate activities would not fall within the Fifth Amendment privilege); ***United States v. Saussy***, 802 F.2d 849, 854-55 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); ***United States v. Carlson***, 617 F.2d 518 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980) (no valid Fifth Amendment privilege excusing failure to file Form 1040 to cover up false Form W-4 previously filed by defendant); ***United States v. Lawson***, 670 F.2d 923, 927 (10th Cir. 1982).

A Fifth Amendment claim, however, may be asserted as to specific line items on tax forms. ***United States v. Sullivan***, 274 U.S. at 263; ***Edelson***, 604 F.2d at 234; ***United States v. Flitcraft***, 863 F.2d 342, 344 (5th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989); ***United States v. Shivers***, 788 F.2d 1046, 1049 (5th Cir. 1986) (amount of taxpayer's income not privileged though source may be); ***Heise***, 709 F.2d at 450-51; ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Turk***, 722 F.2d 1439, 1441 (9th Cir. 1983), *cert. denied*, 469 U.S. 818 (1984); ***United States v. Harting***, 879 F.2d 765, 770 (10th Cir. 1989).

The determination that the defendant's claim to the Fifth Amendment privilege against self-incrimination was invalid does not, however, prohibit the defendant from offering evidence to the effect that there was a good faith belief that he or she could properly assert the privilege. Such a good faith claim, even if erroneous, is a valid defense to the element of willfulness if believed by the jury. ***Shivers***, 788 F.2d at 1048 n.1; ***United States v. Saussy***, 802 F.2d 849, 854-855 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); ***Poschwatta***, 829 F.2d at 1482 n. 3; ***United States v. Goetz***, 746 F.2d 705, 710 (11th Cir. 1982).

Whether the defendant has validly exercised the privilege against self-incrimination is a question of law for the court. ***Turk***, 722 F.2d at 1440. Yet, whether the defendant has asserted

the privilege in good faith, which could entitle the defendant to an acquittal on failure to file charges, is a question of fact for the jury to resolve. *Id.*; ***United States v. Smith***, 735 F.2d 1196, 1198 (9th Cir.), *cert. denied*, 469 U.S. 1076 (1984).

Returns containing little or no financial information from which a tax could be computed are sometimes referred to as "Fifth Amendment returns." The filing of a so-called Fifth Amendment return may constitute an affirmative act for the purposes of proving evasion. *See* ***United States v. Waldeck***, 909 F.2d 555, 559 (1st Cir. 1990) ("filing of returns containing only name, a signature, a figure for federal income tax withheld, asterisks at numbered lines in lieu of information and the statement '[t]his means specific exception is made under the Fifth Amendment, U.S. Constitution,'" is an affirmative act of evasion); ***United States v. DeClue***, 899 F.2d 1465, 1471 (6th Cir. 1990) (filing of return with no financial information and on which was typed: "object: self-incrimination" is affirmative act of evasion).

## 40.14 *MISCELLANEOUS FRIVOLOUS DEFENSES*

### 40.14[1] *Wages Are Not Income*

A common defense raised by protestors is that salaries and wages are not "income" within the meaning of the Sixteenth Amendment, which grants Congress the power "to lay and collect taxes on incomes, from whatever source derived . . ."

The courts have uniformly interpreted the term "income" in its everyday usage to include wages and salaries. ***United States v. Connor***, 898 F.2d 942, 943-44 (3d Cir.), *cert. denied*, 497 U.S. 1029 (1990); ***United States v. Burton,*** 737 F.2d 439, 441 (5th Cir. 1984); ***United States v. Sassak***, 881 F.2d 276, 281 (6th Cir. 1989); ***United States v. Becker***, 965 F.2d 383, 389 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993); ***United States v. Sloan***, 939 F.2d 499, 500 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 940 (1992); ***United States v. Richards***, 723 F.2d 646, 648 (8th Cir. 1983); ***United States v. Buras***, 633 F.2d 1356, 1361 (9th Cir. 1980); ***United States v. Tedder***, 787 F.2d 540, 542 n.3 (10th Cir. 1986). *See* ***Jones v. United States***, 551 F. Supp. 578, 580 (N.D.N.Y. 1982), for a list of cases holding that wages are included in gross income.

payment of taxes is "voluntary." *See* ***United States v. Dunkel***, 927 F.2d 955, 956 (7th Cir. 1991).

40.14[4] ***Duty of IRS to Prepare Returns***

Protestors have argued that 26 U.S.C. § 6020(b)(1) [7] obligates the Internal Revenue Service to prepare a tax return for an individual who does not file before or in lieu of criminal prosecution. There is no merit to this claim. This provision merely provides the Internal Revenue Service with a civil mechanism for assessing the tax liability of a taxpayer who has failed to file a return. It does not excuse the taxpayer from criminal liability for that failure. ***United States v. Harrison***, 30 A.F.T.R.2d 72-5367, 5368 (E.D.N.Y.), *aff'd*, 486 F.2d 1397 (2d Cir. 1972), *cert. denied*, 411 U.S. 965 (1973); ***United States v. Barnett***, 945 F.2d 1296, 1300 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1487 (1992); ***United States v. Millican***, 600 F.2d 273, 278 (5th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); ***United States v. Cheek***, 3 F.3d 1057 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1055 (1994); ***United States v. Verkuilen***, 690 F.2d 648, 657 (7th Cir. 1982); ***United States v. Poschwatta***, 829 F.2d 1477, 1483 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988).

When a defendant raises this argument during trial, the court may properly instruct the jury that while section 6020(b) "authorizes the Secretary to file for a taxpayer, the statute does not require such a filing, nor does it relieve the taxpayer of the duty to file." ***United States v. Stafford***, 983 F.2d 25, 27 (5th Cir. 1993); *accord* ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992). However, an instruction pertaining to section 6020(b) "must not be framed in a way that distracts the jury from its duty to consider a defendant's good-faith defense." ***Powell***, 955 F.2d at 1213.

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7 Section 6020(b)(1) of the Code (Title 26) provides that if a person fails to make a return required by law, then the Internal Revenue Service "shall" make a return based on information available to it.

40.14[7] ***Ratification of Sixteenth Amendment***

The contention that the Sixteenth Amendment was never legally ratified and that the federal government does not, therefore, have the authority to collect an income tax without apportionment has been flatly rejected. ***United States v. Sitka***, 845 F.2d 43, 44-47 (2d Cir.), *cert. denied*, 488 U.S. 827 (1988); ***United States v. Benson***, 941 F.2d 598, 607 (7th Cir. 1991); ***In re Becraft***, 885 F.2d 547, 549 (9th Cir. 1989); ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990); ***United States v. Ward***, 833 F.2d 1538, 1539 (11th Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). As stated in ***United States v. House***, 617 F. Supp. 237 (W.D. Mich. 1985):

> The sixteenth amendment and the tax laws passed pursuant to it have been followed by the courts for over half a century. They represent the recognized law of the land.

***House***, 617 F. Supp. at 240.

40.14[8] ***Violation of the Privacy Act***

Circuit courts also have rejected Privacy Act challenges to the IRS Form 1040 instruction booklet and to Forms W-4. ***United States v. Dack***, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984) (not error to refuse to dismiss for failure to publish, pursuant to Privacy Act, notice of specific criminal penalty which might be imposed); ***United States v. Bressler***, 772 F.2d 287, 292 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986) ("the IRS notice . . . adequately and clearly informs taxpayers that filing is mandatory"); ***United States v. Wilber***, 696 F.2d 79, 80 (8th Cir. 1982) ("the Privacy Act does not require notice of a specific criminal penalty which might be imposed on the errant taxpayer"); ***United States v. Annunziato***, 643 F.2d 676, 678 (9th Cir.), *cert. denied*, 452 U.S. 966 (1981) (notice in Form W-4 instructions adequate); ***United States v. Rickman,*** 638 F.2d 182, 183 (10th Cir. 1980) (Form 1040 instructions adequate).

40.14[9] ***Defendant Not A "Person" or "Citizen"***

In a section 7203 prosecution, it has been argued that the defendant was not a "person" within the meaning of the statute, which imposes an obligation to file on "any person" meeting

the necessary requirements. This argument has been dismissed as frivolous. ***United States v. Karlin***, 785 F.2d 90, 91 (3d Cir. 1986), *cert. denied*, 480 U.S. 907 (1987). A similar argument has been rejected with respect to the term "individual" in section 7201 cases. *See* ***United States v. Studley***, 783 F.2d 934, 937 (9th Cir. 1986); ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2022 (1991); ***United States v. Ward***, 833 F.2d 1538, 1539 (11th Cir. 1987). "All individuals, natural or unnatural, must pay federal income tax on their wages." ***Lovell v. United States***, 755 F.2d 517, 519 (7th Cir. 1984).

Protestors' "rejection" of citizenship in the United States in favor of state citizenship also does not relieve them of income tax requirements. *See* ***United States v. Masat***, 948 F.2d 923, 934 (5th Cir. 1991); ***United States v. Price***, 798 F.2d 111, 113 (5th Cir. 1986) (citizens of the State of Texas are subject to the provisions of the Internal Revenue Code); ***United States v. Sloan***, 939 F.2d 499, 500-01 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 940 (1992) ("strange argument" rejected); ***United States v. Silevan***, 985 F.2d 962, 970 (8th Cir. 1993) (rejecting as "plainly frivolous" defendant's argument that he is not a "federal citizen").

### 40.14[10] *Federal Reserve Notes are Not Legal Tender*

Some protestors have argued that because their wages were paid in Federal Reserve Notes, they need not pay any taxes on those wages. Their argument, which has been uniformly rejected, is that the notes are not valid "currency" or legal tender, and thus, those who possess them cannot be subject to a tax on them. *See* ***United States v. Martin***, 790 F.2d 1215, 1217 (5th Cir.), *cert. denied*, 479 U.S. 868 (1986); ***United States v. Buckner***, 830 F.2d 102, 103 (7th Cir. 1987); ***United States v. Brodie***, 858 F.2d 492, 498 (9th Cir. 1988); ***United States v. Condo***, 741 F.2d 238, 239 (9th Cir. 1984).

### 40.14[11] *Tax Protest Against Government Spending*

A protestor who contends that his refusal to pay taxes or file returns is justified by his disagreement with government policies or spending plans is not entitled to a jury instruction on his theories. In fact, arguments challenging "the constitutionality of or validity of the tax laws are precluded because they are necessarily premised on a defendant's full knowledge of the law

> attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report."

***Cheek***, 3 F.3d at 1061 (citing ***Liss v. United States***, 915 F.2d 287, 291 (7th Cir. 1990)). The Seventh Circuit held that Cheek was not entitled to the instruction because he did not seek advice on possible future conduct, but "merely continued on a course of illegal conduct begun prior to contacting counsel". ***Cheek***, 3 F.3d at 1062. Cheek did not make a full disclosure to his attorney nor follow his attorney's advice that he should obey the tax laws until told by a court that the laws were not valid. ***Cheek***, 3 F.3d at 1062.

40.14[13] ***Rule 404(b) Evidence: Proof of Willfulness***

Prior or subsequent bad acts of the defendant are often admissible to prove willfulness. Such evidence will be relevant to the issue of willfulness where, for instance, the defendant claims that he relied on the advice of others, in good faith, in filing false returns and did not know his conduct was improper. ***United States v. Johnson***, 893 F.2d 451, 453-54 (1st Cir. 1990) (evidence that defendant submitted Form W-4 in 1987 claiming more allowances than he was entitled to and did not file a return in 1987, relevant to show willfulness and absence of mistake in filing false Schedule C forms from 1982 to 1986). A defendant's attendance at protestor meetings has been held admissible to show that she knew what she was doing and knew she had an obligation to pay taxes. ***United States v. Grosshans***, 821 F.2d 1247, 1253 (6th Cir.), *cert. denied*, 484 U.S. 987 (1987).

When willfulness is an issue in a section 7203 case, prior filings may be relevant not just to show defendant's knowledge of filing requirements, but also to demonstrate a single scheme or common pattern of illegal conduct. ***United States v. Birkenstock***, 838 F.2d 1026, 1028 (7th Cir. 1987); *see also* ***United States v. Fingado***, 934 F.2d 1163, 1165 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991). A pattern is relevant because it shows that the failure to file was not due to inadvertence, mistake, or confusion. ***Birkenstock***, 838 F.2d at 1028. Therefore, evidence of a defendant's prior and subsequent acts is probative of willfulness and should be admitted as long as it is not unduly prejudicial. *See* ***United States v. McKee***, 942 F.2d 477, 480 (8th Cir. 1990)

(citing cases); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir.), *cert. denied*, 112 S. Ct. 58 (1991) (evidence that defendant had sent tax protestor materials to the IRS and had failed to comply with tax laws in prior and subsequent years probative of willfulness). Prior tax offense convictions of the defendant may also be admissible. ***United States v. Poschwatta***, 829 F.2d 1477, 1484 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988).

40.14[14] ***Probable Cause Hearings***

The government has the option, in misdemeanor cases, to charge the defendant by filing a criminal information, and issuing the defendant a summons instead of arresting him via a warrant. Protestors have argued, based on Fed. R. Crim. P. 9 and 4(a) requiring that a warrant shall not issue without probable cause, that use of a criminal summons violates their rights. The courts, however, have held to the contrary. *See* ***United States v. Saussy***, 802 F.2d 849, 851-52 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); ***United States v. Birkenstock***, 823 F.2d 1026, 1030-31 (7th Cir. 1987); ***United States v. Dawes***, 874 F.2d 746, 750 (10th Cir. 1989); ***United States v. Bohrer***, 807 F.2d 159, 161 (10th Cir. 1986).

40.14[15] ***Costs of Prosecution***

The imposition of the costs of prosecution is mandated by most of the Title 26 tax offenses. *See* United States Attorneys' Manual (USAM) 6-4.350. The imposition of costs, as authorized, does not constitute cruel and unusual punishment. ***United States v. Dawes***, 874 F.2d 746, 751 (10th Cir. 1989). The judgment of conviction can be amended to include the costs of prosecution even after the defendant has filed a notice of appeal. ***United States v. Dennis***, 902 F.2d 591, 592-93 (7th Cir.), *cert. denied*, 498 U.S. 876 (1990).

The criminal tax statutes do not define "costs" so courts regularly look to 28 U.S.C. § 1920 for guidance on what expenses should be included. ***United States v. Dunkel***, 900 F.2d 105, 108 (7th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 747 (1991). The expenses of transportation and subsistence for witnesses employed by the United States, including the case agent, may be included as part of "costs." ***Dunkel***, 900 F.2d at 108.

40.14[18] ***Conditions of Probation***

Protestors frequently challenge the conditions of probation set by the court. The imposition of those conditions is reviewable for abuse of discretion. ***United States v. Schiff***, 876 F.2d 272, 275 (2d Cir. 1989). Tax offenders are generally required to file any delinquent returns and keep current with their taxes as a condition of probation. ***Schiff***, 876 F.2d at 275; ***United States v. Warner***, 830 F.2d 651, 653 (7th Cir. 1987); ***United States v. Ramsey***, 992 F.2d 831, 833 (8th Cir. 1993); ***United States v. Shields***, 751 F.2d 247, 248 (8th Cir. 1984); ***United States v. Wolters***, 656 F.2d 523, 524-25 (9th Cir. 1981).

Discretionary conditions of probation must, however, be "reasonably related" to the goals of sentencing and involve only those deprivations of liberty and property that are reasonably necessary for such purposes. ***United States v. Stafford***, 983 F.2d 25, 28 (5th Cir. 1993) (citing 18 U.S.C. § 3563(b)). In ***Stafford***, the Fifth Circuit invalidated the requirement that the defendant give his probation officer access to "any financial information." ***Stafford***, 983 F.2d at 28. The court stated that:

> To the extent the conditions apply to tax years other than those which are the subject of this litigation, and for which Stafford may be held accountable during the period of probation, the broad obligation to provide access to *any* requested financial information interferes with Stafford's fourth and fifth amendment rights.

***Stafford***, 983 F.2d at 28.

The Fifth Amendment's privilege against self-incrimination will not shield a defendant from being required to file returns unless the defendant claims that the filing's contents would incriminate him by disclosing illegal income sources. ***Warner***, 830 F.2d at 655. "A taxpayer's fear of prosecution must arise from the return disclosing criminal activities independent of the return filing process itself." ***Warner***, 830 F.2d at 656; *see also* ***Schiff***, 876 F.2d at 275-76.

40.14[19] ***26 U.S.C. § 6103(h)(5) Juror Audit Information***

Under 26 U.S.C. § 6103(h)(5), an attorney from the Department of Justice involved in "any judicial proceeding" and "any person (or his legal representative) who is a party to such proceeding" may obtain from the Secretary of the Treasury information as to whether any

Tax Division policy is to oppose defense motions for early release of the jury list and continuance of trial. Instead, the government should propose *voir dire* questions to determine whether any of the prospective jurors have been the subject of an IRS audit or investigation. ***Peterson Memorandum to United States Attorneys dated September 14, 1989***, pp. 3-4. *See* Section 3.00, *supra*. However, prosecutors in the Ninth Circuit must be mindful of the case law in their circuit.

Section 6103(h)(5) requests are governed by the Internal Revenue Manual Disclosure of Official Information Handbook section 1272(22)70 *et seq*. and handled by the IRS disclosure officer in each district in coordination with the Clerk of Court. Each judicial district has established its own procedures for responding to these burdensome requests. In general, the government, in opposing defendants' motions for early disclosure or continuance, will attach an affidavit of the IRS disclosure officer estimating the time required to obtain tax information regarding each member of the jury panel. **8**

As a practical matter, the government should try to convince the defendant to stipulate to only requiring the IRS to search records for the current and five preceding years, otherwise the government will have to search microfilm records. In some districts, the court will order the Clerk of Court to mail a list of potential jurors, their social security numbers, and addresses, to the IRS disclosure officer to conduct a 6103(h)(5) search. The Court will order the Disclosure Officer to mail the response (yes or no) to the clerk (omitting the social security numbers and addresses), copies of which will be provided to the defendant and United States on the morning of trial. In the likely event that the IRS has been unable to obtain information as to every potential venireperson, the prosecutor should make a record of substantial compliance by having the Disclosure Officer prepare an affidavit describing the government's search and likelihood of

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**8** A search of tax information regarding the current and five preceding years for 100 prospective jurors will generally take 5-10 business days, if the jurors' social security numbers and addresses are provided. However, information regarding some of the jurors may take longer to obtain if the juror has moved or remarried. A microfilm search of records from 1964 to the five years preceding the current year could take up to three months to perform.

obtaining any additional information, or have the Disclosure Officer available for a hearing on the IRS's compliance, and by proposing relevant voir dire questions.

40.14[20] ***Paperwork Reduction Act Defense***

The ***Paperwork Reduction Act of 1980***, 44 U.S.C. § 3501 *et seq.* ("PRA"), was enacted to limit federal agencies' information requests that burden the public. The "Public Protection" provision of the PRA states that no person "shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved does not display a current control number assigned by the Office of Management and Budget [OMB] Director." 44 U.S.C. § 3512.

Protestors claim that they cannot be penalized for failing to file Form 1040 because the instructions and regulations associated with the Form 1040 do not display any OMB control number. This argument has been uniformly rejected on different theories. Some courts have simply noted that the PRA applies to the forms themselves, not to the instruction booklets, and since the Form 1040 does have a control number, there is no PRA violation. *See* ***United States v. Wunder***, 919 F.2d 34, 38 (6th Cir. 1990); ***Salberg v. United States***, 969 F.2d 379, 383-84 (7th Cir. 1992); ***United States v. Holden***, 963 F.2d 1114, 1116 (8th Cir.), *cert. denied*, 113 S. Ct. 419 (1992); ***United States v. Dawes***, 951 F.2d 1189, 1191-93 (10th Cir. 1991). Other courts have held that Congress created the duty to file returns in 26 U.S.C. § 6012(a) and "Congress did not enact the PRA's public protection provision to allow OMB to abrogate any duty imposed by Congress." ***United States v. Neff***, 954 F.2d 698, 699 (11th Cir. 1992). *See also* ***United States v. Kerwin***, 945 F.2d 92 (5th Cir. 1991) (*per curiam*) (defendant was convicted under statutory requirement that he file return and since statute is not an information request, there is no violation of the PRA); ***United States v. Bentson***, 947 F.2d 1353, 1355 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2310 (1992) (defendant convicted of violating a statute requiring him to file, not a regulation lacking OMB number).

40.14[21] ***Admissibility of IRS Computer Records***

Computer data evidence is often introduced in tax cases to prove that the defendant did not file returns as required. Protestors often challenge such evidence and courts routinely reject such challenges. These records may be admitted under Federal Rule of Evidence 803(10) as certificates of lack of official records. *See* ***United States v. Bowers***, 920 F.2d 220, 223 (4th Cir. 1990); ***United States v. Spine***, 945 F.2d 143, 149 (6th Cir. 1991); ***United States v. Ryan***, 969 F.2d 238, 240 (7th Cir. 1992). Such records may be self-authenticating under Rule 902 if under seal or they may be authenticated by an IRS employee. No showing of the accuracy of the computer system needs to be made to introduce the documents. ***Ryan***, 969 F.2d at 240.

The introduction of the actual transcript of account through a witness can open the witness to cross-examination by the defense about every code and piece of information contained in the transcript. In order to avoid this problem, it may be wiser to simply offer the testimony of the IRS employee that a records search was conducted and it was revealed that no return was filed.

Some courts have admitted the records under Rule 803(8) notwithstanding the fact that since it is being offered in a criminal trial and is a matter "observed by law enforcement personnel," Rule 803(8)(C) would seem to forbid its introduction under that rule. These courts have distinguished between law enforcement reports prepared in routine, non-adversarial settings and those resulting from the more subjective endeavor or on-the-scene type investigations of a crime. *See* ***United States v. Wiley***, 979 F.2d 365, 369 (5th Cir. 1992); ***United States v. Wilmer***, 799 F.2d 495, 500-01 (9th Cir.), *cert. denied*, 481 U.S. 1004 (1987). In ***United States v. Hayes***, 861 F.2d 1225, 1230 (10th Cir. 1988), the Tenth Circuit agreed with the Fifth and Ninth Circuits that Rule 803(8)(C) does not compel the exclusion of documents which could properly be admitted under Rule 803(6) if the authoring officer or investigator testifies at trial, thus protecting the defendant's confrontation rights, which is the rationale underlying Rule 803(8).

40.14[22] ***Lack of Publication in the Federal Register***

Protestors have occasionally argued that Form 1040 and its instructions constitute a "rule" for purposes of the Administrative Procedure Act (APA) and therefore must be published in the

Federal Register. This defense has been deemed "meritless." ***United States v. Bentson***, 947 F.2d 1353, 1360 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2310 (1992). It is the tax code itself, which is statutory, not regulatory, that imposes the duty to file a return. *See also* ***United States v. Bowers***, 920 F.2d 220, 221-23 (4th Cir. 1990) (APA protects only those with no notice; to reverse conviction court would need to find that the statutes provided no notice of obligation to pay taxes, the IRS forms and offices were secret although 2 million Americans know about them, and the defendants, who had previously filed returns, had forgotten about the required forms and the IRS offices).

40.14[23] ***IRS Agent's Testimony and Sequestration***

IRS agents usually testify during the course of a tax trial. Often such testimony will consist of summarizing the government's documentary evidence and providing tax requirements and calculations based on that testimony. Provided the agent has been properly qualified as an expert witness, would be helpful to the jury, and does not offer any opinion on the ultimate issue of guilt, such testimony is fully admissible. *See* ***United States v. DeClue***, 899 F.2d 1465, 1473 (6th Cir. 1990); ***United States v. Beall***, 970 F.2d 343, 347 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1291 (1993); ***United States v. Mann***, 884 F.2d 532, 539 (10th Cir. 1989). An IRS agent who does testify as an expert/summary witness should be allowed to remain in the courtroom during the trial, in addition to the case agent under Fed. R. Evid. 615. *See* ***United States v. Lussier***, 929 F.2d 25, 30 (1st Cir. 1991).

40.14[24] ***Attorney Sanctions***

Attorneys representing protestors will sometimes engage in "inappropriate and disruptive behavior." Such behavior is sanctionable. *See* ***United States v. Dickstein***, 971 F.2d 446, 447 (10th Cir. 1992) (revoking defense counsel's *pro hac vice* status); ***United States v. Summet***, 862 F.2d 784, 786-87 (9th Cir. 1988); ***United States v. Collins***, 920 F.2d 619, 633-34 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2022 (1991); ***In re Becraft***, 885 F.2d 547, 550 (9th Cir. 1990) (imposing $2500 sanction for filing frivolous petition for rehearing).

until the defendant completes the required forms. ***United States v. Krzyske***, 836 F.2d 1013, 1018-19 (6th Cir.), *cert. denied*, 488 U.S. 832 (1988).

40.15[2] ***Jury Nullification***

"Jury nullification" is the concept that a jury has the right to ignore a judge's instructions on the law in a trial if they feel the law is unjust and acquit the defendant even if the government has proven guilt beyond a reasonable doubt. Protestors often argue that the authors of the Bill of Rights intended the Sixth Amendment to incorporate such a right. There is no constitutional right to a jury nullification instruction. ***United States v. Krzyske***, 836 F.2d 1013, 1021 (6th Cir. 1988) (upholding court's response to jury's inquiry about meaning of "jury nullification" that "[t]here is no such thing as valid jury nullification. Your obligation is to follow the instructions of the court as to the law given to you."); ***United States v. Drefke***, 707 F.2d 978, 982 (8th Cir.), *cert. denied*, 464 U.S. 942 (1983); ***United States v. Buttorff***, 572 F.2d 619, 627 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978); ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992); ***United States v. Irwin***, 561 F.2d 198, 201 (10th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978). *See also* ***United States v. Dougherty***, 473 F.2d 1113, 1130-1137 (D.C. Cir. 1972) for a thorough discussion of the issue of jury nullification and its historical origins.



# § 6012. Persons required to make returns of income



**(a) General rule**

Returns with respect to income taxes under subtitle A shall be made by the following:

**(1)**

**(A)** Every individual having for the taxable year gross income which equals or exceeds the exemption amount, except that a return shall not be required of an individual—

**(i)** who is not married (determined by applying section 7703), is not a surviving spouse (as defined in section 2 (a)), is not a head of a household (as defined in section 2 (b)), and for the taxable year has gross income of less than the sum of the exemption amount plus the basic standard deduction applicable to such an individual,

**(ii)** who is a head of a household (as so defined) and for the taxable year has gross income of less than the sum of the exemption amount plus the basic standard deduction applicable to such an individual,

**(iii)** who is a surviving spouse (as so defined) and for the taxable year has gross income of less than the sum of the exemption amount plus the basic standard deduction applicable to such an individual, or

**(iv)** who is entitled to make a joint return and whose gross income, when combined with the gross income of his spouse, is, for the taxable year, less than the sum of twice the exemption amount plus the basic standard deduction applicable to a joint

return, but only if such individual and his spouse, at the close of the taxable year, had the same household as their home.

Clause (iv) shall not apply if for the taxable year such spouse makes a separate return or any other taxpayer is entitled to an exemption for such spouse under section 151 (c).

**(B)** The amount specified in clause (i), (ii), or (iii) of subparagraph (A) shall be increased by the amount of 1 additional standard deduction (within the meaning of section 63 (c)(3)) in the case of an individual entitled to such deduction by reason of section 63 (f)(1)(A) (relating to individuals age 65 or more), and the amount specified in clause (iv) of subparagraph (A) shall be increased by the amount of the additional standard deduction for each additional standard deduction to which the individual or his spouse is entitled by reason of section 63 (f)(1).

**(C)** The exception under subparagraph (A) shall not apply to any individual—

**(i)** who is described in section 63 (c)(5) and who has—

**(I)** income (other than earned income) in excess of the sum of the amount in effect under section 63 (c)(5)(A) plus the additional standard deduction (if any) to which the individual is entitled, or

**(II)** total gross income in excess of the standard deduction, or

**(ii)** for whom the standard deduction is zero under section 63 (c)(6).

**(D)** For purposes of this subsection—

**(i)** The terms "standard deduction", "basic standard deduction" and "additional standard deduction" have the respective meanings given such terms by section 63 (c).

**(ii)** The term "exemption amount" has the meaning given such term by section 151 (d). In the case of an individual described in section 151 (d)(2), the exemption amount shall be zero.

**(2)** Every corporation subject to taxation under subtitle A;

**(3)** Every estate the gross income of which for the taxable year is $600 or more;

**(4)** Every trust having for the taxable year any taxable income, or having gross income of $600 or over, regardless of the amount of taxable income;

**(5)** Every estate or trust of which any beneficiary is a nonresident alien;

**(6)** Every political organization (within the meaning of section 527 (e)(1)), and every fund treated under section 527 (g) as if it constituted a political organization, which has political organization taxable income (within the meaning of section 527 (c)(1)) for the taxable year; and [1]

**(7)** Every homeowners association (within the meaning of section 528 (c)(1)) which has homeowners association taxable income (within the meaning of section 528 (d)) for the taxable year.[1]

**(8)** Every individual who receives payments during the calendar year in which the taxable year begins under section 3507 (relating to advance

payment of earned income credit).[1]

**(9)** Every estate of an individual under chapter 7 or 11 of title 11 of the United States Code (relating to bankruptcy) the gross income of which for the taxable year is not less than the sum of the exemption amount plus the basic standard deduction under section 63 (c)(2)(D).[1], [2]

except that subject to such conditions, limitations, and exceptions and under such regulations as may be prescribed by the Secretary, nonresident alien individuals subject to the tax imposed by section 871 and foreign corporations subject to the tax imposed by section 881 may be exempted from the requirement of making returns under this section.

**(b) Returns made by fiduciaries and receivers**

**(1) Returns of decedents**

If an individual is deceased, the return of such individual required under subsection (a) shall be made by his executor, administrator, or other person charged with the property of such decedent.

**(2) Persons under a disability**

If an individual is unable to make a return required under subsection (a), the return of such individual shall be made by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual. The preceding sentence shall not apply in the case of a receiver appointed by authority of law in possession of only a part of the property of an individual.

**(3) Receivers, trustees and assignees for corporations**

In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

**(4) Returns of estates and trusts**

Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

**(5) Joint fiduciaries**

Under such regulations as the Secretary may prescribe, a return made by one of two or more joint fiduciaries shall be sufficient compliance with the requirements of this section. A return made pursuant to this paragraph shall contain a statement that the fiduciary has sufficient knowledge of the affairs of the person for whom the return is made to enable him to make the return, and that the return is, to the best of his knowledge and belief, true and correct.

**(6) IRA share of partnership income**

In the case of a trust which is exempt from taxation under section 408 (e), for purposes of this section, the trust's distributive share of items of gross income and gain of any partnership to which subchapter C or D of chapter 63 applies shall be treated as equal to the trust's distributive share of the taxable income of such partnership.

**(c) Certain income earned abroad or from sale of residence**

For purposes of this section, gross income shall be computed without regard to the exclusion provided for in section 121 (relating to gain from sale of principal residence) and without regard to the exclusion provided for in section 911 (relating to citizens or residents of the United States living abroad).

**(d) Tax-exempt interest required to be shown on return**

Every person required to file a return under this section for the taxable year shall include on such return the amount of interest received or accrued during the taxable year which is exempt from the tax imposed by chapter 1.

**(e) Consolidated returns**

For provisions relating to consolidated returns by affiliated corporations, see chapter 6.

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[1] So in original.

[2] See References in Text note below.

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# § 6211. Definition of a deficiency



**(a) In general**

For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, and 44 the term "deficiency" means the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44 exceeds the excess of—

**(1)** the sum of

**(A)** the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

**(B)** the amounts previously assessed (or collected without assessment) as a deficiency, over—

**(2)** the amount of rebates, as defined in subsection (b)(2), made.

**(b) Rules for application of subsection (a)**

For purposes of this section—

**(1)** The tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 31, without regard to the credit under section 33, and without regard to any credits resulting from the collection of amounts assessed under section 6851 or 6852 (relating to termination assessments).

**(2)** The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by

subtitle A or B or chapter 41, 42, 43, or 44 was less than the excess of the amount specified in subsection (a)(1) over the rebates previously made.

**(3)** The computation by the Secretary, pursuant to section 6014, of the tax imposed by chapter 1 shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

**(4)** For purposes of subsection (a)—

**(A)** any excess of the sum of the credits allowable under sections 24 (d), 32, and 34 over the tax imposed by subtitle A (determined without regard to such credits), and

**(B)** any excess of the sum of such credits as shown by the taxpayer on his return over the amount shown as the tax by the taxpayer on such return (determined without regard to such credits),

shall be taken into account as negative amounts of tax.

### (c) Coordination with subchapters C and D

In determining the amount of any deficiency for purposes of this subchapter, adjustments to partnership items shall be made only as provided in subchapters C and D.

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26 U.S.C.A. § 63 **This document has been updated. Use KEYCITE.**

I.R.C. § 63

**UNITED STATES CODE ANNOTATED**

**TITLE 26. INTERNAL REVENUE CODE**

**SUBTITLE A--INCOME TAXES**

**CHAPTER 1--NORMAL TAXES AND SURTAXES**

**SUBCHAPTER B--COMPUTATION OF TAXABLE INCOME**

**PART I--DEFINITION OF GROSS INCOME, ADJUSTED GROSS INCOME, TAXABLE INCOME, ETC.**



Current through P.L. 107-11, approved 5-28-01

§ 63. Taxable income defined

**(a) In general.**--Except as provided in subsection (b), for purposes of this subtitle, the term "taxable income" means gross income minus the deductions allowed by this chapter (other than the standard deduction).

**(b) Individuals who do not itemize their deductions.**--In the case of an individual who does not elect to itemize his deductions for the taxable year, for purposes of this subtitle, the term "taxable income" means adjusted gross income, minus--

**(1)** the standard deduction, and

**(2)** the deduction for personal exemptions provided in section 151.

**(c) Standard deduction.**--For purposes of this subtitle--

**(1) In general.**--Except as otherwise provided in this subsection, the term "standard deduction" means the sum of--

**(A)** the basic standard deduction, and

**(B)** the additional standard deduction.

**(2) Basic standard deduction.**--For purposes of paragraph (1), the basic standard deduction is--

**(A)** $5,000 in the case of--

**(i)** a joint return, or

**(ii)** a surviving spouse (as defined in section 2(a)),

**(B)** $4,400 in the case of a head of household (as defined in section 2(b)),

**(C)** $3,000 in the case of an individual who is not married and who is not a surviving spouse or head of household, or

**(D)** $2,500 in the case of a married individual filing a separate return.

**(3) Additional standard deduction for aged and blind.**--For purposes of paragraph (1), the additional standard deduction is the sum of each additional amount to which the taxpayer is entitled under subsection (f).

**(4) Adjustments for inflation.**--In the case of any taxable year beginning in a calendar year after 1988, each dollar amount contained in paragraph (2) or (5) or subsection (f) shall be increased by an amount equal to--

**(A)** such dollar amount, multiplied by

**(B)** the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting for "calendar year 1992" in subparagraph (B) thereof.

**(i)** "calendar year 1987" in the case of the dollar amounts contained in paragraph (2) or (5)(A) or subsection (f), and

**(ii)** "calendar year 1997" in the case of the dollar amount contained in paragraph (5)(B).

**(5) Limitation on basic standard deduction in the case of certain** dependents.**--In the case of an individual with respect to whom a deduction** under section 151 is allowable to another taxpayer for a taxable year beginning in the calendar year in which the individual's taxable year begins, the basic standard deduction applicable to such individual for such individual's taxable year shall not exceed the greater of--

**(A)** $500, or

**(B)** the sum of $250 and such individual's earned income.

**(6) Certain individuals, etc., not eligible for standard deduction.**--In the case of--

**(A)** a married individual filing a separate return where either spouse itemizes deductions,

**(B)** a nonresident alien individual,

**(C)** an individual making a return under section 443(a)(1) for a period of less than 12 months on account of a change in his annual accounting period, or

**(D)** an estate or trust, common trust fund, or partnership,

the standard deduction shall be zero.

**(d) Itemized deductions.**--For purposes of this subtitle, the term "itemized deductions" means the deductions allowable under this chapter other than--

**(1)** the deductions allowable in arriving at adjusted gross income, and

**(2)** the deduction for personal exemptions provided by section 151.

**(e) Election to itemize.--**

**(1) In general.**--Unless an individual makes an election under this subsection for the taxable year, no itemized deduction shall be allowed for the taxable year. For purposes of this subtitle, the determination of whether a deduction is allowable under this chapter shall be made without regard to the preceding sentence.

**(2) Time and manner of election.**--Any election under this subsection shall be made on the taxpayer's return, and the Secretary shall prescribe the manner of signifying such election on the return.

**(3) Change of election.**--Under regulations prescribed by the Secretary, a change of election with respect to itemized deductions for any taxable year may be made after the filing of the return for such year. If the spouse of the taxpayer filed a separate return for any taxable year corresponding to the taxable year of the taxpayer, the change shall not be allowed unless, in accordance with such regulations--

**(A)** the spouse makes a change of election with respect to itemized deductions, for the taxable year covered

in such separate return, consistent with the change of treatment sought by the taxpayer, and

**(B)** the taxpayer and his spouse consent in writing to the assessment (within such period as may be agreed on with the Secretary) of any deficiency, to the extent attributable to such change of election, even though at the time of the filing of such consent the assessment of such deficiency would otherwise be prevented by the operation of any law or rule of law.

This paragraph shall not apply if the tax liability of the taxpayer's spouse for the taxable year corresponding to the taxable year of the taxpayer has been compromised under section 7122.

**(f) Aged or blind additional amounts.**--

**(1) Additional amounts for the aged.**--The taxpayer shall be entitled to an additional amount of $600--

**(A)** for himself if he has attained age 65 before the close of his taxable year, and

**(B)** for the spouse of the taxpayer if the spouse has attained age 65 before the close of the taxable year and an additional exemption is allowable to the taxpayer for such spouse under section 151(b).

**(2) Additional amount for blind.**--The taxpayer shall be entitled to an additional amount of $600--

**(A)** for himself if he is blind at the close of the taxable year, and

**(B)** for the spouse of the taxpayer if the spouse is blind as of the close of the taxable year and an additional exemption is allowable to the taxpayer for such spouse under section 151(b).

For purposes of subparagraph (B), if the spouse dies during the taxable year the determination of whether such spouse is blind shall be made as of the time of such death.

**(3) Higher amount for certain unmarried individuals.**--In the case of an individual who is not married and is not a surviving spouse, paragraphs (1) and (2) shall be applied by substituting "$750" for "$600".

**(4) Blindness defined.**--For purposes of this subsection, an individual is blind only if his central visual acuity does not exceed 20/200 in the better eye with correcting lenses, or if his visual acuity is greater than 20/200 but is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees.

**(g) Marital status.**--For purposes of this section, marital status shall be determined under section 7703.

[**(h) Repealed.** Pub.L. 101-508, Title XI, § 11801(a)(4), Nov. 5, 1990, 104 Stat. 1388-520]

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(Aug. 16, 1954, c. 736, 68A Stat. 18; May 23, 1977, Pub.L. 95-30, Title I, § 102(a), 91 Stat. 135; Nov. 6, 1978, Pub.L. 95-600, Title I, § 101(b), 92 Stat. 2769; Aug. 13, 1981, Pub.L. 97-34, Title I, §§ 104(b), 111(b)(4), 121(b), (c)(2), 95 Stat. 189, 194, 196, 197; Oct. 22, 1986, Pub.L. 99-514, Title I, § 102(a), Title XII, § 1272(d)(6), 100 Stat. 2099, 2594; Nov. 10, 1988, Pub.L. 100-647, Title I, § 1001(b)(1), 102 Stat. 3349; Nov. 5, 1990, Pub.L. 101-508, Title XI, §§ 11101(d)(1)(D), 11801(a)(4), 104 Stat. 1388-405, 1388-520; Aug. 10, 1993, Pub.L. 103-66, Title XIII, § 13201(b)(3)(D), 107 Stat. 459; Aug. 5, 1997, Pub.L. 105-34, Title XII, § 1201(a), 111 Stat. 993.)

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26 USCA S 6012



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26 U.S.C.A. § 6012 I.R.C. § 6012

**UNITED STATES CODE ANNOTATED**

**TITLE 26. INTERNAL REVENUE CODE**

**SUBTITLE F--PROCEDURE AND ADMINISTRATION**

**CHAPTER 61--INFORMATION AND RETURNS**

**SUBCHAPTER A--RETURNS AND RECORDS**

**PART II--TAX RETURNS OR STATEMENTS**

**SUBPART B--INCOME TAX RETURNS**



Current through P.L. 107-11, approved 5-28-01

§ 6012. Persons required to make returns of income

**(a) General rule.**--Returns with respect to income taxes under subtitle A shall be made by the following:

**(1)(A)** Every individual having for the taxable year gross income which equals or exceeds the exemption amount, except that a return shall not be required of an individual--

**(i)** who is not married (determined by applying section 7703), is not a surviving spouse (as defined in section 2(a)), is not a head of a household (as defined in section 2(b)), and for the taxable year has gross income of less than the sum of the exemption amount plus the basic standard deduction applicable to such an individual,

**(ii)** who is a head of a household (as so defined) and for the taxable year has gross income of less than the sum of the exemption amount plus the basic standard deduction applicable to such an individual,

**(iii)** who is a surviving spouse (as so defined) and for the taxable year has gross income of less than the sum of the exemption amount plus the basic standard deduction applicable to such an individual, or

**(iv)** who is entitled to make a joint return and whose gross income, when combined with the gross income of his spouse, is, for the taxable year, less than the sum of twice the exemption amount plus the basic standard deduction applicable to a joint return, but only if such individual and his spouse, at the close of the taxable year, had the same household as their home.

Clause (iv) shall not apply if for the taxable year such spouse makes a separate return or any other taxpayer is entitled to an exemption for such spouse under section 151(c).

**(B)** The amount specified in clause (i), (ii), or (iii) of subparagraph (A) shall be increased by the amount of 1 additional standard deduction (within the meaning of section 63(c)(3)) in the case of an individual entitled to such deduction by reason of section 63(f)(1)(A) (relating to individuals age 65 or more), and the amount specified in clause (iv) of subparagraph (A) shall be increased by the amount of the additional standard deduction for each additional standard deduction to which the individual or his spouse is entitled by reason of section 63(f)(1).

**(C)** The exception under subparagraph (A) shall not apply to any individual--

**(i)** who is described in section 63(c)(5) and who has--

**(I)** income (other than earned income) in excess of the sum of the amount in effect under section 63(c)(5)(A) plus the additional standard deduction (if any) to which the individual is entitled, or

**(II)** total gross income in excess of the standard deduction, or

**(ii)** for whom the standard deduction is zero under section 63(c)(6).

**(D)** For purposes of this subsection--

**(i)** The terms "standard deduction", "basic standard deduction" and "additional standard deduction" have the respective meanings given such terms by section 63(c).

**(ii)** The term "exemption amount" has the meaning given such term by section 151(d). In the case of an individual described in section 151(d)(2), the exemption amount shall be zero.

**(2)** Every corporation subject to taxation under subtitle A;

**(3)** Every estate the gross income of which for the taxable year is $600 or more;

**(4)** Every trust having for the taxable year any taxable income, or having gross income of $600 or over,

regardless of the amount of taxable income;

**(5)** Every estate or trust of which any beneficiary is a nonresident alien;

**(6)** Every political organization (within the meaning of section 527(e)(1)), and every fund treated under section 527(g) as if it constituted a political organization, which has political organization taxable income (within the meaning of section 527(c)(1)) for the taxable year or which has gross receipts of $25,000 or more for the taxable year (other than an organization to which section 527 applies solely by reason of subsection (f)(1) of such section); and [FN1]

**(7)** Every homeowners association (within the meaning of section 528(c)(1)) which has homeowners association taxable income (within the meaning of section 528(d)) for the taxable year. [FN1]

**(8)** Every individual who receives payments during the calendar year in which the taxable year begins under section 3507 (relating to advance payment of earned income credit). [FN1]

**(9)** Every estate of an individual under chapter 7 or 11 of title 11 of the United States Code (relating to bankruptcy) the gross income of which for the taxable year is not less than the sum of the exemption amount plus the basic standard deduction under section 63(c)(2)(D). [FN1]

except that subject to such conditions, limitations, and exceptions and under such regulations as may be prescribed by the Secretary, nonresident alien individuals subject to the tax imposed by section 871 and foreign corporations subject to the tax imposed by section 881 may be exempted from the requirement of making returns under this section.

**(b) Returns made by fiduciaries and receivers.--**

**(1) Returns of decedents.**--If an individual is deceased, the return of such individual required under subsection (a) shall be made by his executor, administrator, or other person charged with the property of such decedent.

**(2) Persons under a disability.**--If an individual is unable to make a return required under subsection (a), the return of such individual shall be made by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual. The preceding sentence shall not apply in the case of a receiver appointed by authority of law in possession of only a part of the property of an individual.

**(3) Receivers, trustees and assignees for corporations.**--In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

**(4) Returns of estates and trusts.**--Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

**(5) Joint fiduciaries.**--Under such regulations as the Secretary may prescribe, a return made by one of two or more joint fiduciaries shall be sufficient compliance with the requirements of this section. A return made pursuant to this paragraph shall contain a statement that the fiduciary has sufficient knowledge of the affairs of the person for whom the return is made to enable him to make the return, and that the return is, to the best of his knowledge and belief, true and correct.

**(6) IRA share of partnership income.**--In the case of a trust which is exempt from taxation under section 408(e), for purposes of this section, the trust's distributive share of items of gross income and gain of any partnership to which subchapter C or D of chapter 63 applies shall be treated as equal to the trust's distributive share of the taxable income of such partnership.

**(c) Certain income earned abroad or from sale of residence.**--For purposes of this section, gross income shall be computed without regard to the exclusion provided for in section 121 (relating to gain from sale of principal residence) and without regard to the exclusion provided for in section 911 (relating to citizens or residents of United States living abroad).

**(d) Tax-exempt interest required to be shown on return.**--Every person required to file a return under this section for the taxable year shall include on such return the amount of interest received or accrued during the taxable year which is exempt from the tax imposed by chapter 1.

**(e) Consolidated returns.--**

For provisions relating to consolidated returns by affiliated corporations, see chapter 6.

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(Aug. 16, 1954, c. 736, 68A Stat. 732; Sept. 2, 1958, Pub.L. 85-866, Title I, § 72(a), 72 Stat. 1660; Feb. 26, 1964, Pub.L. 88-272, Title II, § 206(b)(1), 78 Stat. 40; Dec. 30, 1969, Pub.L. 91-172, Title IX, § 941(a), (d), 83 Stat. 726; Dec. 10, 1971, Pub.L. 92-178, Title II, § 204(a), 85 Stat. 511; Oct. 15, 1974, Pub.L. 93-443, Title IV, § 407, 88 Stat. 1297; Jan. 3, 1975, Pub.L. 93- 625, § 10(b), 88 Stat. 2119; Mar. 29, 1975, Pub.L. 94-12, Title II, § 201(b), 89 Stat. 29; Dec. 23, 1975, Pub.L. 94-164, § 2(a)(2), 89 Stat. 970; Oct. 4, 1976, Pub.L. 94-455, Title IV, § 401(b)(3), Title XIX, § 1906(b)(13)(A), Title XXI, § 2101(c), 90 Stat. 1556, 1834, 1899; May 23, 1977, Pub.L. 95-30, Title I, § 104, 91 Stat. 139; Nov. 6, 1978, Pub.L. 95-600, Title I, §§ 101(c), 102 (b)(1), 105(d), Title IV, § 404(c)(8), 92 Stat. 2770, 2771, 2776, 2870; Nov. 8, 1978, Pub.L. 95-615, § 202(g) (5), formerly § 202(f)(5), 92 Stat. 3100, renumbered Apr. 1, 1980, Pub.L. 96-222, Title I, § 108(a)(1)(A), 94 Stat. 223; Dec. 24, 1980, Pub.L. 96-589, §§ 3(b), 6(i)(5), 94 Stat. 3400, 3410; Aug. 13, 1981, Pub.L. 97-34, Title I, §§ 104(d)(1), 111(b)(3), 95 Stat. 189, 194; July 18, 1984, Pub.L. 98-369, Div. A, Title IV, § 412(b) (3), 98 Stat. 792; Oct. 22, 1986, Pub.L. 99-514, Title I, § 104(a)(1), Title XV, § 1525(a), 100 Stat. 2103, 2749; Nov. 10, 1988, Pub.L. 100-647, Title I, § 1001(b)(2), 102 Stat. 3349; Aug. 5, 1997, Pub.L. 105-34, Title III, § 312(d)(11), Title XII, § 1225, 111 Stat. 840, 1019; July 1, 2000, Pub.L. 106-230, § 3(a)(1), 114 Stat. 482.)

[FN1] So in original.

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26 U.S.C.A. § 6211 I.R.C. § 6211

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**TITLE 26. INTERNAL REVENUE CODE**

**SUBTITLE F--PROCEDURE AND ADMINISTRATION**

**CHAPTER 63--ASSESSMENT**

**SUBCHAPTER B--DEFICIENCY PROCEDURES IN THE CASE OF INCOME, ESTATE, GIFT, AND**

**CERTAIN EXCISE TAXES**



Current through P.L. 107-11, approved 5-28-01

§ 6211. Definition of a deficiency

**(a) In general.**--For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, and 44 the term "deficiency" means the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44 exceeds the excess of--

**(1)** the sum of

**(A)** the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

**(B)** the amounts previously assessed (or collected without assessment) as a deficiency, over--

**(2)** the amount of rebates, as defined in subsection (b)(2), made.

**(b) Rules for application of subsection (a).**--For purposes of this section--

**(1)** The tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 31, without regard to the credit under section 33, and without regard to any credits resulting from the collection of amounts assessed under section 6851 or 6852 (relating to termination assessments).

**(2)** The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by subtitle A or B or chapter 41, 42, 43, or 44 was less than the excess of the amount specified in subsection (a)(1) over the rebates previously made.

**(3)** The computation by the Secretary, pursuant to section 6014, of the tax imposed by chapter 1 shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

**(4)** For purposes of subsection (a)--

**(A)** any excess of the sum of the credits allowable under sections 24(d), 32, and 34 over the tax imposed by subtitle A (determined without regard to such credits), and

**(B)** any excess of the sum of such credits as shown by the taxpayer on his return over the amount shown as the tax by the taxpayer on such return (determined without regard to such credits),

shall be taken into account as negative amounts of tax.

**(c) Coordination with subchapters C and D.**--In determining the amount of any deficiency for purposes of this subchapter, adjustments to partnership items shall be made only as provided in subchapters C and D.

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(Aug. 16, 1954, c. 736, 68A Stat. 770; June 21, 1965, Pub.L. 89-44, Title VIII, § 809(d)(5)(A), 79 Stat. 168; Mar. 15, 1966, Pub.L. 89-368, Title I, § 102(b)(4), 80 Stat. 64; Dec. 30, 1969, Pub.L. 91-172, Title I, § 101(f)(1), (j)(39), 83 Stat. 524, 530; Sept. 2, 1974, Pub.L. 93-406, Title II, § 1016(a)(9), 88 Stat. 929; Oct. 4, 1976, Pub.L. 94-455, Title XII, § 1204(c)(4), Title XIII, § 1307(d)(2)(E), (F)(i), Title XVI, § 1605(b)(4), Title XIX, § 1906(b)(13)(A), 90 Stat. 1698, 1728, 1754, 1834; Apr. 2, 1980, Pub.L. 96-223, Title I, § 101(f)(1)(A), (B), (2), (3), 94 Stat. 252; July 18, 1984, Pub.L. 98-369, Div. A, Title IV, § 474(r)(33), 98 Stat. 845; Dec. 22, 1987, Pub.L. 100-203, Title X, § 10713(b)(2)(B), 101 Stat. 1330-470; Aug. 23, 1988, Pub.L. 100-418, Title I, § 1941(b)(2)(B)(i), (ii), (C), (D), 102 Stat. 1323; Nov. 10, 1988, Pub.L. 100-647, Title I, § 1015(r)(2), 102 Stat. 3572; Aug. 5, 1997, Pub.L. 105-34, Title XII, § 1231(b), 111 Stat. 1023; July 22, 1998, Pub.L. 105-206, Title VI, § 6012(f), 112 Stat. 819; Dec. 21, 2000, Pub.L. 106- 554, § 1(a)(7) [Title III, § 314(a)], 114 Stat. 2763, 2763-___.)

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# § 6212. Notice of deficiency



### (a) In general

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.

### (b) Address for notice of deficiency

#### (1) Income and gift taxes and certain excise taxes

In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44 if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

#### (2) Joint income tax return

In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address.

#### (3) Estate tax

In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 11, if addressed in the name of the decedent or other person subject to liability and mailed to his last known address, shall be sufficient for purposes of chapter 11 and of this chapter.

**(c) Further deficiency letters restricted**

**(1) General rule**

If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213 (a), the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, of estate tax in respect of the taxable estate of the same decedent, of chapter 41 tax for the same taxable year, of chapter 43 tax for the same taxable year, of chapter 44 tax for the same taxable year, of section 4940 tax for the same taxable year, or of chapter 42 tax, (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214 (a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213 (b)(1) (relating to mathematical or clerical errors), in section 6851 or 6852 (relating to termination assessments), or in section 6861 (c) (relating to the making of jeopardy assessments).

**(2) Cross references**

For assessment as a deficiency notwithstanding the prohibition of further deficiency letters, in the case of—

**(A)** Deficiency attributable to change of treatment with respect to itemized deductions, see section 63 (e)(3).

**(B)** Deficiency attributable to gain on involuntary conversion, see section 1033 (a)(2)(C) and (D).

**(C)** Deficiency attributable to activities not engaged in for profit, see section 183 (e)(4).

For provisions allowing determination of tax in title 11 cases, see section 505 (a) of title 11 of the United States Code.

**(d) Authority to rescind notice of deficiency with taxpayer's consent**

The Secretary may, with the consent of the taxpayer, rescind any notice of deficiency mailed to the taxpayer. Any notice so rescinded shall not be treated as a notice of deficiency for purposes of subsection (c)(1) (relating to further deficiency letters restricted), section 6213 (a) (relating to restrictions applicable to deficiencies; petition to Tax Court), and section 6512 (a) (relating to limitations in case of petition to Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice. Nothing in this subsection shall affect any suspension of the running of any period of limitations during any period during which the rescinded notice was outstanding.

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26 U.S.C.A. § 6212 I.R.C. § 6212

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**SUBTITLE F--PROCEDURE AND ADMINISTRATION**

**CHAPTER 63--ASSESSMENT**

**SUBCHAPTER B--DEFICIENCY PROCEDURES IN THE CASE OF INCOME, ESTATE, GIFT, AND**

**CERTAIN EXCISE TAXES**



Current through P.L. 107-11, approved 5-28-01

§ 6212. Notice of deficiency

**(a) In general.**--If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.

**(b) Address for notice of deficiency.--**

**(1) Income and gift taxes and certain excise taxes.**--In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a

corporation, has terminated its existence.

**(2) Joint income tax return.**--In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address.

**(3) Estate tax.**--In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 11, if addressed in the name of the decedent or other person subject to liability and mailed to his last known address, shall be sufficient for purposes of chapter 11 and of this chapter.

**(c) Further deficiency letters restricted.--**

**(1) General rule.**--If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213 (a), the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, of estate tax in respect of the taxable estate of the same decedent, of chapter 41 tax for the same taxable year, of chapter 43 tax for the same taxable year, of chapter 44 tax for the same taxable year, of section 4940 tax for the same taxable year, or of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical or clerical errors), in section 6851 or 6852 (relating to termination assessments), or in section 6861(c) (relating to the making of jeopardy assessments).

**(2) Cross references.--**

For assessment as a deficiency notwithstanding the prohibition of further deficiency letters, in the case of--

(A) Deficiency attributable to change of treatment with respect to itemized deductions, see section 63 (e)(3).

(B) Deficiency attributable to gain on involuntary conversion, see section 1033(a)(2)(C) and (D).

(C) Deficiency attributable to activities not engaged in for profit, see section 183(e)(4).

[(D) Repealed. Pub.L. 94-455, Title XIX, § 1901(b)(37)(C), Oct. 4, 1976, 90 Stat. 1803]

[(E) Redesignated (C)]

For provisions allowing determination of tax in title 11 cases, see section 505(a) of title 11 of the United States Code.

**(d) Authority to rescind notice of deficiency with taxpayer's consent.**--The Secretary may, with the

consent of the taxpayer, rescind any notice of deficiency mailed to the taxpayer. Any notice so rescinded shall not be treated as a notice of deficiency for purposes of subsection (c)(1) (relating to further deficiency letters restricted), section 6213(a) (relating to restrictions applicable to deficiencies; petition to Tax Court), and section 6512(a) (relating to limitations in case of petition to Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice. Nothing in this subsection shall affect any suspension of the running of any period of limitations during any period during which the rescinded notice was outstanding.

## CREDIT(S)

### 2001 Electronic Update

(Aug. 16, 1954, c. 736, 68A Stat. 770; Sept. 2, 1958, Pub.L. 85-866, Title I, §§ 76, 89(b), 72 Stat. 1661, 1665; Feb. 26, 1964, Pub.L. 88-272, Title I, § 112(d)(1), 78 Stat. 24; Dec. 30, 1969, Pub.L. 91-172, Title I, § 101(f)(2), (j)(40), (41), 83 Stat. 524, 530; Dec. 31, 1970, Pub.L. 91-614, Title I, § 102(d)(5), 84 Stat. 1842; Sept. 2, 1974, Pub.L. 93-406, Title II, § 1016(a)(10), 88 Stat. 930; Oct. 4, 1976, Pub.L. 94-455, Title II, § 214(b), Title XII, §§ 1204(c)(5), 1206(c)(3), Title XIII, § 1307(d)(2)(F)(ii), (G), Title XVI, § 1605(b)(5), Title XIX, §§ 1901(b)(31)(C), (37)(C), 1906(b)(13)(A), 90 Stat. 1549, 1698, 1704, 1728, 1754, 1755, 1800, 1803, 1834; May 23, 1977, Pub.L. 95-30, Title I, § 101(d)(15), 91 Stat. 134; Nov. 6, 1978, Pub.L. 95- 600, Title IV, § 405(c)(5), Title VII, § 701(t)(3)(C), 92 Stat. 2871, 2912; Apr. 2, 1980, Pub.L. 96-223, Title I, § 101(f)(1)(C), (4), (5), 94 Stat. 252, 253; Dec. 24, 1980, Pub.L. 96-589, § 6(d)(2), 94 Stat. 3408; Aug. 13, 1981, Pub. L. 97-34, Title IV, § 442(d)(4), 95 Stat. 323; Oct. 22, 1986, Pub.L. 99- 514, Title I, § 104(b)(17), Title XV, § 1562(a), 100 Stat. 2106, 2761; Dec. 22, 1987, Pub.L. 100-203, Title X, § 10713(b)(2)(C), 101 Stat. 1330-470; Aug. 23, 1988, Pub.L. 100-418, Title I, § 1941(b)(2)(B)(iii), (E), (F), 102 Stat. 1323; Nov. 10, 1988, Pub.L. 100-647, Title I, § 1015(m), 102 Stat. 3572; Aug. 5, 1997, Pub.L. 105-34, Title III, § 312(d)(12), 111 Stat. 84; July 22, 1998, Pub.L. 105-206, Title I, § 1102(b), 112 Stat. 703.

<General Materials (GM) - References, Annotations, or Tables>

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# § 455. Disqualification of justice, judge, or magistrate judge



**(a)** Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

**(b)** He shall also disqualify himself in the following circumstances:

**(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

**(2)** Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

**(3)** Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

**(4)** He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

**(5)** He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

**(i)** Is a party to the proceeding, or an officer, director, or trustee of a party;

**(ii)** Is acting as a lawyer in the proceeding;

**(iii)** Is known by the judge to have an interest that could be

substantially affected by the outcome of the proceeding;

**(iv)** Is to the judge's knowledge likely to be a material witness in the proceeding.

**(c)** A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

**(d)** For the purposes of this section the following words or phrases shall have the meaning indicated:

**(1)** "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

**(2)** the degree of relationship is calculated according to the civil law system;

**(3)** "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

**(4)** "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

**(i)** Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

**(ii)** An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

**(iii)** The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

**(iv)** Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

**(e)** No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

**(f)** Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

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# U.S. Constitution: Article III

## Article Text | Annotations

**Article. III.** [ Annotations ]

**Section 1.**

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

**Section 2.**

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and

Chief Justice

maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

**Section 3.**

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

## Annotations

## Article III - Judicial Department

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# Annotations

**Article III - Judicial Department**

- **Clause 2. Punishment**
  - Corruption of the Blood and Forfeiture

## Search the Legal Dictionary

Search Dictionary

# order

**1:** a state of peace, freedom from unruly behavior, and respect for law and proper authority
Example: maintain law and **{h,1}order**

**2:** an established mode or state of procedure
Example: a call to **{h,1}order**

**3 a:** a mandate from a superior authority
(see also executive order)

**b:** a ruling or command made by a competent administrative authority

*specif*
**:** one resulting from administrative adjudication and subject to judicial review and enforcement
Example: an administrative **{h,1}order** may not be inconsistent with the Constitution -- *Wells v. State*, 654 So. 2d 145 (1995)

**c:** an authoritative command issued by the court
Example: violated a court **{h,1}order** and was jailed for contempt

**c:** a command issued by a military superior

**4 a:** a direction regarding the party to whom a negotiable instrument shall be paid
Example: pay to the **{h,1}order** of John Doe
(see also money order negotiable instrument)

**b:** an instruction or authorization esp. to buy or sell goods or securities or to perform work
Example: a purchase **{h,1}order**
Example: a work **{h,1}order**

**c:** goods or items bought or sold
Example: the **{h,1}order** was received in good condition

---

**cease-and-desist order**
['s*e*s-*e*nd-di-'zist-, -'sist-]

**:** an order from a court or quasi-judicial tribunal to stop engaging in a particular activity or practice (as an unfair labor practice)
(compare injunction mandamus stay)

---

**consent order**
**:** an agreement of litigating parties that by consent takes the form of a court order

---

**final order**
**:** an order of a court or quasi-judicial tribunal which leaves nothing further to be determined or accomplished in that forum except execution of the judgment and from which an appeal will lie

---

**gag order**
**:** an order barring public disclosure or discussion (as by the involved parties or the press) of information relating to a case

---

**order to show cause**
**:** an order requiring the prospective object of a legal action to show cause why that action should not take place
(*called also show cause order*)

---

**pretrial order**
**:** a court order setting out the rulings, stipulations, and other actions taken at a pretrial conference

---

**protection order**
**:** "restraining order § 2" in this entry

---

**protective order**
**:** an order issued for the protection of a particular party: as

**a :** an order that limits, denies, or defers discovery by a party in order to prevent undue embarrassment, expense, oppression, or disclosure of trade secrets

**b :** "restraining order § 2" in this entry

---

**qualified domestic relations order**
**:** an order, decree, or judgment that satisfies the criteria set out in section 414 of the Internal Revenue Code for the payment of all or part of individual pension, profit sharing, or retirement benefits usu. to a divorcing spouse (as for alimony or child support)
*Note: The alienation or assignment of funds under a qualified domestic relations order does not affect the tax status of the plan from which such funds are paid.*

---

**restraining order**
[ri-'stra-ni[ng]-]

**1 :** "temporary restraining order § 1" in this entry

**2 :** an order of a specified duration issued after a hearing attended by all parties that is intended to protect one individual from violence, abuse, harassment, or

stalking by another esp. by prohibiting or restricting access or proximity to the protected party
Example: excluded from the home by a *restraining order* issued because of domestic violence
(*called also protection order, protective order*)
(compare temporary restraining order § 2 in this entry)

---

**show cause order**
**:** "order to show cause" in this entry

---

**temporary restraining order**

**1 :** an order of brief duration that is issued ex parte to protect the plaintiff's rights from immediate and irreparable injury by preserving a situation or preventing an act until a hearing for a preliminary injunction can be held

**2 :** a protective order issued ex parte for a brief period prior to a hearing on a restraining order attended by both parties and intended to provide immediate protection from violence or threatened violence

---

**turnover order**
['tər-'nō-vər-]

**:** an order commanding one party to turn over property to another

*esp*
**:** an order commanding a judgment debtor to turn over assets to a judgment creditor
Example: *turnover order* in aid of execution -- *California Code of Civil Procedure*

---

**alternative order**
**:** an order to a broker in which alternative methods of carrying out the order (as by buying or selling) are set forth

---

**open order**

**1 :** an order to buy securities or commodity futures that remains effective until filled or canceled

**2 :** an order for merchandise expressed in very general terms so that the seller has considerable latitude in selecting the articles actually provided

---

**stop order**
**:** an order to a broker to buy or sell a security when the price advances or declines to a designated level

*King James Version* for John 3:16-21

Click to view instructions

**Jhn 3:16** For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life.

**Jhn 3:17** For God sent not his Son into the world to condemn the world; but that the world through him might be saved.

**Jhn 3:18** He that believeth on him is not condemned: but he that believeth not is condemned already, because he hath not believed in the name of the only begotten Son of God.

**Jhn 3:19** And this is the condemnation, that light is come into the world, and men loved darkness rather than light, because their deeds were evil.

**Jhn 3:20** For every one that doeth evil hateth the light, neither cometh to the light, lest his deeds should be reproved.

**Jhn 3:21** But he that doeth truth cometh to the light, that his deeds may be made manifest, that they are wrought in God.

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***King James Version*** for John 3:16-21

Click to view instructions

| | | |
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# U.S. Constitution: Seventh Amendment

## Seventh Amendment - Civil Trials

## Amendment Text | Annotations

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in

any Court of the United States, than according to the rules of the common law.

## Annotations

- **Trial by Jury in Civil Cases**
- **The Right and the Characteristics of the Civil Jury**
  - History
  - Composition and Functions of Civil Jury
  - Courts in Which the Guarantee Applies
  - Waiver of the Right
- **Application of the Amendment**
  - Cases "at Common Law"
  - The Continuing Law-Equity Distinction
  - Procedures Limiting Jury's Role
  - Directed Verdicts
  - Jury Trial Under the Federal Employers'


**Amendment**

**Constitution**

**Law**

**Supreme Court**

**Age Discrimination Act**

Liability Act

- **Appeals from State Courts to the Supreme Court**

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- **Appeals from State Courts to the Supreme Court**




**United States Tax Court**, 400 Second Street, NW, Washington, DC 20217 **Telephone:** 202-521-0700



Tuesday, January 9, 2007

# Welcome

## New & Noteworthy

- Comments regarding the proposed amendment to Rule 173(b), Tax Court Rules of Practice and Procedure, received, and effective date of the proposed amendment extended until further notice by the Court. For more information, see the **Press Release**.
- The Court has proposed amending its Rules of Practice and Procedure, requiring the filing of answers by the Commissioner of Internal Revenue in all small tax cases. For more information, see the **Press Release** and **Notice**.
- If you are unfamiliar with the Tax Court or you would like information about starting a case and/or representing yourself before the Court, please visit the new **Taxpayer Information** Section.
- The installation of a new telephone system necessitated changes to the Court's telephone numbers, effective Friday, February 3, 2006. For more information, see the **Press Release**.
- The Tax Court began accepting credit card payments presented in person and converting checks into electronic funds transfers on December 19, 2005. For more information, see the **Press Release**.
- Electronic (North) Courtroom located in Washington, DC, is available for use in Tax Court Proceedings. **Press Release** and **Guidelines** issued.
- The Court has added TC and Memorandum Opinions from 09/25/95 to its Opinions Search.


### SESSION SCHEDULES

- **NEW!** 2007 Spring Trial Session Schedules
- 2007 Winter Trial Session Schedules


★ **Electronic (North) Courtroom Information Sheet**

★ **Guidelines for Use of the Tax Court's Electronic (North) Courtroom**

- Search the content of TC and Memorandum Opinions published from 09/25/95 and Summary Opinions published after 01/01/01* for key words and phrases with Opinion Text Search.

*Pursuant to Internal Revenue Code Section 7463(b), Summary opinions may not be treated as precedent for any other case.

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**Last updated:** January 3, 2007

# Mathes v. Commissioner of Internal Revenue, 576 F.2d 70, 1978:

# What "Money" Are You Paying to the Internal Revenue Service?

[1] UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[2] No. 77-3164, Summary Calendar[*fn*]

[3] 1978.C05.40838 <http://www.versuslaw.com>; 576 F.2d 70

[4] July 10, 1978

[5] **DONALD H. *MATHES* AND PATRICIA MARIE *MATHES*, PETITIONERS-APPELLANTS,**
**v.**
**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT-APPELLEE**

[6] Appeal from the Decision of the Tax Court of the United States.

[7] Donald H. Mathes, Houston, Texas, Patricia Marie Mathes, Houston, Texas, (Pro Se), for Appellant.

[8] M. Carr Ferguson, Asst. Atty. General, Tax Division, U.S. Dept. of Justice, Washington, District of Columbia, Gilbert E. Andrews, Act. Chief, Appellate Section U.S. Dept. of Justice, Washington, District of Columbia, Stuart E. Seigel, Cnsl., IRS, Washington, District of Columbia, Crombie J.D. Garrett, Atty., Tax Div., Dept. of Justice, Washington, District of Columbia, Gayle P. Miller, Atty., Tax Div., Dept. of Justice, Washington, District of Columbia, for Appellee.

[9] Roney, Gee and Fay, Circuit Judges.

[10] Author: Per Curiam

[11] Taxpayers, Donald and Patricia Mathes, are husband and wife and filed their 1973 and 1974 tax returns jointly. On May 20, 1975, taxpayers filed a Form 1040 return which they denominated "Amended 5-19-75 for Statutory Dollars" for 1973. On this amended return they reported as income approximately 40% of the amount on the original return. They repeated this process for their 1974 return. This discount upon the face value was, according to taxpayers, based upon statutes which define "the standard United States dollar . . . as either a specific weight of gold in a coin or a specific weight of silver in a coin."

[12] After an audit, the Commissioner of Internal Revenue issued a deficiency assessment based upon the face amount of income received by taxpayers in Federal Reserve Notes. The taxpayers filed a petition in the United States Tax Court challenging the deficiency assessment. The Tax Court rejected the challenge and taxpayers appeal.

[13] Taxpayers first assert that they have a legal right to choose a lawful method of reporting income which in their case is to report their income of "notes" in terms of lawful, statutory dollars. Taxpayers correctly state that "the legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." Gregory v. Helvering, 293 U.S. 465, 469, 55 S. Ct. 266, 267, 79 L. Ed. 596 (1935). However, the method used by these taxpayers to reduce their taxes is not a legal method.

[14] ***Close to a century ago, the Supreme Court stated:***

[15] ***Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, [Congress'] power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals. . . . (Emphasis added)***

[16] ***Juilliard v. Greenman, 110 U.S. 421, 448, 4 S. Ct. 122, 130, 28 L. Ed. 204 (1884).***

[17] Congress has delegated the power to establish this national currency which is lawful money to the Federal Reserve System. 12 U.S.C. § 411. Congress has made the Federal Reserve note the measure of value in our monetary system, 12 U.S.C. § 412 (1968),*fn1 and has defined Federal Reserve notes as legal tender for taxes, 31 U.S.C. § 392 (1965). Taxpayers' attempt to devalue the Federal Reserve notes they received as income is, therefore, not lawful under the laws of the United States.

[18] Taxpayers also assert they were denied their Seventh Amendment right to trial by jury before the Tax Court. The Seventh Amendment preserves the right to jury trial "in suits at common law." Since there was no right of action at common law against a sovereign, enforceable by jury trial or otherwise, there is no constitutional right to a jury trial in a suit against the United States. See 9 C. Wright & A. Miller, Federal Practice & Procedure § 2314, at 68-69 (1971). Thus, there is a right to a jury trial in actions against the United States only if a statute so provides. Congress has not so provided when the taxpayer elects not to pay the assessment and sue for a redetermination in the Tax Court. For a taxpayer to obtain a trial by jury, he must pay the tax allegedly owed and sue for a refund in district court. 28 U.S.C. §§ 2402 and 1346(a)(1). The law is therefore clear that a taxpayer who elects to bring his suit in the Tax Court has no right, statutory or constitutional, to a trial by jury. Phillips v. Commissioner, 283 U.S. 589, 599 n. 9, 51 S. Ct. 608, 75 L. Ed. 1289 (1931); Wickwire v. Reinecke, 275 U.S. 101, 105-106, 48 S. Ct. 43, 72 L. Ed. 184 (1927); Dorl v. Commissioner, 507 F.2d 406, 407 (2d Cir. 1974) (holding it "elementary that there is no right to a jury trial in the Tax Court.").

[19] One other issue the taxpayers raise is that the Tax Court judge violated the Canons of Judicial Ethics in deciding this case for the Internal Revenue Service. Although the Tax Court's opinion did not answer every argument, statute, and case cited by the taxpayers (as ours does not) and the opinion did not give an analysis of its decision, the decision was grounded upon the Constitution and the laws of the United States.

[20] AFFIRMED.

[21] Disposition

[22] AFFIRMED.

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General Footnotes

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[23] *fn* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir. 1970, 431 F.2d 409, Part I.

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Opinion Footnotes

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[24] *fn1 Any Federal Reserve bank may make application to the local Federal Reserve agent for such amount of the Federal Reserve notes hereinbefore provided for as it may require. Such application shall be accompanied with a tender to the local Federal Reserve agent or collateral in amount equal to the sum of the Federal Reserve notes thus applied for and issued pursuant to such application. The collateral security thus offered shall be notes, drafts, bills of exchange, or acceptances acquired under the provisions of sections 82, 342-347, 347c, and 372 of this title, or bills of exchange endorsed by a member bank of any Federal Reserve district and purchased under the provisions of sections 348a and 353-359 of this title, or bankers' acceptances purchased under the provisions of said sections 348a and 353-359 of this title, or gold certificates, or Special Drawing Right certificates, or direct obligations of the United States. In no event shall such collateral security be less than the amount of Federal Reserve notes applied for. The Federal Reserve agents shall each day notify the Board of Governors of the Federal Reserve System of all issues and withdrawals of Federal Reserve notes to and by the Federal Reserve bank to which he is accredited. The said Board of Governors of the Federal Reserve System may at any time call upon a Federal Reserve bank for additional security to protect the Federal Reserve notes issued to it. (Emphasis added)

# U.S. Supreme Court

## DOWNES v. BIDWELL, 182 U.S. 244 (1901)

**182 U.S. 244**

**SAMUEL DOWNES, Doing Business under the Firm Name of S. B. Downes & Company, Plff. in Err.,**
**v.**
**GEORGE R. BIDWELL.**
**No. 507.**

**Argued January 8, 9, 10, 11, 1901.**
**Decided May 27, 1901.**

[182 U.S. 244, 247] This was an action begun in the circuit court by Downes, doing business under the firm name of S. B. Downes & Co., against the collector of the port of New York, to recover back duties to the amount of $659.35 exacted and paid under protest upon certain oranges consigned to the plaintiff at New York, and brought thither from the port of San Juan in the island of Porto Rico during the month of November, 1900, after the passage of the act temporarily providing a civil government and revenues for ths island of Porto Rico, known as the Foraker act.

The district attorney demurred to the complaint for the want of jurisdiction in the court, and for insufficiency of its averments. The demurrer was sustained, and the complaint dismissed. Whereupon plaintiff sued out this writ of error.

Messrs. Frederic R. Coudert, Jr., and Paul Fuller for plaintiff in error.

Solicitor General Richards and Attorney General Griggs for defendant in error.

Statement by Mr. Justice Brown:

This case involves the question whether merchandise brought into the port of New York from Porto Rico since the passage of the Foraker act is exempt from duty, notwithstanding the 3d section of that act which requires the payment of '15 [182 U.S. 244, 248] per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries.'

**1.** The exception to the jurisdiction of the court is not well taken. By Rev. Stat. 629, subd. 4, the circuit courts are vested with jurisdiction 'of all suits at law or in equity arising under any act providing for revenue from imports or tonnage,' irrespective of the amount involved. This section should be construed in connection with 643, which provides for the removal from state courts to circuit courts of the United States of suits against revenue officers 'on account of any act done under color of his office, or of any such [revenue] law, or on account of any right, title, or authority claimed by such officer or other person under any such law.' Both these sections are taken from the act of March 2, 1833 ( 4 Stat. at L. 632, chap. 57) commonly known as the force bill, and are evidently intended to include all actions against customs officers acting under color of their office. While, as we have held in De Lima v. Bidwell, 181 U. S. --, ante, 743, 21 Sup. Ct. Rep. 743, Actions against the collector to recover back duties assessed upon nonimportable property are not 'customs cases' in the sense of the administrative act, they are, nevertheless, actions arising under an act to provide for a revenue from imports, in the sense of 629, since they are for acts done by a collector under color of his office. This subdivision of 629 was not repealed by the jurisdictional act of 1875, or the subsequent act of August 13, 1888, since these acts were 'not intended to interfere with the prior statutes conferring jurisdiction upon the circuit or district courts in special cases and over particular subjects. United States v. Mooney, 116 U.S. 104, 107 , 29 S. L. ed. 550, 552, 6 Sup. Ct. Rep. 304, 306. See also Merchants' Ins. Co. v. Ritchie, 5 Wall. 541, 18 L. ed. 540; Philadelphia v. The Collector, 5 Wall. 720, sub nom. Philadelphia v. Diehl, 18 L. ed. 614; Hornthall v. The Collector, 9 Wall. 560, sub nom. Hornthall v. Keary, 19 L. ed. 560 As the case 'involves the construction or application of the Constitution,' as well as the constitutionality of a law of the United States, the writ of error was properly sued out from this court.

**2.** In the case of De Lima v. Bidwell just decided, 181 U. S. --, ante, 743, 21 Sup. Ct. Rep. 743, we held that, upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a terri- [182 U.S. 244, 249] tory of the United States, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the United States within that provision of the Constitution which declares that 'all duties, imposts, and excises shall be uniform throughout the United States.' Art. 1, 8. If Porto Rico be a part of the United States, the Foraker act imposing duties upon its products is unconstitutional, not only by reason of a violation of the uniformity clause, but because by 9 'vessels bound to or from one state' cannot 'be obliged to enter, clear, or pay duties in another.'

The case also involves the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress, and in the decisions of this court.

The Federal government was created in 1777 by the union of thirteen colonies of Great Britain in 'certain articles of confederation and perpetual union,' the first one of which declared that 'the stile of this confederacy shall be the United States of America.' Each member of the confederacy was denominated a state. Provision was made for the representation of each state by not less than two nor more than seven delegates; but no mention was made of territories or other lands, except in article 11,

which authorized the admission of Canada, upon its 'acceding to this confederation,' and of other colonies if such admission were agreed to by nine states. At this time several states made claims to large tracts of land in the unsettled west, which they were at first indisposed to relinquish. Disputes over these lands became so acrid as nearly to defeat the confederacy, before it was fairly put in operation. Several of the states refused to ratify the articles, because the convention had taken no steps to settle the titles to these lands upon principles of equity and sound policy; but all of them, through fear of being accused of disloyalty, finally yielded their claims, though Maryland held out until 1781. Most of these states in the [182 U.S. 244, 250] meantime having ceded their interests in these lands, the confederate Congress, in 1787, created the first territorial government northwest of the Ohio river, provided for local self-government, a bill of rights, a representation in Congress by a delegate, who should have a seat 'with a right of debating, but not of voting,' and for the ultimate formation of states therefrom, and their admission into the Union on an equal footing with the original states.

The confederacy, owing to well-known historical reasons, having proven a failure, a new Constitution was formed in 1787 by 'the people of the United States' 'for the United States of America,' as its preamble declares. All legislative powers were vested in a Congress consisting of representatives from the several states, but no provision was made for the admission of delegates from the territories, and no mention was made of territories as separate portions of the Union, except that Congress was empowered 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' At this time all of the states had ceded their unappropriated lands except North Carolina and Georgia. It was thought by Chief Justice Taney in the Dred Scott Case, 19 How. 393, 436, 15 L. ed. 691, 713, that the sole object of the territorial clause was 'to transfer to the new government the property then held in common by the states, and to give to that government power to apply it to the objects for which it had been destined by mutual agreement among the states before their league was dissolved;' that the power 'to make needful rules and regulations' was not intended to give the powers of sovereignty, or to authorize the establishment of territorial governments,-in short, that these words were used in a proprietary, and not in a political, sense. But, as we observed in De Lima v. Bidwell, the power to establish territorial governments has been too long exercised by Congress and acquiesced in by this court to be deemed an unsettled question. Indeed, in the Dred Scott Case it was admitted to be the inevitable consequence of the right to acquire territory.

It is sufficient to observe in relation to these three fundamental instruments, that it can nowhere be inferred that the [182 U.S. 244, 251] territories were considered a part of the United States. The Constitution was created by the people of the United States, as a union of states, to be governed solely by representatives of the states; and even the provision relied upon here, that all duties, imposts, and excises shall be uniform 'throughout the United States,' is explained by subsequent provisions of the Constitution, that 'no tax or duty shall be laid on articles exported from any state,' and 'no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.' In short, the Constitution deals with states, their people, and their representatives.

The 13th Amendment to the Constitution, prohibiting slavery and involuntary servitude 'within the United States, or in any place subject to their jurisdiction,' is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union. To say that the phraseology of this amendment was due to the fact that it was intended to prohibit slavery in the seceded states, under a possible interpretation that those states were no longer a part of the Union, is to confess the very point in issue, since it involves an admission that, if these states were not a part of the Union, they were still subject to the jurisdiction of the United States.

Upon the other hand, the 14th Amendment, upon the subject of citizenship, declares only that 'all

persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside.' Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place 'subject to their jurisdiction.'

The question of the legal relations between the states and the newly acquired territories first became the subject of public discussion in connection with the purchase of Louisiana in 1803. This purchase arose primarily from the fixed policy of Spain to exclude all foreign commerce from the Mississippi. This restriction became intolerable to the large number of immigrants who were leaving the eastern states to settle in the fertile val- [182 U.S. 244, 252] ley of that river and its tributaries. After several futile attempts to secure the free navigation of that river by treaty, advantage was taken of the exhaustion of Spain in her war with France, and a provision inserted in the treaty of October 27, 1795, by which the Mississippi river was opened to the commerce of the United States. 8 Stat. at L. 138, 140, art. 4. In October, 1800, by the secret treaty of San Ildefonso, Spain retroceded to France the territory of Louisiana. This treaty created such a ferment in this country that James Monroe was sent as minister extraordinary with discretionary powers to co-operate with Livingston, then minister to France, in the purchase of New Orleans, for which Congress appropriated $2,000,000. To the surprise of the negotiators, Bonaparte invited them to make an offer for the whole of Louisiana at a price finally fixed at $15,000,000. It is well known that Mr. Jefferson entertained grave doubts as to his power to make the purchase, or, rather, as to his right to annex the territory and make it part of the United States, and had instructed Mr. Livingston to make no agreement to that effect in the treaty, as he believed it could not be legally done. Owing to a new war between England and France being upon the point of breaking out, there was need for haste in the negotiations, and Mr. Livingston took the responsibility of disobeying his instructions, and, probably owing to the insistence of Bonaparte, consented to the 3d article of the treaty, which provided that 'the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.' [8 Stat. at L. 202.] This evidently committed the government to the ultimate, but not to the immediate, admission of Louisiana as a state, and postponed its incorporation into the Union to the pleasure of Congress. In regard to this, Mr. Jefferson, in a letter to Senator Breckinridge of Kentucky, of August 12, 1803, used the following language: 'This treaty must, of course, be laid before both Houses, because [182 U.S. 244, 253] both have important functions to exercise respecting it. They, I presume, will see their duty to their country in ratifying and paying for it, so as to secure a good which would otherwise probably be never again in their power. But I suppose they must then appeal to the nation for an additional article to the Constitution approving and confirming an act which the nation had not previously authorized. The Constitution has made no provision for holding foreign territory, still less for incorporating foreign nations into our Union. The Executive, in seizing the fugitive occurrence which so much advances the good of our country, have done an act beyond the Constitution.'

To cover the questions raised by this purchase Mr. Jefferson prepared two amendments to the Constitution, the first of which declared that 'the province of Louisiana is incorporated with the United States and made part thereof;' and the second of which was couched in a little different language, viz.: 'Louisiana, as ceded by France to the United States, is made a part of the United States. Its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing as other citizens in analogous situations.' But by the time Congress assembled, October 17, 1803, either the argument of his friends or the pressing necessity of the situation seems to have dispelled his doubts regarding his power under the Constitution, since in his message to Congress he referred the whole matter to that body, saying that 'with the wisdom of Congress it will rest to take those ulterior measures which may be necessary for the immediate occupation and temporary government of the country; for its

incorporation into the Union.' Jefferson's Writings, vol. 8, p. 269.

The raising of money to provide for the purchase of this territory, and the act providing a civil government, gave rise to an animated debate in Congress, in which two questions were prominently presented: First, whether the provision for the ultimate incorporation of Louisiana into the Union was constitutional; and, second, whether the 7th article of the treaty admitting the ships of Spain and France for the next twelve years 'into the ports of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of [182 U.S. 244, 254] the United States coming directly from France or Spain, or any of their colonies, without being subject to any other or greater duty on merchandise or other or greater tonnage than that paid by the citizens of the United States' [8 Stat. at L. 204], was an unlawful discrimination in favor of those ports and an infringement upon art. 1, 9, of the Constitution, that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another.' This article of the treaty contained the further stipulation that 'during the space of time above mentioned to other nation shall have a right to the same privileges in the ports of the ceded territory; . . . and it is well understood that the object of the above article is to favor the manufactures, commerce, freight, and navigation of France and Spain.'

It is unnecessary to enter into the details of this debate. The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts. United States v. Union P. R. Co. 91 U.S. 72, 79 , 23 S. L. ed, 224, 228. Suffice it to say that the administration party took the ground that, under the constitutional power to make treaties, there was ample power to acquire territory, and to hold and govern it under laws to be passed by Congress; and that as Louisiana was incorporated into the Union as a territory, and not as a state, a stipulation for citizenship became necessary; that as a state they would not have needed a stipulation for the safety of their liberty, property, and religion, but as territory this stipulation would govern and restrain the undefined powers of Congress to 'make rules and regulations' for territories. The Federalists admitted the power of Congress to acquire and hold territory, but denied its power to incorporate it into the Union under the Constitution as it then stood.

They also attacked the 7th article of the treaty, discriminating in favor of French and Spanish ships, as a distinct violation of the Constitution against preference being given to the [182 U.S. 244, 255] ports of one state over those of another. The administration party, through Mr. Elliott of Vermont, replied to this that 'the states, as such, were equal and intended to preserve that equality; and the provision of the Constitution alluded to was calculated to prevent Congress from making any odious discrimination or distinctions between particular states. It was not contemplated that this provision would have application to colonial or territorial acquisitions.' Said Mr. Nicholson of Maryland, speaking for the administration: It [Louisiana] is in the nature of a colony whose commerce may be regulated without any reference to the Constitution. Had it been the island of Cuba which was ceded to us, under a similar condition of admitting French and Spanish vessels for a limited time into Havana, could it possibly have been contended that this would be giving a preference to the ports of one state over those of another, or that the uniformity of duties, imposts, and excises throughout the United States would have been destroyed? And because Louisiana lies adjacent to our own territory is it to be viewed in a different light?'

As a sequence to this debate two bills were passed, one October 31, 1803 (2 Stat. at L. 245, chap. 1), authorizing the President to take possession of the territory and to continue the existing government, and the other November 10, 1803 (2 Stat. at L. 245, chap. 2), making provision for the payment of the purchase price. These acts continued in force until March 26, 1804, when a new act was passed

providing for a temporary government (2 Stat. at L. 283, chap. 38), and vesting all legislative powers in a governor and legislative council, to be appointed by the President. These statutes may be taken as expressing the views of Congress, first, that territory may be lawfully acquired by treaty, with a provision for its ultimate incorporation into the Union; and, second, that a discrimination in favor of certain foreign vessels trading with the ports of a newly acquired territory is no violation of that clause of the Constitution (art. 1, 9) that declares that no preference shall be given to the ports of one state over those of another. It is evident that the constitutionality of this discrimination can only be supported upon the theory that ports of territories are not ports of state within the meaning of the Constitution. [182 U.S. 244, 256] The same construction was adhered to in the treaty with Spain for the purchase of Florida (8 Stat. at L. 252) the 6th article of which provided that the inhabitants should 'be incorporated into the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution;' and the 15th article of which agreed that Spanish vessels coming directly from Spanish ports and laden with productions of Spanish growth or manufacture should be admitted, for the term of twelve years, to the ports of Pensacola and St. Augustine 'without paying other or higher duties on their cargoes, or of tonnage, than will be paid by the vessels of the United States,' and that 'during the said term no other nation shall enjoy the same privileges within the ceded territories.'

So, too, in the act annexing the Republic of Hawaii, there was a provision continuing in effect the customs relations of the Hawaiian islands with the United States and other countries, the effect of which was to compel the collection in those islands of a duty upon certain articles, whether coming from the United States or other countries, much greater than the duty provided by the general tariff law then in force. This was a discrimination against the Hawaiian ports wholly inconsistent with the revenue clauses of the Constitution, if such clauses were there operative.

The very treaty with Spain under discussion in this case contains similar discriminative provisions, which are apparently irreconcilable with the Constitution, if that instrument be held to extend to these islands immediately upon their cession to the United States. By article 4 the United States agree, for the term of ten years from the date of the exchange of the ratifications of the present treaty, to admit Spanish ships and merchandise to the ports of the Philippine islands on the same terms as ships and merchandise of the United States,'-a privilege not extending to any other ports. It was a clear breach of the uniformity clause in question, and a manifest excess of authority on the part of the commissioners, if ports of the Philippine islands be ports of the United States.

So, too, by article 13, 'Spanish scientific, literary, and artistic works . . . shall be continued to be admitted free of [182 U.S. 244, 257] duty in such territories for the period of ten years, to be reckoned from the date of the exchange of the ratifications of this treaty.' This is also a clear discrimination in favor of Spanish literary productions into particular ports.

Notwithstanding these provisions for the incorporation of territories into the Union, Congress, not only in organizing the territory of Louisiana by act of March 26, 1804, but all other territories carved out of this vast inheritance, has assumed that the Constitution did not extend to them of its own force, and has in each case made special provision, either that their legislatures shall pass no law inconsistent with the Constitution of the United States, or that the Constitution or laws of the United States shall be the supreme law of such territories. Finally, in Rev. Stat. 1891, a general provision was enacted that 'the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the United States.'

So, too, on March 6, 1820 (3 Stat. at L. 545, chap. 22), in an act authorizing the people of Missouri to form a state government, after a heated debate, Congress declared that in the territory of Louisiana

north of 36ø 30' slavery should be forever prohibited. It is true that, for reasons which have become historical, this act was declared to be unconstitutional in Scott v. Sandford, 19 How. 393, 15 L. ed. 691, but it is none the less a distinct annunciation by Congress of power over property in the territories, which it obviously did not possess in the several states.

The researches of counsel have collated a large number of other instances in which Congress has in its enactments recognized the fact that provisions intended for the states did not embrace the territories, unless specially mentioned. These are found in the laws prohibiting the slave trade with 'the United States or territories thereof;' or equipping ships 'in any port or place within the jurisdiction of the United States;' in the internal revenue laws, in the early ones of which no provision was made for the collection of taxes in the territory not included within the boundaries of the existing states, and others of which extended them expressly to the territories, or 'within [182 U.S. 244, 258] the exterior boundaries of the United States;' and in the acts extending the internal revenue laws to the territories of Alaska and Oklahoma. It would prolong this opinion unnecessarily to set forth the provisions of these acts in detail. It is sufficient to say that Congress has or has not applied the revenue laws to the territories, as the circumstances of each case seemed to require, and has specifically legislated for the territories whenever it was its intention to execute laws beyond the limits of the states. Indeed, whatever may have been the fluctuations of opinion in other bodies (and even this court has not been exempt from them ), Congress has been consistent in recognizing the difference between the states and territories under the Constitution.

The decisions of this court upon this subject have not been altogether harmonious. Some of them are based upon the theory that the Constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the Constitution took effect immediately upon the cession of the territory to the United States. It may be remarked, upon the threshold of an analysis of these cases, that too much weight must not be given to general expressions found in several opinions that the power of Congress over territories is complete and supreme, because these words may be interpreted as meaning only supreme under the Constitution; her, upon the other hand, to general statements that the Constitution covers the territories as well as the states, since in such cases it will be found that acts of Congress had already extended the Constitution to such territories, and that thereby it subordinated, not only its own acts, but those of the territorial legislatures, to what had become the supreme law of the land. 'It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually [182 U.S. 244, 259] before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' Cohen v. Virginia, 6 Wheat. 264, 399, 5 L. ed. 257, 290.

The earliest case is that of Hepburn v. Ellzey, 2 Cranch, 445, 2 L. ed. 332, in which this court held that, under that clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of different states, a citizen of the District of Columbia could not maintain an action in the circuit court of the United States. It was argued that the word 'state.' in that connection, was used simply to denote a distinct political society. 'But,' said the Chief Justice, 'as the act of Congress obviously used the word 'state' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the Constitution , . . . and excludes from the term the signification attached to it by writers on the law of nations.' This case was followed in Barney v. Baltimore, 6 Wall. 280, 18 L. ed.

825, and quite recently in Hooe v. Jamieson, 166 U.S. 395 , 41 L. ed. 1049, 17 Sup. Ct. Rep. 596. The same rule was applied to citizens of territories in New Orleans v. Winter, 1 Wheat. 91, 4 L. ed. 44, in which an attempt was made to distinguish a territory from the District of Columbia. But it was said that 'neither of them is a state in the sense in which that term is used in the Constitution.' In Scott v. Jones, 5 How. 343, 12 L. ed. 181, and in Miners' Bank v. Iowa ex rel. District Prosecuting Attorney, 12 How. 1, 13 L. ed. 867, it was held that under the judiciary act, permitting writs of error to the supreme court of a state in cases where the validity of a state statute is drawn in question, an act of a territorial legislature was not within the contemplation of Congress.

Loughborough v. Blake, 5 Wheat. 317, 5 L. ed. 98, was an action of trespass or, as appears by the original record, replevin, brought in the circuit court for the District of Columbia to try the right of Congress to impose a direct tax for general purposes on that District. 3 Stat. at L. 216, chap. 60. It was insisted that Congress could act in a double capacity: in one as legislating [182 U.S. 244, 260] for the states; in the other as a local legislature for the District of Columbia. In the latter character, it was admitted that the power of levying direct taxes might be exercised, but for District purposes only, as a state legislature might tax for state purposes; but that it could not legislate for the District under art. 1, 8, giving to Congress the power 'to lay and collect taxes, imposts, and excises,' which 'shall be uniform throughout the United States,' inasmuch as the District was no part of the United States. It was held that the grant of this power was a general one without limitation as to place, and consequently extended to all places over which the government extends; and that it extended to the District of Columbia as a constituent part of the United States. The fact that art. 1 , 2, declares that 'representatives and direct taxes shall be apportioned among the several states . . . according to their respective numbers' furnished a standard by which taxes were apportioned, but not to exempt any part of the country from their operation. 'The words used do not mean that direct taxes shall be imposed on states only which are represented, or shall be apportioned to representatives; but that direct taxation, in its application to states, shall be apportioned to numbers.' That art. 1, 9, 4, declaring that direct taxes shall be laid in proportion to the census, was applicable to the District of Columbia, 'and will enable Congress to apportion on it its just and equal share of the burden, with the same accuracy as on the respective states. If the tax be laid in this proportion, it is within the very words of the restriction. It is a tax in proportion to the census or enumeration referred to.' It was further held that the words of the 9th section did not 'in terms require that the system of direct taxation, when resorted to, shall be extended to the territories, as the words of the 2d section require that it shall be extended to all the states. They therefore may, without violence, be understood to give a rule when the territories shall be taxed, without imposing the necessity of taxing them.'

There could be no doubt as to the correctness of this conclusion, so far, at least, as it applied to the District of Columbia. This District had been a part of the states of Maryland and [182 U.S. 244, 261] Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the states of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government.

In delivering the opinion, however, the Chief Justice made certain observations which have occasioned

some embarrassment in other cases. 'The power,' said he, 'to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit but of one answer. It is the name given to our great Republic which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends through- [182 U.S. 244, 262] out the United States.' So far as applicable to the District of Columbia, these observations are entirely sound. So far as they apply to the territories, they were not called for by the exigencies of the case.

In line with Loughborough v. Blake is the case of Callan v. Wilson, 127 U.S. 540 , 32 L. ed. 223, 8 Sup. Ct. Rep. 1301, in which the provisions of the Constitution relating to trial by jury were held to be in force in the District of Columbia. Upon the other hand, in De Geofroy v. Riggs 133 U.S. 258 , 33 L. ed. 642, 10 Sup. Ct. Rep. 295, the District of Columbia, as a political community, was held to be one of 'the states of the Union' within the meaning of that term as used in a consular convention of February 23, 1853, with France. The 7th article of that convention provided that in all the states of the Union whose existing laws permitted it Frenchmen should enjoy the right of holding, disposing of, and inheriting property in the same manner as citizens of the United States; and as to the states of the Union by whose existing laws aliens were not permitted to hold real estate the President engaged to recommend to them the passage of such laws as might be necessary for the purpose of conferring this right. The court was of opinion that if these terms, 'states of the Union,' were held to exclude the District of Columbia and the territories, our government would be placed in the inconsistent position of stipulating that French citizens should enjoy the right of holding, disposing of, and inheriting property in like manner as citizens of the United States, in states whose laws permitted it, and engaging that the President should recommend the passage of laws conferring that right in states whose laws did not permit aliens to hold real estate, while at the same time refusing to citizens of France holding property in the District of Columbia and in some of the territories, where the power of the United States is in that respect unlimited, a like release from the disabilities of alienage, 'thus discriminating against them in favor of citizens of France holding property in states having similar legislation. No plausible motive can be assigned for such discrimination. A right which the government of the United States apparently desires that citizens of France should enjoy in all the states it would hardly refuse to them in the district [182 U.S. 244, 263] embracing its capital, or in any of its own territorial dependencies.'

This case may be considered as establishing the principle that, in dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is so, not because the territories comprised a part of the government established by the people of the states in their Constitution, but because the Federal government is the only authorized organ of the territories, as well as of the states, in their foreign relations. By art. 1, 10, of the Constitution, 'no state shall enter into any treaty, alliance, or confederation, . . . [or] enter into any agreement or compact with another state, or with a foreign power.' It would be absurd to hold that the territories, which are much less independent than the states, and are under the direct control and tutelage of the general government, possess a power in this particular which is thus expressly forbidden to the states.

It may be added in this connection, that to put at rest all doubts regarding the applicability of the Constitution to the District of Columbia, Congress by the act of February 21, 1871 (16 Stat. at L. 419,

426, chap. 62, 34), specifically extended the Constitution and laws of the United States to this District.

The case of American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242, originated in a libel filed in the district court for South Carolina, for the possession of 356 bales of cotton which had been wrecked on the coast of Florida, abandoned to the insurance companies, and subsequently brought to Charleston. Canter claimed the cotton as bona fide purchaser at a marshal's sale at Key West, by virtue of a decree of a territorial court consisting of a notary and five jurors, proceeding under an act of the governor and legislative council of Florida. The case turned upon the question whether the sale by that court was effectual to devest the interest of the underwriters. The district judge pronounced the proceedings a nullity, and rendered a decree from which both parties appealed to the circuit court. The circuit court [182 U.S. 244, 264] reversed the decree of the district court upon the ground that the proceedings of the court at Key West were legal, and transferred the property to Canter, the alleged purchaser.

The opinion of the circuit court was delivered by Mr. Justice Johnson, of the Supreme Court, and is published in full in a note in Peters's Reports. It was argued that the Constitution vested the admiralty jurisdiction exclusively in the general government; that the legislature of Florida had exercised an illegal power in organizing this court, and that its decrees were void. On the other hand, it was insisted that this was a court of separate and distinct jurisdiction from the courts of the United States, and as such its acts were not to be reviewed in a foreign tribunal, such as was the court of South Carolina; 'that the district of Florida was no part of the United States, but only an acquisition or dependency, and as such the Constitution per se had no binding effect in or over it.' 'It becomes,' said the court 'indispensable to the solution of these difficulties that we should conceive a just idea of the relation in which Florida stands to the United States. . . . And, first, it is obvious that there is a material distinction between the territory now under consideration and that which is acquired from the aborigines ( whether by purchase or conquest) within the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these there can be no question that the sovereignty of the state or territory within which it lies, and of the United States, immediately attached, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty. The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign, such as was Florida to the Crown of Spain. And on this subject we have the most explicit proof that the understanding of our public functionaries is that the government and laws of the United States do not extend to such territory by the mere act of cession. For in the act of Congress of March 30, 1822, 9, we have an enumeration of the acts of Congress which are to be held in force in the territory; and in the 10th section an enumeration, in the nature of a bill [182 U.S. 244, 265] of rights, of privileges and immunities which could not be denied to the inhabitants of the territory if they came under the Constitution by the mere act of cession. . . . These states, this territory, and future states to be admitted into the Union are the sole objects of the Constitution; there is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those limits.' He further held that the right of acquiring territory was altogether incidental to the treaty-making power; that their government was left to Congress; that the territory of Florida did 'not stand in the relation of a state to the United States;' that the acts establishing a territorial government were the Constitution of Florida; that while, under these acts, the territorial legislature could enact nothing inconsistent with what Congress had made inherent and permanent in the territorial government, it had not done so in organizing the court at Key West.

From the decree of the circuit court the underwriters appealed to this court, and the question was argued whether the circuit court was correct in drawing a distinction between territories existing at the date of the Constitution and territories subsequently acquired. The main contention of the appellants was that the superior courts of Florida had been vested by Congress with exclusive jurisdiction in all admiralty and maritime cases; that salvage was such a case, and therefore any law of Florida giving jurisdiction in

salvage cases to any other court was unconstitutional. On behalf of the purchaser it was argued that the Constitution and laws of the United States were not per se in force in Florida, nor the inhabitants citizens of the United States; that the Constitution was established by the people of the United States for the United States; that if the Constitution were in force in Florida it was unnecessary to pass an act extending the laws of the United States to Florida. 'What is Florida?' said Mr. Webster. 'It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions.'

The opinion of Mr. Chief Justice Marshall in this case should be read in connection with art. 3, 1 and 2, of the Con- [182 U.S. 244, 266] stitution, vesting 'the judicial power of the United States' in 'one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the Supreme and inferior courts shall hold their offices during good behavior,' etc. He held that the court 'should take into view the relation in which Florida stands to the United States;' that territory ceded by treaty 'becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose.' That Florida, upon the conclusion of the treaty, became a territory of the United States and subject to the power of Congress under the territorial clause of the Constitution. The acts providing a territorial government for Florida were examined in detail. He held that the judicial clause of the Constitution, above quoted, did not apply to Florida; that the judges of the superior courts of Florida held their office for four years; that 'these courts are not, then, constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited;' that 'they are legislative courts, created in virtue of the general right of sovereignty which exists in the government,' or in virtue of the territorial clause of the Constitution; that the jurisdiction with which they are invested is not a part of judicial power of the Constitution, but is conferred by Congress in the exercise of those general powers which that body possesses over the territories of the United States; and that in legislating for them Congress exercises the combined powers of the general and of a state government. The act of the territorial legislature creating the court in question was held not to be 'inconsistent with the laws and Constitution of the United States,' and the decree of the circuit court was affirmed.

As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution and upon territory which is not part of the United States within the meaning of the Constitution. In delivering his opinion in this [182 U.S. 244, 267] case Mr. Chief Justice Marshall made no reference whatever to the prior case of Loughborough v. Blake, 5 Wheat. 317, 5 L. ed. 98, in which he had intimated that the territories were part of the United States. But if they be a part of the United States, it is difficult to see how Congress could create courts in such territories, except under the judicial clause of the Constitution. The power to make needful rules and regulations would certainly not authorize anything inconsistent with the Constitution if it applied to the territories. Certainly no such court could be created within a state, except under the restrictions of the judicial clause. It is sufficient to say that this case has ever since been accepted as authority for the proposition that the judicial clause of the Constitution has no application to courts created in the territories, and that with respect to them Congress has a power wholly unrestricted by it. We must assume as a logical inference from this case that the other powers vested in Congress by the Constitution have no application to these territories, or that the judicial clause is exceptional in that particular.

This case was followed in Benner v. Porter, 9 How. 235, 13 L. ed. 119, in which it was held that the jurisdiction of these territorial courts ceased upon the admission of Florida into the Union, Mr. Justice Nelson remarking of them (p. 242, L. ed. p. 122), that 'they are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether

or not there are provisions in that instrument which extend to and act upon these territorial governments, it is not now material to examine. We are speaking here of those provisions that refer particularly to the distinction between Federal and state jurisdiction . . . . (p. 244, L. ed. p. 123). Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a state.' To the same effect are Clinton v. Englebrecht, 13 Wall. 434, 20 L. ed. 659; Good v. Martin, 95 U.S. 90, 98 , 24 S. L. ed. 341, 344; and McAllister v. United States, 141 U.S. 174 , 35 L. ed. 693, 11 Sup. Ct. Rep. 949.

That the power over the territories is vested in Congress [182 U.S. 244, 268] without limitation, and that this power has been considered the foundation upon which the territorial governments rest, was also asserted by Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, 422, 4 L. ed. 579, 605, and in United States v. Gratiot, 14 Pet. 526, 10 L. ed. 573. So, too, in Church of Jesus Christ of L. D. S. v. United States, 136 U.S. 1 , 34 L. ed. 478, 10 Sup. Ct. Rep. 792, in holding that Congress had power to repeal the charter of the church, Mr. Justice Bradley used the following forceful language: 'The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio river (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. . . . Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but those limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions.' See also, to the same [182 U.S. 244, 269] effect First Nat. Bank v. Yankton County, 101 U.S. 129 , 25 L. ed. 1046; Murphy v. Ramsey, 114 U.S. 15 , 29 L. ed. 47, 5 Sup. Ct. Rep. 747.

In Webster v. Reid, 11 How. 437, 13 L. ed. 761, it was held that a law of the territory of Iowa, which prohibited the trial by jury of certain actions at law founded on contract to recover payment for services, was void; but the case is of little value as bearing upon the question of the extension of the Constitution to that territory, inasmuch as the organic law of the territory of Iowa, by express provision and by reference, extended the laws of the United States, including the ordinance of 1787 (which provided expressly for jury trials), so far as they were applicable; and the case was put upon this ground. 5 Stat. at L. 235, 239, chap. 96, 12.

In Reynolds v. United States, 98 U.S. 145 , 25 L. ed. 244, a law of the territory of Utah, providing for grand juries of fifteen persons, was held to be constitutional, though Rev. Stat. 808, required that a grand jury impaneled before any circuit or district court of the United States shall consist of not less than sixteen nor more than twenty-three persons. Section 808 was held to apply only to the circuit and district courts. The territorial courts were free to act in obedience to their own laws.

In Ross's Case, 140 U.S. 453 , sub nom. Ross v. McIntyre, 35 L. ed. 581, 11 Sup. Ct. Rep. 897, petitioner had been convicted by the American consular tribunal in Japan, of a murder committed upon an American vessel in the harbor of Yokohama, and sentenced to death. There was no indictment by a grand jury, and no trial by a petit jury. This court affirmed the conviction, holding that the Constitution had no application, since it was ordained and established 'for the United States of America,' and not for countries outside of their limits. 'The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad.'

In Springville v. Thomas, 166 U.S. 707 , 41 L. ed. 1172, 17 Sup. Ct. Rep. 717, it was held that a verdict returned by less than the whole number of jurors was invalid because in contravention of the 7th Amendment to the Constitution and the act of Congress of April 7, 1874 [182 U.S. 244, 270] (18 Stat. at L. 27, chap. 80), which provide 'that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law.' It was also intimated that Congress 'could not impart the power to change the constitutional rule,' which was obviously true with respect to Utah, since the organic act of that territory (9 Stat. at L. 458, chap. 51, 17) had expressly extended to it the Constitution and laws of the United States. As we have already held, that provision, once made, could not be withdrawn. If the Constitution could be withdrawn directly, it could be nullified indirectly by acts passed inconsistent with it. The Constitution would thus cease to exist as such, and become of no greater authority than an ordinary act of Congress. In American Pub. Co. v. Fisher, 166 U.S. 464 , 41 L. ed. 1079, 17 Sup. Ct. Rep. 618, a similar law providing for majority verdicts was put upon the express ground above stated, that the organic act of Utah extended the Constitution over that territory. These rulings were repeated in Thompson v. Utah, 170 U.S. 343 , 42 L. ed. 1061, 18 Sup. Ct. Rep. 620, and applied to felonies committed before the territory became a state, although the state Constitution continued the same provision.

Eliminating, then, from the opinions of this court all expressions unnecessary to the disposition of the particular case, and gleaning therefrom the exact point decided in each, the following propositions may be considered as established:

**1.** That the District of Columbia and the territories are not states within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states;

**2.** That territories are not states within the meaning of Rev. Stat. 709, permitting writs of error from this court in cases where the validity of a state statute is drawn in question;

**3.** That the District of Columbia and the territories are states as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property;

**4.** That the territories are not within the clause of the Constitution providing for the creation of a supreme court and such inferior courts as Congress may see fit to establish;

**5.** That the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully [182 U.S. 244, 271] provide for such trials before consular tribunals, without the intervention of a grand or petit jury;

**6.** That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.

The case of Dred Scott v. Sandford, 19 How. 393, 15 L. ed. 691, remains to be considered. This was an action of trespass vi et armis brought in the circuit court for the district of Missouri by Scott, alleging himself to be a citizen of Missouri, against Sandford, a citizen of New York. Defendant pleaded to the jurisdiction that Scott was not a citizen of the state of Missouri, because a negro of African descent, whose ancestors were imported as negro slaves. Plaintiff demurred to this plea and the demurrer was sustained; whereupon, by stipulation of counsel and with leave of the court, defendant pleaded in bar the general issue, and specially that the plaintiff was a slave and the lawful property of defendant, and, as such, he had a right to restrain him. The wife and children of the plaintiff were also involved in the suit.

The facts in brief were that plaintiff had been a slave belonging to Dr. Emerson, a surgeon in the army; that in 1834 Emerson took the plaintiff from the state of Missouri to Rock Island, Illinois, and subsequently to Fort Snelling, Minnesota (then known as Upper Louisiana), and held him there until 1838. Scott married his wife there, of whom the children were subsequently born. In 1838 they returned to Missouri.

Two questions were presented by the record: First, whether the circuit court had jurisdiction; and, second, if it had jurisdiction, was the judgment erroneous or not? With regard to the first question, the court stated that it was its duty 'to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States,' and that the question was whether 'a negro whose ancestors were imported into this country and sold as slaves became a member of the political community formed and brought into existence by the Constitution of the United States, and as such became entitled to all the rights and privileges and immunities guaranteed by that instrument to the citizen, one of which rights is the privilege of suing in a court [182 U.S. 244, 272] of the United States.' It was held that he was not, and was not included under the word 'citizens' in the Constitution, and therefore could claim 'none of the rights and privileges which that instrument provides for and secures to citizens of the United States;' that it did not follow, because he had all the rights and privileges of a citizen of a state, he must be a citizen of the United States; that no state could by any law of its own 'introduce a new member into the political community created by the Constitution;' that the African race was not intended to be included, and formed no part of the people who framed and adopted the Declaration of Independence. The question of the status of negroes in England and the several states was considered at great length by the Chief Justice, and the conclusion reached that Scott was not a citizen of Missouri, and that the circuit court had no jurisdiction of the case.

This was sufficient to dispose of the case without reference to the question of slavery; but, as the plaintiff insisted upon his title to freedom and citizenship by the fact that he and his wife, though born slaves, were taken by their owner and kept four years in Illinois and Minnesota, they thereby became and upon their return to Missouri became citizens of that state, the Chief Justice proceeded to discuss the question whether Scott was still a slave. As the court had decided against his citizenship upon the plea in abatement, it was insisted that further decision upon the question of his freedom or slavery was extrajudicial and mere obiter dicta. But the Chief Justice held that the correction of one error in the court below did not deprive the appellate court of the power of examining further into the record and correcting any other material error which may have been committed; that the error of an inferior court in actually pronouncing judgment for one of the parties, in a case in which it had no jurisdiction, can be looked into or corrected by this court, even though it had decided a similar question presented in the pleadings.

Proceeding to decide the case upon the merits, he held that the territorial clause of the Constitution was confined to the territory which belonged to the United States at the time the Con- [182 U.S. 244, 273]

stitution was adopted, and did not apply to territory subsequently acquired from a foreign government.

In further examining the question as to what provision of the Constitution authorizes the Federal government to acquire territory outside of the original limits of the United States, and what powers it may exercise therein over the person or property of a citizen of the United States, he made use of the following expressions, upon which great reliance is placed by the plaintiff in this case (p. 446, L. ed. p. 718): 'There is certainly no power given by the Constitution to the Federal government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure ; . . . and if a new state is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the state, and the citizens of the state, and the Federal government. But no power is given to acquire a territory to be held and governed permanently in that character.'

He further held that citizens who migrate to a territory cannot be ruled as mere colonists, and that, while Congress had the power of legislating over territories until states were formed from them, it could not deprive a citizen of his property merely because he brought it into a particular territory of the United States, and that this doctrine applied to slaves as well as to other property. Hence, it followed that the act of Congress which prohibited a citizen from holding and owning slaves in territories north of 36ø 30' (known as the Missouri Compromise) was unconstitutional and void, and the fact that Scott was carried into such territory, referring to what is now known as Minnesota, did not entitle him to his freedom.

He further held that whether he was made free by being taken into the free state of Illinois and being kept there two years depended upon the laws of Missouri, and not those of Illinois, and that by the decisions of the highest court of that state his status as a slave continued, notwithstanding his residence of two years in Illinois.

It must be admitted that this case is a strong authority in favor of the plaintiff, and if the opinion of the Chief Justice be [182 U.S. 244, 274] taken at its full value it is decisive in his favor. We are not, however, bound to overlook the fact, that, before the Chief Justice gave utterance to his opinion upon the merits, he had already disposed of the case adversely to the plaintiff upon the question of jurisdiction, and that, in view of the excited political condition of the country at the time, it is unfortunate that he felt compelled to discuss the question upon the merits, particularly so in view of the fact that it involved a ruling that an act of Congress which had been acquiesced in for thirty years was declared unconstitutional. It would appear from the opinion of Mr. Justice Wayne that the real reason for discussing these constitutional questions was that 'there had become such a difference of opinion' about them 'that the peace and harmony of the country required the settlement of them by judicial decision.' p. 455, L. ed. p. 721. The attempt was not successful. It is sufficient to say that the country did not acquiesce in the opinion, and that the Civil War, which shortly thereafter followed, produced such changes in judicial, as well as public, sentiment as to seriously impair the authority of this case.

While there is much in the opinion of the Chief Justice which tends to prove that he thought all the provisions of the Constitution extended of their own force to the territories west of the Mississippi, the question actually decided is readily distinguishable from the one involved in the cause under consideration. The power to prohibit slavery in the territories is so different from the power to impose duties upon territorial products, and depends upon such different provisions of the Constitution, that they can scarcely be considered as analogous, unless we assume broadly that every clause of the Constitution attaches to the territories as well as to the states,-a claim quite inconsistent with the position of the court in the Canter Case. If the assumption be true that slaves are indistinguishable from other property, the inference from the Dred Scott Case is irresistible that Congress had no power to

prohibit their introduction into a territory. It would scarcely be insisted that Congress could with one hand invite settlers to locate in the territories of the United States, and with the other deny them the right to take their property and belongings with them. The two [182 U.S. 244, 275] are so inseparable from each other that one could scarcely be granted and the other withheld without an exercise of arbitrary power inconsistent with the underlying principles of a free government. It might indeed be claimed with great plausibility that such a law would amount to a deprivation of property within the 14th Amendment. The difficulty with the Dred Scott Case was that the court refused to make a distinction between property in general and a wholly exceptional class of property. Mr. Benton tersely stated the distinction by saying that the Virginian might carry his slaves into the territories, but he could not carry with him the Virginian law which made him a slave.

In his history of the Dred Scott Case, Mr. Benton states that the doctrine that the Constitution extended to territories as well as to states first made its appearance in the Senate in the session of 1848-1849, by an attempt to amend a bill giving territorial government to California, New Mexico, and Utah (itself 'hitched on' to a general appropriation bill), by adding the words 'that the Constitution of the United States and all and singular the several acts of Congress (describing them) be and the same hereby are extended and given full force and efficacy in said territories.' Says Mr. Benton: 'The novelty and strangeness of this proposition called up Mr. Webster, who repulsed as an absurdity and as an impossibility the scheme of extending the Constitution to the territories, declaring that instrument to have been made for states, not territories; that Congress governed the territories independently of the Constitution and incompatibly with it; that no part of it went to a territory but what Congress chose to send; that it could not act of itself anywhere, not even in the states for which it was made, and that it required an act of Congress to put it in operation before it had effect anywhere Mr. Clay was of the same opinion and added: 'Now, really, I must say the idea that eo instanti upon the consummation of the treaty, the Constitution of the United States spread itself over the acquired territory and carried along with it the institution of slavery is so irreconcilable with my comprehension, or any reason I possess, that I hardly know how to meet it.' Upon the other hand, Mr. Cal- [182 U.S. 244, 276] houn boldly avowed his intent to carry slavery into them under the wing of the Constitution, and denounced as enemies of the south all who opposed it.'

The amendment was rejected by the House, and a contest brought on which threatened the loss of the general appropriation bill in which this amendment was incorporated, and the Senate finally receded from its amendment. 'Such,' said Mr. Benton, 'were the portentous circumstances under which this new doctrine first revealed itself in the American Senate, and then as needing legislative sanction requiring an act of Congress to carry the Constitution into the territories and to give it force and efficacy there.' Of the Dred Scott Case he says: 'I conclude this introductory note with recurring to the great fundamental error of the court (father of all the political errors), that of assuming the extension of the Constitution to the territories. I call it assuming, for it seems to be a naked assumption without a reason to support it, or a leg to stand upon, condemned by the Constitution itself and the whole history of its formation and administration. Who were the parties to it? The states alone. Their delegates framed it in the Federal convention; their citizens adopted it in the state conventions. The Northwest Territory was then in existence and it had been for three years; yet it had no voice either in the framing or adopting of the instrument, no delegate at Philadelphia, no submission of it to their will for adoption. The preamble shows it made by states. Territories are not alluded to in it.'

Finally, in summing up the results of the decisions holding the invalidity of the Missouri Compromise and the self-extension of the Constitution to the territories, he declares 'that the decisions conflict with the uniform action of all the departments of the Federal government from its foundation to the present time, and cannot be received as rules governing Congress and the people without reversing that action, and admitting the political supremacy of the court, and accepting an altered Constitution from its hands and taking a new and portentous point of departure in the working of the government.'

To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles [182 U.S. 244, 277] of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time of place, and such as are operative only 'throughout the United States' or among the several states.

Thus, when the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may apply to the 1st Amendment, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.

Upon the other hand, when the Constitution declares that all duties shall be uniform 'throughout the United States,' it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the 'United States,' by which term we understand the states whose people united to form the Constitution, and such as have since been admitted to the Union upon an equality with them. Not only did the people in adopting the 13th Amendment thus recognize a distinction between the United States and 'any place subject to their jurisdiction,' but Congress itself, in the act of March 27, 1804 (2 Stat. at L. 298, chap. 56), providing for the proof of public records, applied the provisions of the act, not only to 'every court and office within the United States,' but to the 'courts and offices of the respective territories of the United States and countries subject to the jurisdiction of the United States,' as to the courts and offices of the several states. This classification, adopted by the Eighth Congress, is carried into the Revised Statutes as follows:

> 'Sec. 905. The acts of the legislature of any state or terri- [182 U.S. 244, 278] tory, or of any country subject to the jurisdiction of the United States, shall be authenticated,' etc.
>
> 'Sec. 906. All records and exemplifications of books which may be kept in any public office of and state or territory, or of any country subject to the jurisdiction of the United States,' etc.

Unless these words are to be rejected as meaningless, we must treat them as a recognition by Congress of the fact that there may be teritories subject to the jurisdiction of the United States, which are not of the United States.

In determining the meaning of the words of article 1, section 8, 'uniform throughout the United States,' we are bound to consider, not only the provisions forbidding preference being given to the ports of one state over those of another (to which attention has already been called), but the other clauses declaring that no tax or duty shall be laid on articles exported from any state, and that no state shall, without the consent of Congress, lay any imposts or duties upon imports or exports, nor any duty on tonnage. The object of all of these was to protect the states which united in forming the Constitution from discriminations by Congress, which would operate unfairly or injuriously upon some states and not equally upon others. The opinion of Mr. Justice White in Knowlton v. Moore, 178 U.S. 41 , 44 L. ed. 969, 20 Sup. Ct. Rep. 747, contains an elaborate historical review of the proceedings in the convention, which resulted in the adoption of these different clauses and their arrangement, and he there comes to the conclusion (p. 105, L. ed. p. 995, Sup. Ct. Rep. p. 772) that 'although the provision as to preference between ports and that regarding uniformity of duties, imposts, and excises were one in purpose, one in their adoption,' they were originally placed together, and 'became separated only in arranging the

Constitution for the purpose of style.' Thus construed together, the purpose is irresistible that the words 'throughout the United States' are indistinguishable from the words 'among or between the several states,' and that these prohibitions were intended to apply only to commerce between ports of the several states as they then existed or should thereafter be admitted to the Union.

Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect [182 U.S. 244, 279] that the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct. Notwithstanding its duty to 'guarantee to every state in this Union a republican form of government' (art. 4, 4), by which we understand, according to the definition of Webster, 'a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them,' Congress did not hesitate, in the original organization of the territories of Louisiana, Florida, the Northwest Territory, and its subdivisions of Ohio, Indiana, Michigan, Illinois, and Wisconsin and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British Crown colony than a republican state of America, and to vest the legislative power either in a governor and council, or a governor and judges, to be appointed by the President. It was not until they had attained a certain population that power was given them to organize a legislature by vote of the people. In all these cases, as well as in territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend to Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of habeas corpus, as well as other privileges of the bill of rights.

We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American empire.' There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes [182 U.S. 244, 280] of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that 'the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible . . . to the enjoyment of all the rights, advantages, and immunities of citizens of the United States;' in the case of Mexico, that they should 'be incorporated into the Union, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States;' in the case of Alaska, that the inhabitants who remained three years, 'with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights,' etc; and in the case of Porto Rico and the Philippines, 'that the civil rights and political status of the native inhabitants . . . shall be determined by Congress.' In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.

Grave apprehensions of danger are felt by many eminent men,-a fear lest an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation in which the natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism. These rears, however, find no justification in the action of Congress in the past century, nor in the conduct of the British Parliament towards its outlying possessions since the American Revolution. Indeed, in the only instance in which this court has declared an act of Congress unconstitutional as trespassing upon the rights of territories (the Missouri Compromise), such action was dictated by motives of humanity and justice, and so far commanded popular approval as to be embodied in the 13th Amendment to the Constitution.

There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests. Even in the Foraker act itself, the constitutionality of which is so vigorously assailed, power [182 U.S. 244, 281] was given to the legislative assembly of Porto Rico to repeal the very tariff in question in this case, a power it has not seen fit to exercise. The words of Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, with respect to the power of Congress to regulate commerce, are pertinent in this connection: 'This power,' said he, 'like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are in this, as in many other instances.-as that, for example, of declaring war,-the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.'

So too, in Johnson v. M'Intosh, 8 Wheat. 543, 583, 5 L. ed. 681, 691, it was said by him:

> 'The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old; and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers.
>
> 'When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he can- [182 U.S. 244, 282] not neglect them without injury to his fame and hazard to his power.'

The following remarks of Mr. Justice White in the case of Knowlton v. Moore, 178 U.S. 109 , 44 L. ed. 996, 20 Sup. Ct. Rep. 774, in which the court upheld the progressive features of the legacy tax, are also pertinent:

> 'The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise where an arbitrary and confiscatory exaction is imposed, bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so.'

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of

native Indians.

We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are in- [182 U.S. 244, 283] dispensable to a free government. Of the latter class are the rights to citizenship, to suffrage (Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627 ), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,-whether they shall be introduced into the sisterhood of states or be permitted to form independent governments,-it does not follow that in the meantime, a waiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. Yick Wo v. Hopkins, 118 U.S. 356 , 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Fong Yue Ting v. United States, 149 U.S. 698 , 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; Lem Moon Sing, 158 U.S. 538, 547 , 39 S. L. ed. 1082, 1085, 15 Sup. Ct. Rep. 962; Wong Wing v. United States, 163 U.S. 228 , 41 L. ed. 140, 16 Sup. Ct. Rep. 977. We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect.

Large powers must necessarily be intrusted to Congress in dealing with these problems, and we are bound to assume that they will be judiciously exercised. That these powers may be abused is possible. But the same may be said of its powers under the Constitution as well as outside of it. Human wisdom has never devised a form of government so perfect that it may not be perverted to bad purposes. It is never conclusive to argue against the possession of certain powers from possible abuses of them. It is safe to say that if Congress should venture upon legislation manifestly dictated by selfish interests, it would receive quick rebuke at the hands of the people. Indeed, it is scarcely possible that Congress could do a greater injustice [182 U.S. 244, 284] to these islands than would be involved in holding that it could not impose upon the states taxes and excises without extending the same taxes to them. Such requirement would bring them at once within our internal revenue system, including stamps, licenses, excises, and all the paraphernalia of that system, and apply it to territories which have had no experience of this kind, and where it would prove an intolerable burden.

This subject was carefully considered by the Senate committee in charge of the Foraker bill, which found, after an examination of the facts, that property in Porto Rico was already burdened with a private debt amounting probably to $30,000,000; that no system of property taxation was or ever had been in force in the island, and that it probably would require two years to inaugurate one and secure returns from it; that the revenues had always been chiefly raised by duties on imports and exports, and that our internal revenue laws, if applied in that island, would prove oppressive and ruinous to many people and interests; that to undertake to collect our heavy internal revenue tax, far heavier than Spain ever

imposed upon their products and vocations, would be to invite violations of the law so innumerable as to make prosecutions impossible, and to almost certainly alienate and destroy the friendship and good will of that people for the United States.

In passing upon the questions involved in this and kindred cases, we ought not to overlook the fact that, while the Constitution was intended to establish a permanent form of government for the states which should elect to take advantage of its conditions, and continue for an indefinite future, the vast possibilities of that future could never have entered the minds of its framers. The states had but recently emerged from a war with one of the most powerful nations of Europe, were disheartened by the failure of the confederacy, and were doubtful as to the feasibility of a stronger union. Their territory was confined to a narrow strip of land on the Atlantic coast from Canada to Florida, with a somewhat indefinite claim to territory beyond the Alleghanies, where their sovereignty was disputed by tribes of hostile Indians supported, as was popularly believed, by the British, who had never formally delivered possession [182 U.S. 244, 285] under the treaty of peace. The vast territory beyond the Mississippi, which formerly had been claimed by France, since 1762 had belonged to Spain, still a powerful nation and the owner of a great part of the Western Hemisphere. Under these circumstances it is little wonder that the question of annexing these territories was not made a subject of debate. The difficulties of bringing about a union of the states were so great, the objections to it seemed so formidable, that the whole thought of the convention centered upon surmounting these obstacles. The question of territories was dismissed with a single clause, apparently applicable only to the territories then existing, giving Congress the power to govern and dispose of them.

Had the acquisition of other territories been contemplated as a possibility, could it have been foreseen that, within little more than one hundred years, we were destined to acquire, not only the whole vast region between the Atlantic and Pacific Oceans, but the Russian possessions in America and distant islands in the Pacific, it is incredible that no provision should have been made for them, and the question whether the Constitution should or should not extend to them have been definitely settled. If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them. If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafter acquire, such limitations should have been expressed. Instead of that, we find the Constitution speaking only to states, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them. The states could only delegate to Congress such powers as they themselves possessed, and as they had no power to acquire new territory they had none to delegate in that connection. The logical inference from this is that if Congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions. If, upon the other hand, we assume [182 U.S. 244, 286] that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing with them was intended to be restricted by any of the other provisions.

There is a provision that 'new states may be admitted by the Congress into this Union.' These words, of course, carry the Constitution with them, but nothing is said regarding the acquisition of new territories or the extension of the Constitution over them. The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression. There is not even an analogy to the provisions of an ordinary mortgage, for its attachment to after-acquired property, without which it covers only property existing at the date of the mortgage. In short, there is absolute silence upon the subject. The executive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the

Constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the Constitution, it should be followed by the judicial department. Cooley, Const. Lim. 81-85. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 , 28 S. L. ed. 349, 351, 4 Sup. Ct. Rep. 279; Marshall Field & Co. v. Clark, 143 U.S. 649, 691 , 36 S. L. ed. 294, 309, 12 Sup. Ct. Rep. 495.

Patriotic and intelligent men may differ widely as to the desireableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant posses- [182 U.S. 244, 287] sions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

The judgment of the Circuit Court is therefore affirmed.

Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice McKenna, uniting in the judgment of affirmance:

Mr. Justice Brown, in announcing the judgment of affirmance, has in his opinion stated his reasons for his concurrence in such judgment. In the result I likewise concur. As, however, the reasons which cause me to do so are different from, if not in conflict with, those expressed in that opinion, if its meaning is by me not misconceived, it becomes my duty to state the convictions which control me.

The recovery sought is the amount of duty paid on merchandise which came into the United States from Porto Rico after July 1, 1900. The exaction was made in virtue of the act of Congress approved April 12, 1900, entitled 'An Act Temporarily to Provide Revenue and a Civil Government for Porto Rico, and for Other Purposes.' 31 Stat. at L. 77. The right to recover is predicated on the assumption that Porto Rico, by the ratification of the treaty with Spain, became incorporated into the [182 U.S. 244, 288] United States, and therefore the act of Congress which imposed the duty in question is repugnant to article 1, 8, clause 1, of the Constitution providing that 'the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.' Subsidiarily, it is contended that the duty collected was also repugnant to the export and preference clauses of the Constitution. But as the case concerns no duty on goods going from the United States to Porto Rico, this proposition must depend also on the hypothesis that the provisions of the Constitution referred to apply to Porto Rico because that island has been incorporated into the United States. It is hence manifest that this latter contention is involved in the previous one, and need not be separately considered.

The arguments at bar embrace many propositions which seem to me to be irrelevant, or, if relevant, to be so contrary to reason and so in conflict with previous decisions of this court as to cause them to require but a passing notice. To eliminate all controversies of this character, and thus to come to the pivotal contentions which the case involves, let me state and concede the soundness of some principles, referring, in doing so, in the margin to the authorities by which they are sustained, and making such comment on some of them as may to me appear necessary.

First. The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument. Ever then, when an act of any department is challenged because not warranted by the Constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the Constitution, either in express terms or by lawful implication, to be drawn from the express authority conferred, or deduced as an attribute which legitimately inheres in the nature of the powers given, and which flows from the character of the government established by the Constitution. In other words, while confined to its constitu- [182 U.S. 244, 289] tional orbit, the government of the United States is supreme within its lawful sphere. 1

Second. Every function of the government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable. 2

Third. Hence it is that wherever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits. 3

Fourth. Consequently it is impossible to conceive that, where conditions are brought about to which any particular provision of the Constitution applies, its controlling influence may be frustrated by the action of any or all of the departments of the government. Those departments, when discharging, within the limits of their constitutional power, the duties which rest on them, may of course deal with the subjects committed to them in such a way as to cause the matter dealt with to come under the control of provisions of the Constitution which may not have been previously applicable. But this does not conflict with the doctrine just stated, or presuppose that the Constitution may or may not be applicable at the election of any agency of the government.

Fifth. The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public well-being, to deprive such [182 U.S. 244, 290] territory of representative government if it is considered just to do so, and to change such local governments at discretion. 4

The plenitude of the power of Congress as just stated is conceded by both sides to this controversy. It has been manifest from the earliest days, and so many examples are afforded of it that to refer to them seems superfluous. However, there is an instance which exemplifies the exercise of the power substantially in all its forms, in such an apt way that reference is made to it. The instance referred to is the District of Columbia, which has had from the beginning different forms of government conferred upon it by Congress, some largely representative, others only partially so, until, at the present time, the people of the District live under a local government totally devoid of local representation, in the elective sense, administered solely by officers appointed by the President, Congress, in which the District has no representative in effect, acting as the local legislature.

In some adjudged cases the power to locally govern at discretion has been declared to arise as an incident to the right to acquire territory. In others it has been rested upon the clause of 3, article 4, of the Constitution, which vests Congress with the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. 5 But this divergence, if not conflict of opinion, does not imply that the authority of Congress to govern the territories is outside of the Constitution, since in either case the right is founded on the Constitution, although referred to different provisions of that instrument.

While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for [182 U.S. 244, 291] any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended. 6 But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.

Sixth. As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows, also, that every provision of the Constitution which is applicable to the territories is also controlling therein. To justify a departure from this elementary principle by a criticism of the opinion of Mr. Chief Justice Taney in Scott v. Sandford, 19 How. 393, 15 L. ed. 691, appears to me to be unwarranted. Whatever may be the view entertained of the correctness of the opinion of the court in that case, in so far as it interpreted a particular provision of the Constitution concerning slavery, and decided that as so construed it was in force in the territories, this in no way affects the principle which that decision announced, that the applicable provisions of the Constitution were operative. That doctrine was concurred in by the dissenting judges, as the following excerpts demonstrate. Thus Mr. Justice McLean, in the course of his dissenting opinion, said (19 How. 542, 15 L. ed. 757):

> 'In organizing the government of a territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit.' [182 U.S. 244, 292] Mr. Justice Curtis, also, in the dissent expressed by him, said (p. 614, L. ed. p. 787):
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> 'If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?
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> 'To this I answer that, in common with all other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.'

Seventh. In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.

Eighth. As Congress derives its authority to levy local taxes for local purposes within the territories, not from the general grant of power to tax as expressed in the Constitution, it follows that its right to locally tax is not to be measured by the provision empowering Congress 'to lay and collect taxes, duties,

imposts, and excises,' and is not restrained by the requirement of uniformity throughout the United States. But the power just referred to, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States. This results because the clause of the Constitution in question does not confer upon Congress power to impose such an impost duty on goods coming from one part of the United States to another part thereof, and such duty, besides, would be repugnant to the requirement of uniformity throughout the United States. 7

To question the principle above stated on the assumption that the rulings on this subject of Mr. Chief Justice Marshall in Loughborough borough v. Blake were mere dicta seems to me to be entirely inadmissible. And, besides, if such view was justified, [182 U.S. 244, 293] the principle would still find support in the decision in Woodruff v. Parham, and that decision, in this regard, was affirmed by this court in Brown v. Houston, 114 U.S. 622 , 29 L. ed. 257, 5 Sup. Ct. Rep. 1091 and Fairbank v. United States, 181 U.S. 283 , ante, 648, 21 Sup. Ct. Rep. 648.

From these conceded propositions it follows that Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island was potential in Porto Rico.

And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States. This is well illustrated by some of the decisions of this court which are cited in the margin. 8 Some of these decisions hold on the one hand that, growing out of the presumably ephemeral nature of a territorial government, the provisions of the Constitution relating to the life tenure of judges is inapplicable to courts created by Congress, even in territories which are incorporated into the United States, and some, on the other hand, decide that the provisions as to common-law juries found in the Constitution are applicable under like conditions; that is to say, although the judge presiding over a jury need not have the constitutional tenure, yet the jury must be in accordance with the Constitution. And the application of the provision of the Constitution relating to juries has been also considered in a different aspect, the case being noted in the margin. 9

The question involved was the constitutionality of the statutes of the United States conferring power on ministers and consuls [182 U.S. 244, 294] to try American citizens for crimes committed in certain foreign countries. Rev. Stat. 4083-4086. The court held the provisions in question not to be repugnant to the Constitution, and that a conviction for a felony without a previous indictment by a grand jury, or the summoning of a petty jury, was valid.

It was decided that the provisions of the Constitution relating to grand and petty juries were inapplicable to consular courts exercising their jurisdiction in certain countries foreign to the United States. But this did not import that the government of the United States in creating and conferring jurisdiction on consuls and ministers acted outside of the Constitution, since it was expressly held that the power to call such courts into being and to confer upon them the right to try, in the foreign countries in question, American citizens, was deducible from the treaty- making power as conferred by the Constitution. The court said (p. 463, L. ed. p. 585, Sup. Ct. Rep. p. 900):

> 'The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.'

In other words, the case concerned, not the question of a power outside the Constitution, but simply whether certain provisions of the Constitution were applicable to the authority exercised under the circumstances which the case presented.

Albeit, as a general rule, the status of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow, when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this char- [182 U.S. 244, 295] acter cannot be under any circumstances transcended, because of the complete absence of power.

The distinction which exists between the two characters of restrictions-those which regulate a granted power and those which withdraw all authority on a particular subject-has in effect been always conceded, even by those who most strenuously insisted on the erroneous principle that the Constitution did not apply to Congress in legislating for the territories, and was not operative in such districts of country. No one had more broadly asserted this principle than Mr. Webster. Indeed, the support which that proposition receives from expressions of that illustrious man have been mainly relied upon to sustain it, and yet there can be no doubt that, even while insisting upon such principle, it was conceded by Mr. Webster that those positive prohibitions of the Constitution which withhold all power on a particular subject were always applicable. His views of the principal proposition and his concession as to the existence of the qualification are clearly shown by a debate which took place in the Senate on February 24, 1849, on an amendment offered by Mr. Walker extending the Constitution and certain laws of the United States over California and New Mexico. Mr. Webster, in support of his conception that the Constitution did not, generally speaking, control Congress in legislating for the territories or operate in such districts, said as follows (20 Cong. Globe, App. p. 272):

> 'Mr. President, it is of importance that we should seek to have clear ideas and correct notions of the question which this amendment of the member from Wisconsin has presented to us; and especially that we should seek to get some conception of what is meant by the proposition, in a law, to 'extend the Constitution of the United States to the territories.' Why, sir, the thing is utterly impossible. All the legislation in the world, in this general form, could not accomplish it. There is no cause for the operation of the legislative power in such a matter as that. The Constitution, what is it-we extend the Constitution of the United States by law to a territory? What is the Constitution of the United States? Is not its very first principle that all within its influence and comprehension shall [182 U.S. 244, 296] be represented in the legislature which it establishes, with not only the right of debate and the right to vote in both Houses of Congress, but a right to partake in the choice of the President and Vice President? And can we by law extend these rights, or any of them, to a territory of the United States? Everybody will see that it is altogether impracticable.'

Thereupon, the following colloquy ensued between Mr. Underwood and Mr. Webster (Ibid. 281-282):

> 'Mr. Underwood: 'The learned Senator from Massachusetts says, and says most appropriately and forcibly, that the principles of the Constitution are obligatory upon us even while legislating for the territories. That is true, I admit, in its fullest force, but if it is obligatory upon us while legislating for the territories, is it possible that it will not be equally obligatory upon the officers who are appointed to administer the laws in these territories?'

> 'Mr. Webster: 'I never said it was not obligatory upon them. What I said was, that in making laws for these territories it was the high duty of Congress to regard those great principles in the Constitution intended for the security of personal liberty and for the security of property.'
>
> 'Mr. Underwood: '. . . Suppose we provide by our legislation that nobody shall be appointed to an office there who professes the Catholic religion. What do we do by an act of this sort?'
>
> 'Mr. Webster: 'We violate the Constitution, which says that no religious test shall be required as qualification for office."

And this was the state of opinion generally prevailing in the Free Soil and Republican parties, since the resistance of those parties to the extension of slavery into the territories, while in a broad sense predicated on the proposition that the Constitution was not generally controlling in the territories, was sustained by express reliance upon the 5th Amendment to the Constitution forbidding Congress from depriving any person of life, liberty, or property without due process of law. Every platform adopted by those parties down to and including 1860, while propounding the general doctrine, also in effect declared [182 U.S. 244, 297] the rule just stated. I append in the margin an excerpt from the platform of the Free Soil party adopted in 1842.10

The conceptions embodied in these resolutions were in almost identical language reiterated in the platform of the Liberty party in 1843, in that of the Free Soil party in 1852, and in the platform of the Republican party in 1856. Stanwood, Hist. of Presidency, pp. 218, 253, 254, and 271. In effect, the same thought was repeated in the declaration of principles made by the Republican party convention in 1860, when Mr. Lincoln was nominated, as will be seen from an excerpt therefrom set out in the margin. 11

The doctrine that those absolute withdrawals of power which [182 U.S. 244, 298] the Constitution has made in favor of human liberty are applicable to every condition or status has been clearly pointed out by this court in Chicago, R. I. & P. R. Co. v. McGlinn (1885) 114 U.S. 542 , 29 L. ed. 270, 5 Sup. Ct. Rep. 1005, where, speaking through Mr. Justice Field, the court said (p. 546, L. ed. p. 271, Sup. Ct. Rep. p. 1006):

> 'It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation of sovereign to another the municipal laws of the country-that is, laws which are intended for the protection of private rights-continue in force until abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power-and the latter is involved in the former-to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force, without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed. American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 542, 7 L. ed. 255;

Halleck, International Law, chap. 34, 14.'

There is in reason, then, no room in this case to contend that Congress can destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied. There can [182 U.S. 244, 299] also be no controversy as to the right of Congress to locally govern the island of Porto Rico as its wisdom may decide, and in so doing to accord only such degree of representative government as may be determined on by that body. There can also be no contention as to the authority of Congress to levy such local taxes in Porto Rico as it may choose, even although the amount of the local burden so levied be manifold more onerous than is the duty with which this case is concerned. But as the duty in question was not a local tax, since it was levied in the United States on goods coming from Porto Rico, it follows that, if that island was a part of the United States, the duty was repugnant to the Constitution, since the authority to levy an impost duty conferred by the Constitution on Congress does not, as I have conceded, include the right to lay such a burden on goods coming from one to another part of the United States. And, besides, if Porto Rico was a part of the United States the exaction was repugnant to the uniformity clause.

The sole and only issue, then, is not whether Congress has taxed Porto Rico without representation,-for, whether the tax was local or national, it could have been imposed although Porto Rico had no representative local government and was not represented in Congress,-but is whether the particular tax in question was levied in such form as to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?

On the one hand, it is affirmed that, although Porto Rico had been ceded by the treaty with Spain to the United States, the cession was accompanied by such conditions as prevented that island from becoming an integral part of the United States, at least temporarily and until Congress had so determined. On the other hand, it is insisted that by the fact of cession to the United States alone, irrespective of any conditions found in the treaty, Porto Rico became a part of the United States and was incorporated into it. It is incompatible with the Constitution, it is argued, for the government of the United States to accept a cession of territory from a foreign country without [182 U.S. 244, 300] complete incorporation following as an immediate result, and therefore it is contended that it is immaterial to inquire what were the conditions of the cession, since if there were any which were intended to prevent incorporation they were repugnant to the Constitution and void. The result of the argument is that the government of the United States is absolutely without power to acquire and hold territory as property or as appurtenant to the United States. These conflicting contentions are asserted to be sanctioned by many adjudications of this court and by various acts of the executive and legislative branches of the government; both sides, in many instances, referring to the same decisions and to the like acts, but deducing contrary conclusions from them. From this it comes to pass that it will be impossible to weigh the authorities relied upon without ascertaining the subject-matter to which they refer, in order to determine their proper influence. For this reason, in the orderly discussion of the controversy, I propose to consider the subject from the Constitution itself, as a matter of first impression, from that instrument as illustrated by the history of the government, and as construed by the previous decisions of this court. By this process, if accurately carried out, it will follow that the true solution of the question will be ascertained, both deductively and inductively, and the result, besides, will be adequately proved.

It may not be doubted that by the general principles of the law of nations every government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest. It cannot also be gainsaid that, as a general rule, wherever a government acquires territory as a result of any of the modes above stated, the relation of the territory to the new government is to be determined by the acquiring power in the absence of

stipulations upon the subject. These general principles of the law of nations are thus stated by Halleck in his treatise on International Law, page 126:

> 'A state may acquire property or domain in various ways; its title may be acquired originally by mere occupancy, and confirmed by the presumption arising from the lapse of time; [182 U.S. 244, 301] or by discovery and lawful possession; or by conquest, confirmed by treaty or tacit consent; or by grant, cession, purchase, or exchange; in fine, by any of the recognized modes by which private property is acquired by individuals. It is not our object to enter into any general discussion of these several modes of acquisition, any further than may be necessary to distinguish the character of certain rights of property which are the peculiar objects of international jurisprudence. Wheaton, International Law, pt. 2, chap. 4, 1, 4, 5; 1 Phillimore, International Law, 221- 227; Grotius, de Jur. Bel. ac. Pac., lib. 2, chap. 4; Vattel, Droit des Gens, liv. 2, chaps. 7 and 11; Rutherford, Inst. b. 1, chap. 3, b. 2, chap. 9; Puffendorf, de Jur. Nat. et. Gent., lib. 4, chaps. 4-6; Moser, Versuch, etc., b. 5, chap. 9; Martens, Precis du Droit des Gens. 35 et seq.; Schmaltz, Droit des Gens, liv. 4, chap. 1; Kluber, Droit des Gens, 125, 126; Heffter, Droit International, 76; Ortolan, Domaine International, 53 et seq.; Bowyer, Universal Public Law, chap. 28; Bello, Derecho Internacional, pt. 1, chap. 4; Riquelme, Derecho, Pub. Int., lib. 1, title 1, chap. 2; Burlamaqui, Droit de la Nat. et des Gens, tome 4, pt. 3, chap. 5.'

Speaking of a change of sovereignty, Halleck says (pp. 76, 814):

> 'Chap. 3, 23. The sovereignty of a state may be lost in various ways. It may be vanquished by a foreign power, and become incorporated into the conquering state as a province or as one of its component parts; or it may voluntarily unite itself with another in such a way that its independent existence as a state will entirely cease.

... * *

> 'Chap. 33, 3. If the hostile nation be subdued and the entire state conquered, a question arises as to the manner in which the conqueror may treat it without transgressing the just bounds established by the rights of conquest. If he simply replaces the former sovereign, and, on the submission of the people, governs them according to the laws of the state, they can have no cause of complaint. Again, if he incorporate them with his former states, giving to them the rights, privileges, and immunities of his own subjects, he does for them all that is due [182 U.S. 244, 302] from a humane and equitable conqueror to his vanquished foes. But if the conquered are a fierce, savage, and restless people, he may, according to the degree of their indocility, govern them with a tighter rein, so as to curb their 'impetuosity, and to keep them under subjection.' Moreover, the rights of conquest may, in certain cases, justify him in imposing a tribute or other burthen, either a compensation for the expenses of the war or as a punishment for the injustice he has suffered from them . . . Vattel, Droit des Gens, liv. 3, ch. 13, 201; 2 Curtius, History, etc., liv. 7, cap. 8; Grotius, de Bel. ac Pac. lib. 3, caps. 8, 15; Puffendorf, de Jur. Nat. et Gent. lib. 8, cap. 6, 24; Real, Science du Gouvernement, tome 5, ch. 2, 5; Heffter, Droit International, 124; Abegg. Untersuchungen, etc., p. 86.'

In American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242, the general doctrine was thus summarized in the opinion delivered by Mr. Chief Justice Marshall (p. 542, L. ed. p. 255):

> 'If it [conquered territory] be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose.'

When our forefathers threw off their allegiance to Great Britain and established a republican government, assuredly they deemed that the nation which they called into being was endowed with those general powers to acquire territory which all independent governments in virtue of their sovereignty enjoyed. This is demonstrated by the concluding paragraph of the Declaration of Independence, which reads as follows:

> 'As free and independent states, they [the United States of America] have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.'

That under the Confederation it was considered that the government of the United States had authority to acquire territory like any other sovereignty is clearly established by the 11th of the Articles of Confederation.

The decisions of this court leave no room for question that, under the Constitution, the government of the United States, [182 U.S. 244, 303] in virtue of its sovereignty, supreme within the sphere of its delegated power, has the full right to acquire territory enjoyed by every other sovereign nation.

In American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242, the court, by Mr. Chief Justice Marshall, said (p. 542, L. ed. p. 255):

> 'The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.'

In United States v. Huckabee (1872) 16 Wall. 414, 21 L. ed. 457, the court speaking through Mr. Justice Clifford, said (p. 434, L. ed. p. 464):

> 'Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined; but if the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent, and the title vests absolutely in the conqueror. American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242; 30 Hogsheads of Sugar v. Boyle, 9 Cranch, 195, 3 L. ed. 702; Shanks v. Dupont, 3 Pet. 246, 7 L. ed. 668; United States v. Rice, 4 Wheat. 254, 4 L. ed. 564; The Amy Warwick, 2 Sprague, 143, Fed. Cas. No. 342; Johnson v. M'Intosh, 8 Wheat. 588, 5 L. ed. 692. Complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former government; or, in other words, the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy nation or state. His rights are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered state, including even debts as well as personal and real property. Halleck, International Law, 839; Elphinstone v. Bedreechund, 1 Knapp, P. C. C. 329; Vattel, 365; 3 Phillimore, International Law, 505.'

In Church of Jesus Christ of L. D. S. v. United States (1889) 136 U.S. 1 , 34 L. ed. 478, 10 Sup. Ct. Rep. 792, Mr. Justice Bradley, announcing the opinion of the court declared (p. 42, L. ed. p. 491, Sup. Ct. Rep. p. 802):

> 'The power to acquire territory, other than the territory northwest of the Ohio river (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-

> making power and the power to declare and carry [182 U.S. 244, 304] on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories.'

Indeed, it is superfluous to cite authorities establishing the right of the government of the United States to acquire territory, in view of the possession of the Northwest Territory when the Constitution was framed and the cessions to the general government by various states subsequent to the adoption of the Constitution, and in view also of the vast extension of the territory of the United States brought about since the existence of the Constitution by substantially every form of acquisition known to the law of nations. Thus, in part at least, 'the title of the United States to Oregon was founded upon original discovery and actual settlement by citizens of the United States, authorized or approved by the government of the United States.' Shively v. Bowlby, 152 U.S. 50 , 38 L. ed. 349, 14 Sup. Ct. Rep. 566. The province of Louisiana was ceded by France in 1803; the Floridas were transferred by Spain in 1819; Texas was admitted into the Union by compact with Congress in 1845; California and New Mexico were acquired by the treaty with Mexico of 1848, and other western territory from Mexico by the treaty of 1853; numerous islands have been brought within the dominion of the United States under the authority of the act of August 18, 1856, chap. 164, usually designated as the Guano islands act, re-enacted in Revised Statutes, 5570-5578; Alaska was ceded by Russia in 1867; Medway island, the western end of the Hawaiian group, 1,200 miles from Honolulu, was acquired in 1867, and $50,000 was expended in efforts to make it a naval station; on the renewal of a treaty with Hawaii November 9, 1887, Pearl harbor was leased for a permanent naval station; by joint resolution of Congress the Hawaiian islands came un- [182 U.S. 244, 305] der the sovereignty of the United States in 1898; and on April 30, 1900, an act for the government of Hawaii was approved, by which the Hawaiian islands were given the status of an incorporated territory; on May 21, 1890, there was proclaimed by the President an agreement, concluded and signed with Germany and Great Britain, for the joint administration of the Samoan islands (26 Stat. at L. 1497); and on February 16, 1900 (31 Stat. at L. --, there was proclaimed a convention between the United States, Germany, and Great Britain, by which Germany and Great Britain renounced in favor of the United States all their rights and claims over and in respect to the island of Tutuilla and all other islands of the Samoan group east of longitude 171ø west of Greenwich. And finally the treaty with Spain which terminated the recent war was ratified.

It is worthy of remark that, beginning in the administration of President Jefferson, the acquisition of foreign territory above referred to were largely made while that political party was in power which announced as its fundamental tenet the duty of strictly construing the Constitution, and it is true to say that all shades of political opinion have admitted the power to acquire and lent their aid to its accomplishment. And the power has been asserted in instances where it has not been exercised. Thus, during the administration of President Pierce, in 1854, a draft of a treaty for the annexation of Hawaii was agreed upon, but, owing to the death of the King of the Hawaiian islands, was not executed. The 2d article of the proposed treaty provided as follows (Ex. Doc. Senate, 55th Congress, 2d sess., Report No. 681, Calendar No. 747, p. 91):

Article 2.

The Kingdom of the Hawaiian Islands shall be incorporated into the American Union as a state, enjoying the same degree of sovereignty as other states, and admitted as such as soon as it can be done

in consistency with the principles and requirements of the Federal Constitution, to all the rights, privileges, and immunities of a state as aforesaid, on a perfect equality with the other states of the Union.

It is insisted, however, conceding the right of the gov- [182 U.S. 244, 306] ernment of the United States to acquire territory, as all such territory when acquired becomes absolutely incorporated into the United States, every provision of the Constitution which would apply under that situation is controlling in such acquired territory. This, however, is but to admit the power to acquire, and immediately to deny its beneficial existence.

The general principle of the law of nations, already stated, is that acquired territory, in the absence of agreement to the contrary, will bear such relation to the acquiring government as may be by it determined. To concede to the government of the United States the right to acquire, and to strip it of all power to protect the birthright of its own citizens and to provide for the well being of the acquired territory by such enactments as may in view of its condition be essential, is, in effect, to say that the United States is helpless in the family of nations, and does not possess that authority which has at all times been treated as an incident of the right to acquire. Let me illustrate the accuracy of this statement. Take a case of discovery. Citizens of the United States discover an unknown island, peopled with an uncivilized race, yet rich in soil, and valuable to the United States for commercial and strategic reasons. Clearly, by the law of nations, the right to ratify such acquisition and thus to acquire the territory would pertain to the government of the United States. Johnson v. M'Intosh, 8 Wheat. 543, 595, 5 L. ed. 681, 694; Martin v. Waddell, 16 Pet. 367, 409, 10 L. ed. 997, 1012; Jones v. United States, 137 U.S. 202, 212 , 34 S. L. ed. 691, 695, 11 Sup. Ct. Rep. 80; Shively v. Bowlby, 152 U.S. 1, 50 , 38 S. L. ed. 331, 349, 14 Sup. Ct. Rep. 548. Can it be denied that such right could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States and to subject them, not only to local, but also to an equal proportion of national, taxes, even although the consequence would be to entail ruin on the discovered territory, and to inflict grave detriment on the United States, to arise both from the dislocation of its fiscal system and the immediate bestowal of citizenship on those absolutely unfit to receive it?

The practice of the government has been otherwise. As early as 1856 Congress enacted the Guano islands act, heretofore referred to, which by 1 provided that when any [182 U.S. 244, 307] citizen of the United States shall 'discover a deposit of guano on any island, rock, or key not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and shall take peaceable possession thereof, and occupy the same, said island, rock, or key may, at the discretion of the President of the United States, be considered as appertaining to the United States.' 11 Stat. at L. 119, chap. 164; Rev. Stat. 5570. Under the act referred to, it was stated in argument, that the government now holds and protects American citizens in the occupation of some seventy islands. The statute came under consideration in Jones v. United States, 137 U.S. 202 , 34 L. ed. 691, 11 Sup. Ct. Rep. 80, where the question was whether or not the act was valid, and it was decided that the act was a lawful exercise of power, and that islands thus acquired were 'appurtenant' to the United States. The court, in the course of the opinion, speaking through Mr. Justice Gray, said (p. 212, L. ed. p. 695, Sup. Ct. Rep. p. 83):

> 'By the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish or working mines) of territory unoccupied by any other government of its citizens, the nation to which they belong may exercise such jurisdiction and for

> such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. Vattel, lib. 1, chap. 18; Wheaton, International Law, 8th ed. 161, 165, 176, note 104; Halleck, International Law, chap. 6, 7, 15; 1 Phillimore, International Law, 3d ed. 227, 229, 230, 232, 242; 1 Calvo, Droit International, 4th ed. 266, 277, 300; Whiton v. Albany City Ins. Co. 109 Mass. 24, 31.

And these considerations concerning discovery are equally applicable to ownership resulting from conquest. A just war is declared, and in its prosecution the territory of the enemy is invaded and occupied. Would not the war, even if waged successfully, be fraught with danger if the effect of occupation was [182 U.S. 244, 308] to necessarily incorporate an alien and hostile people into the United States? Take another illustration. Suppose at the termination of a war the hostile government had been overthrown, and the entire territory or a portion thereof was occupied by the United States, and there was no government to treat with or none willing to cede by treaty, and thus it became necessary for the United States to hold the conquered country for an indefinite period, or at least until such time as Congress deemed that it should be either released or retained because it was apt for incorporation into the United States. If holding was to have the effect which is now claimed for it, would not the exercise of judgment respecting the retention be so fraught with danger to the American people that it could not be safely exercised?

Yet again. Suppose the United States, in consequence of outrages perpetrated upon its citizens, was obliged to move its armies or send its fleets to obtain redress, and it came to pass that an expensive war resulted and culminated in the occupation of a portion of the territory of the enemy, and that the retention of such territory-an event illustrated by examples in history-could alone enable the United States to recover the pecuniary loss it had suffered. And suppose, further, that to do so would require occupation for an indefinite period, dependent upon whether or not payment was made of the required indemnity. It being true that incorporation must necessarily follow the retention of the territory, it would result that the United States must abandon all hope of recouping itself for the loss suffered by the unjust war, and hence the whole burden would be entailed upon the people of the United States. This would be a necessary consequence, because if the United States did not hold the territory as security for the needed indemnity it could not collect such indemnity, and, on the other hand, if incorporation must follow from holding the territory the uniformity provision of the Constitution would prevent the assessment of the cost of the war solely upon the newly acquired country. In this, as in the case of discovery, the traditions and practices of the government demonstrate the unsoundness of the contention. Congress on May 13, 1846, declared that [182 U.S. 244, 309] war existed with Mexico. In the summer of that year New Mexico and California were subdued by the American arms, and the military occupation which followed continued until after the treaty of peace was ratified, in May, 1848. Tampico, a Mexican port, was occupied by our forces on November 15, 1846, and possession was not surrendered until after the ratification. In the spring of 1847 President Polk, through the Secretary of the Treasury, prepared a tariff of duties on imports and tonnage which was put in force in the conquered country. 1 Senate Documents, First Session, 30th Congress, pp. 562, 569. By this tariff, duties were laid as well on merchandise, exported from the United States as from other countries, except as to supplies for our army, and on May 10, 1847, an exemption from tonnage duties was accorded to 'all vessels chartered by the United States to convey supplies of any and all descriptions to our army and navy, and actually laden with supplies.' Ibid. 583. An interesting debate respecting the constitutionality of this action of the President is contained in 18 Cong. Globe, First Session, 30th Congress, at pp. 478, 479, 484-489, 495, 498, etc.

In Fleming v. Page, 9 How. 603, 13 L. ed. 276, it was held that the revenue officials properly treated Tampico as a port of a foreign country during the occupation by the military forces of the United States, and that duties on imports into the United States from Tampico were lawfully levied under the general tariff act of 1846. Thus, although Tampico was in the possession of the United States, and the court

expressly held that in an international sense the port was a part of the territory of the United States, yet it was decided that in the sense of the revenue laws Tampico was a foreign country. The special tariff act promulgated by President Polk was in force in New Mexico and California until after notice was received of the ratification of the treaty of peace. In Cross v. Harrison, 16 How. 164, 14 L. ed. 889, certain collections of impost duties on goods brought from foreign countries into California prior to the time when official notification had been received in California that the treaty of cession had been ratified, as well as impost duties levied after the receipt of such notice, were called in question. The duties collected prior to the receipt of notice were laid at the rate fixed by the tariff promulgated by the Presi- [182 U.S. 244, 310] dent; those laid after the notification conformed to the general tariff laws of the United States. The court decided that all the duties collected were valid. The court undoubtedly in the course of its opinion said that immediately upon the ratification of the treaty California became a part of the United States and subject to its revenue laws. However, the opinion pointedly referred to a letter of the Secretary of the Treasury directing the enforcement of the tariff laws of the United States, upon the express ground that Congress had enacted laws which recognized the treaty of cession. Besides, the decision was expressly placed upon the conditions of the treaty, and it was stated, in so many words, that a different rule would have been applied had the stipulations in the treaty been of a different character.

But, it is argued, all the instances previously referred to may be conceded, for they but illustrate the rule inter arma sitent leges. Hence, they do not apply to acts done after the cessation of hostilities when a treaty of peace has been concluded. This not only begs the question, but also embodies a fallacy. A case has been supposed in which it was impossible to make a treaty because of the unwillingness or disappearance of the hostile government, and therefore the occupation necessarily continued, although actual war had ceased. The fallacy lies in admitting the right to exercise the power, if only it is exerted by the military arm of the government, but denying it wherever the civil power comes in to regulate and make the conditions more in accord with the spirit of our free institutions. Why it can be thought, although under the Constitution the military arm of the government is in effect the creature of Congress, that such arm may exercise a power without violating the Constitution, and yet Congress-the creator-may not regulate, I fail to comprehend.

This further argument, however, is advanced. Granting that Congress may regulate without incorporating, where the military arm has taken possession of foreign territory, and where there has been or can be no treaty, this does not concern the decision of this case, since there is here involved no regulation, but an actual cession to the United States of territory by treaty. The general rule of the law of nations, by which the acquiring [182 U.S. 244, 311] government fixes the status of acquired territory, it is urged, does not apply to the government of the United States, because it is incompatible with the Constitution that that government should hold territory under a cession and administer it as a dependency without its becoming incorporated. This claim, I have previously said, rests on the erroneous assumption that the United States under the Constitution is stripped of those powers which are absolutely inherent in and essential to national existnece. The certainty of this is illustrated by the examples already made use of in the supposed cases of discovery and conquest.

If the authority by treaty is limited as is suggested, then it will be impossible to terminate a successful war by acquiring territory through a treaty, without immediately incorporating such territory into the United States. Let me, however, eliminate the case of war, and consider the treaty-making power as subserving the purposes of the peaceful evolution of national life. Suppose the necessity of acquiring a naval station or a coaling station on an island inhabited with people utterly unfit for American citizenship and totally incapable of bearing their proportionate burden of the national expense. Could such island, under the rule which is now insisted upon, be taken? Suppose, again, the acquisition of territory for an interoceanic canal, where an inhabited strip of land on either side is essential to the United States for the preservation of the work. Can it be denied that, if the requirements of the

Constitution as to taxation are to immediately control, it might be impossible by treaty to accomplish the desired result?

While no particular provision of the Constitution is referred to, to sustain the argument that it is impossible to acquire territory by treaty without immediate and absolute incorporation, it is said that the spirit of the Constitution excludes the conception of property or dependencies possessed by the United States and which are not so completely incorporated as to be in all respects a part of the United States; that the theory upon which the Constitution proceeds is that of confederated and independent states, and that no territory, therefore, can be acquired which does not contemplate statehood, and excludes the acquisition of [182 U.S. 244, 312] any territory which is not in a position to be treated as an integral part of the United States. But this reasoning is based on political, and not judicial, considerations. Conceding that the conception upon which the Constitution proceeds is that no territory, as a general rule, should be acquired unless the territory may reasonably be expected to be worthy of statehood, the determination of when such blessing is to be bestowed is wholly a political question, and the aid of the judiciary cannot be invoked to usurp political discretion in order to save the Constitution from imaginary or even real dangers. The Constitution may not be saved by destroying its fundamental limitations.

Let me come, however, to a consideration of the express powers which are conferred by the Constitution, to show how unwarranted is the principle of immediate incorporation, which is here so strenuously insisted on. In doing so it is conceded at once that the true rule of construction is not to consider one provision of the Constitution alone, but to contemplate all, and therefore to limit one conceded attribute by those qualifications which naturally result from the other powers granted by that instrument, so that the whole may be interpreted by the spirit which vivifies, and not by the letter which killeth. Undoubtedly, the power to carry on war and to make treaties implies also the exercise of those incidents which ordinarily inhere in them. Indeed, in view of the rule of construction which I have just conceded-that all powers conferred by the Constitution must be interpreted with reference to the nature of the government and be construed in harmony with related provisions of the Constitution-it seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the express or implied approval of Congress. And from this it must follow that there can be no foundation for the assertion that, where the treaty-making power has inserted conditions which preclude incorporation until Congress has acted in respect thereto, such conditions are void and incorporation results in spite thereof. If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may [182 U.S. 244, 313] not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown. While thus aggrandizing the treaty-making power on the one hand, the construction at the same time minimizes it on the other, in that it strips that authority of any right to acquire territory upon any condition which would guard the people of the United States from the evil of immediate incorporation. The treaty-making power, then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted,-vested with the right to destroy upon the one hand, and deprived of all power to protect the government on the other.

And, looked at from another point of view, the effect of the principle asserted is equally antagonistic, not only to the express provisions, but to the spirit of the Constitution in other respects. Thus, if it be true that the treaty-making power has the authority which is asserted, what becomes of that branch of Congress which is peculiarly the representative of the people of the United States, and what is left of the

functions of that body under the Constitution? For, although the House of Representatives might be unwilling to agree to the incorporation of alien races, it would be impotent to prevent its accomplishment, and the express provisions conferring upon Congress the power to regulate commerce, the right to raise revenue,-bills for which, by the Constitution, must originate in the House of Representatives,-and the authority to prescribe uniform naturalization laws, would be in effect set at naught by the treaty-making power. And the consequent result-incorporation-would be beyond all future control of or remedy by the American people, since, at once and without hope of redress or power of change, incorporation by the treaty would have been brought about. [182 U.S. 244, 314] The inconsistency of the position is at once manifest. The basis of the argument is that the treaty must be considered to have incorporated, because acquisition presupposes the exercise of judgment as to fitness for immediate incorporation. But the deduction drawn is, although the judgment exercised is against immediate incorporation and this result is plainly expressed, the conditions are void because no judgment against incorporation can be called into play.

All the confusion and dangers above indicated, however, it is argued, are more imaginary than real, since, although it be conceded that the treaty-making power has the right by cession to incorporate without the consent of Congress, that body may correct the evil by availing itself of the provision of the Constitution giving to Congress the right to dispose of the territory and other property of the United States. This assumes that there has been absolute incorporation by the treaty-making power on the one hand, and yet asserts that Congress may deal with the territory as if it had not been incorporated into the United States. In other words, the argument adopts conflicting theories of the Constitution, and applies them both at the same time. I am not unmindful that there has been some contrariety of decision on the subject of the meaning of the clause empowering Congress to dispose of the territories and other property of the United States, some adjudged cases treating that article as referring to property as such, and others deriving from it the general grant of power to govern territories. In view, however, of the relations of the territories to the government of the United States at the time of the adoption of the Constitution, and the solemn pledge then existing that they should forever 'remain a part of the Confederacy of the United States of America,' I cannot resist the belief that the theory that the disposing clause relates as well to a relinquishment or cession of sovereignty as to a mere transfer of rights of property is altogether erroneous.

Observe, again, the inconsistency of this argument. It considers, on the one hand, that so vital is the question of incorporation that no alien territory may be acquired by a cession without absolutely endowing the territory with incorporation and [182 U.S. 244, 315] the inhabitants with resulting citizenship, because, under our system of government, the assumption that a territory and its inhabitants may be held by any other title than one incorporating is impossible to be thought of. And yet, to avoid the evil consequences which must follow from accepting this proposition, the argument is that all citizenship of the United States is precarious and fleeting, subject to be sold at any moment like any other property. That is to say, to protect a newly acquired people in their presumed rights, it is essential to degrade the whole body of American citizenship.

The reasoning which has sometimes been indulged in by those who asserted that the Constitution was not at all operative in the territories is that, as they were acquired by purchase, the right to buy included the right to sell. This has been met by the proposition that if the country purchased and its inhabitants became incorporated into the United States, it came under the shelter of the Constitution, and no power existed to sell American citizens. In conformity to the principles which I have admitted it is impossible for me to say at one and the same time that territory is an integral part of the United States protected by the Constitution, and yet the safeguards, privileges, rights, and immunities which arise from this situation are so ephemeral in their character that by a mere act of sale they may be destroyed. And applying this reasoning to the provisions of the treaty under consideration, to me it seems indubitable that if the treaty with Spain incorporated all the territory ceded into the United States, it resulted that the

millions of people to whom that treaty related were, without the consent of the American people as expressed by Congress, and without any hope of relief, indissolubly made a part of our common country.

Undoubtedly, the thought that under the Constitution power to dispose of people and territory, and thus to annihilate the rights of American citizens, was contrary to the conceptions of the Constitution entertained by Washington and Jefferson. In the written suggestions of Mr. Jefferson, when Secretary of State, reported to President Washington in March, 1792, on the subject of proposed negotiations between the United States and Spain, which were intended to be communicated by way of in- [182 U.S. 244, 316] struction to the commissioners of the United States appointed to manage such negotiations, it was observed, in discussing the possibility as to compensation being demanded by Spain 'for the ascertainment of our right' to navigate the lower part of the Mississippi, as follows:

> 'We have nothing else' (than a relinquishment of certain claims on Spain) 'to give in exchange. For as to territory, we have neither the right nor the disposition to alienate an inch of what belongs to any member of our Union. Such a proposition therefore is totally inadmissible, and not to be treated for a moment.' Ford's Writings of Jefferson, vol. 5, p. 476.

The rough draft of these observations was submitted to Mr. Hamilton, then Secretary of the Treasury, for suggestions, previously to sending it to the President, some time before March 5, and Hamilton made the following (among other) notes upon it:

> 'Page 25. Is it true that the United States have no right to alienate an inch of the territory in question, except in the case of necessity intimated in another place? Or will it be useful to avow the denial of such a right? It is apprehended that the doctrine which restricts the alienation of territory to cases of extreme necessity is applicable rather to peopled territory than to waste and uninhabited districts. Positions restraining the right of the United States to accommodate to exigencies which may arise ought ever to be advanced with great caution.' Ford's Writings of Jefferson, vol. 5, p. 443.

Respecting this note, Mr. Jefferson commented as follows:

> 'The power to alienate the unpeopled territories of any state is not among the enumerated powers given by the Constitution to the general government, and if we may go out of that instrument and accommodate to exigencies which may arise by alienating the unpeopled territory of a state, we may accommodate ourselves a little more by alienating that which is peopled, and still a little more by selling the people themselves. A shade or two more in the degree of exigency is all that will be requisite, and of that degree we shall ourselves be the judges. However, may it not be hoped that these questions are forever laid to rest by the 12th Amendment once made a part of the Constitution, declaring expressly that 'the powers not delegated to the [182 U.S. 244, 317] United States by the Constitution are reserved to the states respectively?' And if the general government has no power to alienate the territory of a state, it is too irresistible an argument to deny ourselves the use of it on the present occasion.' Ibid.

The opinions of Mr. Jefferson, however, met the approval of President Washington. On March 18, 1792, in inclosing to the commissioners to Spain their commission, he said, among other things:

> 'You will herewith receive your commission; as also observations on these several subjects reported to the President and approved by him, which will therefore serve as instructions for you. These expressing minutely the sense of our government, and what they wish to have done, it is

> unnecessary for me to do more here than desire you to pursue these objects unremittingly,' etc. Ford's Writings of Jefferson, vol. 5, p. 456.

When the subject-matter to which the negotiations related is considered, it becomes evident that the word 'state' as above used related merely to territory which was either claimed by some of the states, as Mississippi territory was by Georgia, or to the Northwest Territory, embraced within the ordinance of 1787, or the territory south of the Ohio ( Tennessee), which had also been endowed with all the rights and privileges conferred by that ordinance, and all which territory had originally been ceded by states to the United States under express stipulations that such ceded territory should be ultimately formed into states of the Union. And this meaning of the word 'state' is absolutely in accord with what I shall hereafter have occasion to demonstrate was the conception entertained by Mr. Jefferson of what constituted the United States.

True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress.

But the arising of these particular conditions cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of. If, however, the right to dispose of an incorporated American territory and citizens by the mere exertion of the power to sell [182 U.S. 244, 318] be conceded, arguendo, it would not relieve the dilemma. It is ever true that, where a malign principle is adopted, as long as the error is adhered to it must continue to produce its baleful results. Certainly, if there be no power to acquire subject to a condition, it must follow that there is no authority to dispose of subject to conditions, since it cannot be that the mere change of form of the transaction could bestow a power which the Constitution has not conferred. It would follow, then, that any conditions annexed to a disposition which looked to the protection of the people of the United States, or to enable them to safeguard the disposal of territory, would be void; and thus it would be that either the United States must hold on absolutely, or must dispose of unconditionally.

A practical illustration will at once make the consequences clear. Suppose Congress should determine that the millions of inhabitants of the Philippine islands should not continue appurtenant to the United States, but that they should be allowed to establish an autonomous government, outside of the Constitution of the United States, coupled, however, with such conditions providing for control as far only as essential to the guaranty of life and property and to protect against foreign encroachment. If the proposition of incorporation be well founded, at once the question would arise whether the ability to impose these conditions existed, since no power was conferred by the Constitution to annex conditions which would limit the disposition. And if it be that the question of whether territory is immediately fit for incorporation when it is acquired is a judicial, and not a legislative one, it would follow that the validity of the conditions would also come within the scope of judicial authority, and thus the entire political policy of the government be alone controlled by the judiciary.

The theory as to the treaty-making power upon which the argument which has just been commented upon rests, it is now proposed to be shown, is refuted by the history of the government from the beginning. There has not been a single cession made from the time of the Confederation up to the present day, excluding the recent treaty with Spain, which has not contained stipulations to the effect that the United States through Con- [182 U.S. 244, 319] gress would either not disincorporate or would incorporate the ceded territory into the United States. There were such conditions in the deed of cession by Virginia when it conveyed the Northwest Territory to the United States. Like conditions were attached by North Carolina to the cession whereby the territory south of the Ohio, now Tennessee, was transferred. Similar provisions were contained in the cession by Georgia of the Mississippi territory,

now the states of Alabama and Mississippi. Such agreements were also expressed in the treaty of 1803, ceding Louisiana; that of 1819, ceding the Floridas, and in the treaties of 1848 and 1853, by which a large extent of territory was ceded to this country, as also in the Alaska treaty of 1867. To adopt the limitations on the treaty-making power now insisted upon would presuppose that every one of these conditions thus sedulously provided for were superfluous, since the guaranties which they afforded would have obtained, although they were not expressly provided for.

When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surrounded them, it becomes to my mind clearly established that the treaty-making power was always deemed to be devoid of authority to incorporate territory into the United States without the assent, express or implied, of Congress, and that no question to the contrary has ever been even mooted. To appreciate this it is essential to bear in mind what the words 'United States' signified at the time of the adoption of the Constitution. When by the treaty of peace with Great Britain the independence of the United States was acknowledged, it is unquestioned that all the territory within the boundaries defined in that treaty, whatever may have been the disputes as to title, substantially belonged to particular states. The entire territory was part of the United States, and all the native white inhabitants were citizens of the United States and endowed with the rights and privileges arising from that relation. When, as has already been said, the Northwest Territory was ceded by Virginia, it was expressly stipulated that the rights of the inhabitants in this regard should be respected. The ordinance of 1787, providing for the government of the Northwest Territory, fulfilled [182 U.S. 244, 320] this promise on behalf of the Confederation. Without undertaking to reproduce the text of the ordinance, it suffices to say that in contained a bill of rights, a promise of ultimate statehood, and it provided ( italics mine) that 'the said territory and the states which may be formed therein shall ever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made, and to all the acts and ordinances of the United States in Congress assembled, conformably thereto.' It submitted the inhabitants to a liability for a tax to pay their proportional part of the public debt and the expenses of the government, to be assessed by the rule of apportionment which governed the states of the Confederation. It forbade slavery within the territory, and contained a stipulation that the provisions of the ordinance should ever remain unalterable unless by common consent.

Thus it was at the adoption of the Constitution, the United States, as a geographical unit and as a governmental conception both in the international and domestic sense, consisted not only of states, but also of territories, all the native white inhabitants being endowed with citizenship, protected by pledges of a common union, and, except as to political advantages, all enjoying equal rights and freedom, and safeguarded by substantially similar guaranties, all being under the obligation to contribute their proportionate share for the liquidation of the debt and future expenses of the general government.

The opinion has been expressed that the ordinance of 1787 became inoperative and a nullity on the adoption of the Constitution (Taney, Ch. J., in Scott v. Sandford, 19 How. 438, 15 L. ed. 713), while, on the other hand, it has been said that the ordinance of 1787 was 'the most solemn of all engagements,' and became a part of the Constitution of the United States by reason of the 6th article, which provided that 'all debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation.' Per Baldwin, J., concurring opinion in Pollard v. Kibbe, 14 Pet. 417, 10 L. ed. 521, and per Catron, J ., in dissenting opinion in Stra- [182 U.S. 244, 321] der. Graham, 10 How. 98, 13 L. ed. 343. Whatever view may be taken of this difference of legal opinion, my mind refuses to assent to the conclusion that under the Constitution the provision of the Northwest Territory ordinance making such territory forever a part of the Confederation was not binding on the government of the United States when the Constitution was formed. When it is borne in mind that large tracts of this territory were reserved for distribution among the Continental soldiers, it is impossible for me to believe that it was ever considered that the result of

the cession was to take the Northwest Territory out of the Union, the necessary effect of which would have been to expatriate the very men who by their suffering and valor had secured the liberty of their united country. Can it be conceived that North Carolina, after the adoption of the Constitution, would cede to the general government the territory south of the Ohio river, intending thereby to expatriate those dauntless mountaineers of North Carolina who had shed lustre upon the Revolutionary arms by the victory of King's mountain? And the rights bestowed by Congress after the adoption of the Constitution, as I shall proceed to demonstrate, were utterly incompatible with such a theory.

Beyond question, in one of the early laws enacted at the first session of the First Congress, the binding force of the ordinance was recognized, and certain of its provisions concerning the appointment of officers in the territory were amended to conform the ordinance to the new Constitution. 1 Stat. at L. 50, chap. 8.

In view of this it cannot, it seems to me, be doubted that the United States continued to be composed of states and territories, all forming an integral part thereof and incorporated therein, as was the case prior to the adoption of the Constitution. Subsequently, the territory now embraced in the state of Tennessee was ceded to the United States by the state of North Carolina. In order to insure the rights of the native inhabitants, it was expressly stipulated that the inhabitants of the ceded territory should enjoy all the rights, privileges, benefits, and advantages set forth in the ordinance 'of the late Congress for the government of the western territory of the United [182 U.S. 244, 322] States.' A condition was, however, inserted in the cession, that no regulation should be made by Congress tending to emancipate slaves. By act of April 2, 1790 (1 Stat. at L. 106, chap. 6) this cession was accepted. And at the same session, on May 26, 1790, an act was passed for the government of this territory, under the designation of 'the territory of the United States south of the Ohio river.' 1 Stat. at L. 123, chap. 14. This act, except as to the prohibition which was found in the Northwest Territory ordinance as to slavery, in express terms declared that the inhabitants of the territory should enjoy all the rights conferred by that ordinance.

A government for the Mississippi territory was organized on April 7, 1798. 1 Stat. at L. 549, chap. 28. The land embraced was claimed by the state of Georgia, and her rights were saved by the act. The 6th section thereof provided as follows:

> 'Sec. 6. And be it further enacted, That from and after the establishment of the said government, the people of the aforesaid territory shall be entitled to and enjoy, all and singular, the rights, privileges, and advantages granted to the people of the territory of the United States northwest of the river Ohio, in and by the aforesaid ordinance of the thirteenth day of July, in the year one thousand seven hundred and eighty-seven, in as full and ample a manner as the same are possessed and enjoyed by the people of the said last-mentioned territory.'

Thus clearly defined by boundaries, by common citizenship, by like guaranties, stood the United States when the plan of acquiring by purchase from France the province of Louisiana was conceived by President Jefferson. Naturally, the suggestion which arose was the power on the part of the government of the United States, under the Constitution, to incorporate into the United States-a Union then composed, as I have stated, of states and territories-a foreign province inhabited by an alien people, and thus make them partakers in the American commonwealth. Mr. Jefferson, not doubting the power of the United States to acquire, consulted Attorney General Lincoln as to the right by treaty to stipulate for incorporation. By that officer Mr. Jefferson was, in effect, advised that the power to incorporate, that is, to share the privileges and im- [182 U.S. 244, 323] munities of the people of the United States with a foreign population, required the consent of the people of the United States, and it was suggested, therefore, that if a treaty of cession were made containing such agreements it should be put in the form of a change of boundaries, instead of a cession, so as thereby to bring the territory within the United

States. The letter of Mr. Lincoln was sent by President Jefferson to Mr. Gallatin, the Secretary of the Treasury. Mr. Gallatin did not agree as to the propriety of the expedient suggested by Mr. Lincoln. In a letter to President Jefferson, in effect so stating, he said:

> 'But does any constitutional objection really exist? To me it would appear (1) that the United States as a nation have an inherent right to acquire territory; (2) that whenever that acquisition is by treaty, the same constituted authorities in which the treaty-making power is vested have a constitutional right to sanction the acquisition; (3) that whenever the territory has been acquired Congress have the power either of admitting into the Union as a new state, or of annexing to a state, with the consent of that state, or of making regulations for the government of such territory.' Gallatin's Writings, vol. 1, p. 11, etc.

To this letter President Jefferson replied in January, 1803, clearly showing that he thought there was no question whatever of the right of the United States to acquire, but that he did not believe incorporation could be stipulated for and carried into effect without the consent of the people of the United States. He said (italics mine):

> 'You are right, in my opinion, as to Mr. L.'s proposition: There is no constitutional difficulty as to the acquisition of territory, and whether when acquired it may be taken into the Union by the Constitution as it now stands will become a question of expediency. I think it will be safer not to permit the enlargement of the Union but by amendment of the Constitution.' Gallatin's Writings, vol. 1, p. 115.

And the views of Mr. Madison, then Secretary of State, exactly conformed to those of President Jefferson, for, on March 2, 1803, in a letter to the commissioners who were negotiating the treaty, he said:

> 'To incorporate the inhabitants of the hereby ceded territory [182 U.S. 244, 324] with the citizens of the United States, being a provision which cannot now be made, it is to be expected from the character and policy of the United States that such incorporation will take place without unnecessary delay.' 2 State Papers, 540.

Let us pause for a moment to accentuate the irreconcilable conflict which exists between the interpretation given to the Constitution at the time of the Louisiana treaty by Jefferson and Madison, and the import of that instrument as now insisted upon. You are to negotiate, said Madison to the commissioners, to obtain a cession of the territory, but you must not under any circumstances agree 'to incorporate the inhabitants of the hereby ceded territory with the citizens of the United States, being a provision which cannot now be made.' Under the theory now urged, Mr. Madison should have said: You are to negotiate for the cession of the territory of Louisiana to the United States, and if deemed by you expedient in accomplishing this purpose, you may provide for the immediate incorporation of the inhabitants of the acquired territory into the United States. This you can freely do because the Constitution of the United States has conferred upon the treaty-making power the absolute right to bring all the alien people residing in acquired territory into the United States, and thus divide with them the rights which peculiarly belong to the citizens of the United States. Indeed, it is immaterial whether you make such agreements, since by the effect of the Constitution, without reference to any agreements which you may make for that purpose, all the alien territory and its inhabitants will instantly become incorporated into the United States if the territory is acquired.

Without going into details, it suffices to say that a compliance with the instructions given them would have prevented the negotiators on behalf of the United States from inserting in the treaty any provision

looking even to the ultimate incorporation of the acquired territory into the United States. In view of the emergency and exigencies of the negotiations, however, the commissioners were constrained to make such a stipulation, and the treaty provided as follows:

> 'Art. 3. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted [182 U.S. 244, 325] as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.' 8 Stat. at L. 202.

Weighing the provisions just quoted, it is evident they refute the theory of incorporation arising at once from the mere force of a treaty, even although such result be directly contrary to any provisions which a treaty may contain. Mark the language. It expresses a promise: 'The inhabitants of the ceded territory shall be incorporated in the Union of the United States. . . .' Observe how guardedly the fulfilment of this pledge is postponed until its accomplishment is made possible by the will of the American people, since it is to be executed only 'as soon as possible according to the principles of the Federal Constitution.' If the view now urged be true, this wise circumspection was unnecessary, and, indeed, as I have previously said, the entire proviso was superfluous, since everything which it assured for the future was immediately and unalterably to arise.

It is said, however, that the treaty for the purchase of Louisiana took for granted that the territory ceded would be immediately incorporated into the United States, and hence the guaranties contained in the treaty related, not to such incorporation, but was a pledge that the ceded territory was to be made a part of the Union as a state. The minutest analysis, however, of the clauses of the treaty, fails to disclose any reference to a promise of statehood, and hence it can only be that the pledges made referred to incorporation into the United States. This will further appear when the opinions of Jefferson and Madison and their acts on the subject are reviewed. The argument proceeds upon the theory that the words of the treaty, 'shall be incorporated into the Union of the United States,' could only have referred to a promise of statehood, since the then existing and incorporated territories were not a part of the Union of the United States, as that Union consisted only of the states. But this has been shown to be unfounded, [182 U.S. 244, 326] since the 'Union of the United States' was composed of states and territories, both having been embraced within the boundaries fixed by the treaty of peace between Great Britain and the United States which terminated the Revolutionary War, the latter, the territories, embracing districts of country which were ceded by the states to the United States under the express pledge that they should forever remain a part thereof. That this conception of the Union composing the United States was the understanding of Jefferson and Madison, and indeed of all those who participated in the events which preceded and led up to the Louisiana treaty, results from what I have already said, and will be additionally demonstrated by statements to be hereafter made. Again, the inconsistency of the argument is evident. Thus, while the premise upon which it proceeds is that foreign territory, when acquired, becomes at once a part of the United States, despite conditions in the treaty expressly excluding such consequence, it yet endeavors to escape the refutation of such theory which arises from the history of the government by the contention that the territories which were a part of the United States were not component constituents of the Union which composed the United States. I do not understand how foreign territory which has been acquired by treaty can be asserted to have been absolutely incorporated into the United States as a part thereof despite conditions to the contrary inserted in the treaty, and yet the assertion be made that the territories which, as I have said, were in the United States originally as a part of the states, and which were ceded by them upon express condition that they should forever so remain a part of the United States, were not a part of the Union composing the United States. The argument, indeed, reduces itself to this, that for the purpose of incorporating foreign territory into the United States domestic territory must be disincorporated. In other words, that the Union must be, at least in theory, dismembered for the purpose of maintaining the doctrine of the

immediate incorporation of alien territory.

That Mr. Jefferson deemed the provision of the treaty relating to incorporation to be repugnant to the Constitution is unquestioned. While he conceded, as has been seen, the right [182 U.S. 244, 327] to acquire, he doubted the power to incorporate the territory into the United States without the consent of the people by a consitutional amendment. In July, 1803, he proposed two drafts of a proposed amendment, which he thought ought to be submitted to the people of the United States to enable them to ratify the terms of the treaty. The first of these, which is dated July, 1803, is printed in the margin. 12

The second and revised amendment was as follows:

> 'Louisiana, as ceded by France to the United States, is made a part of the United States. Its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations. Save only that, as to the portion thereof lying north of the latitude of the mouth of Arcana river, no new state shall be established nor any grants of land made therein other than to Indians in exchange for equivalent portions of lands occupied by them until an amendment of the Constitution shall be made for those purposes.
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> 'Florida also, whensoever it may be rightfully obtained, shall become a part of the United States. Its white inhabitants shall thereupon become citizens, and shall stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations.' Ford's Writings of Jefferson, vol. 8, p. 241.

It is strenuously insisted that Mr. Jefferson's conviction on the subject of the repugnancy of the treaty to the Constitution was [182 U.S. 244, 328] based alone upon the fact that he thought the treaty exceeded the limits of the Constitution, because he deemed that it provided for the admission, according to the Constitution, of the acquired territory as a new state or states into the Union, and hence, for the purpose of conferring this power, he drafted the amendment. The contention is refuted by two considerations: The first, because the two forms of amendment which Mr. Jefferson prepared did not purport to confer any power upon Congress to admit new states; and, second, they absolutely forbade Congress from admitting a new state out of a described part of the territory without a further amendment to the Constitution. It cannot be conceived that Mr. Jefferson would have drafted an amendment to cure a defect which he thought existed, and yet say nothing in the amendment on the subject of such defect. And, moreover, it cannot be conceived that he drafted an amendment to confer a power he supposed to be wanting under the Constitution, and thus ratify the treaty, and yet in the very amendment withhold in express terms, as to a part of the ceded territory, the authority which it was the purpose of the amendment to confer.

I excerpt in the margin13 two letters from Mr. Jefferson, one [182 U.S. 244, 329] written under date of July 7, 1803, to William Dunbar, and the other dated September 7, 1803, to Wilson Cary Nicholas, which show clearly the difficulties which were in the mind of Mr. Jefferson, and which remove all doubt concerning the meaning of the amendment which he wrote and the adoption of which he deemed necessary to cure any supposed want of power concerning the treaty would be provided for.

These letters show that Mr. Jefferson bore in mind the fact that the Constitution in express terms delegated to Congress the power to admit new states, and therefore no further authority on this subject was required. But he thought this power in Congress was confined to the area embraced within the limits of the United States, as existing at the adoption of the Constitution. To fulfil the stipulations of the treaty so as to cause the ceded territory to become a part of the United States, Mr. Jefferson deemed

an amendment to the Constitution to be essential. For this reason the amendment which he formulated declared that the territory ceded was to be 'a part of the United States, and its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations.' What these words meant is not open to doubt when it is observed that they were but the paraphrase of the following words, which were contained in the first proposed amendment which Mr. Jefferson wrote: 'Vesting the inhabitants thereof with all rights possessed by other territorial citizens of the United States,'-which clearly show that it was the want of power to incorporate the ceded country into the United States as a territory which was in Mr. Jefferson's mind, and to accomplish which re- [182 U.S. 244, 330] sult he thought an amendment to the Constitution was required. This provision of the amendment applied to all of the territory ceded, and therefore brought it all into the United States, and hence placed it in a position where the power of Congress to admit new states would have attached to it. As Mr. Jefferson deemed that every requirement of the treaty would be fulfilled by incorporation, and that it would be unwise to form a new state out of the upper part of the new territory, after thus providing for the complete execution of the treaty by incorporation of all the territory into the United States, he inserted a provision forbidding Congress from admitting a new state out of a part of the territory.

With the debates which took place on the subject of the treaty I need not particularly concern myself. Some shared Mr. Jefferson's doubts as to the right of the treaty-making power to incorporate the territory into the United States without an amendment of the Constitution; others deemed that the provision of the treaty was but a promise that Congress would ultimately incorporate as a territory, and, until by the action of Congress this latter result was brought about, full power of legislation to govern as deemed best was vested in Congress. This latter view prevailed. Mr. Jefferson's proposed amendment to the Constitution, therefore, was never adopted by Congress, and hence was never submitted to the people.

An act was approved on October 31, 1803 (2 Stat. at L. 245, chap. 1) 'to enable the President of the United States to take possession of the territories ceded by France to the United States by the treaty concluded at Paris on the 30th of April last, and for the temporary government thereof.' The provisions of this act were absolutely incompatible with the conception that the territory had been incorporated into the United States by virtue of the cession. On November 10, 1803 (2 Stat. at L. 245, chap. 2 ), an act was passed providing for the issue of stock to raise the funds to pay for the territory. On February 24, 1804 (2 Stat. at L. 251, chap. 13), an act was approved which expressly extended certain revenue and other laws over the ceded country. On March 26, 1804 (2 Stat. at L. 283, chap. 38), an act was passed dividing the 'province of Louisiana' into Orleans territory on the south and the district of Louisiana to [182 U.S. 244, 331] the north. This act extended over the territory of Orleans a large number of the general laws of the United States, and provided a form of government. For the purposes of government the district of Louisiana was attached to the territory of Indiana, which had been carved out of the Northwest Territory. Although the area described as Orleans territory was thus under the authority of a territorial government, and many laws of the United States had been extended by act of Congress to it, it was manifest that Mr. Jefferson thought that the requirement of the treaty that it should be incorporated into the United States had not been complied with.

In a letter written to Mr. Madison on July 14, 1804, Mr. Jefferson, speaking of the treaty of cession, said (Ford's Writings of Jefferson, vol. 8, p. 313):

> 'The inclosed reclamations of Girod & Chote against the claims of Bapstroop to a monopoly of the Indian commerce supposed to be under the protection of the 3d article of the Louisiana convention, as well as some other claims to abusive grants, will probably force us to meet that question. The article has been worded with remarkable caution on the part of our negotiators. It is

> that the inhabitants shall be admitted as soon as possible, according to the principles of our Constitution, to the enjoyment of all the rights of citizens, and, in the meantime, en attendant, shall be maintained in their liberty, property, and religion. That is, that they shall continue under the protection of the treaty until the principles of our Constitution can be extended to them, when the protection of the treaty is to cease, and that of our own principles to take its place. But as this could not be done at once, it has been provided to be as soon as our rules will admit. Accordingly, Congress has begun by extending about twenty particular laws by their titles, to Louisiana. Among these is the act concerning intercourse with the Indians, which establishes a system of commerce with them admitting no monopoly. That class of rights, therefore, are now taken from under the treaty and placed under the principles of our laws. I imagine it will be necessary to express an opinion to Governor Claiborne on this subject, after you shall have made up one.' [182 U.S. 244, 332] In another letter to Mr. Madison, under date of August 15, 1804, Mr. Jefferson said (Ibid. p. 315):
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> 'I am so much impressed with the expediency of putting a termination to the right of France to patronize the rights of Louisiana, which will cease with their complete adoption as citizens of the United States, that I hope to see that take place on the meeting of Congress.'

At the following session of Congress, on March 2, 1805 (2 Stat. at L. 322, chap. 23), an act was approved, which, among other purposes, doubtless was intended to fulfil the hope expressed by Mr. Jefferson in the letter just quoted. That act, in the 1st section, provided that the inhabitants of the territory of Orleans 'shall be entitled to and enjoy all the rights, privileges, and advantages secured by the said ordinance' ( that is, the ordinance of 1787) 'and now enjoyed by the people of the Mississippi territory.' As will be remembered, the ordinance of 1787 had been extended to that territory. 1 Stat. at L. 550, chap. 28. Thus, strictly in accord with the thought embodied in the amendments contemplated by Mr. Jefferson, citizenship was conferred, and the territory of Orleans was incorporated into the United States to fulfil the requirements of the treaty, by placing it exactly in the position which it would have occupied had it been within the boundaries of the United States as a territory at the time the Constitution was framed. It is pertinent to recall that the treaty contained stipulations giving certain preferences and commercial privileges for a stated period to the vessels of French and Spanish subjects, and that, even after the action of Congress above stated, this condition of the treaty continued to be enforced, thus demonstrating that even after the incorporation of the territory the express provisions conferring a temporary right which the treaty had stipulated for and which Congress had recognized were not destroyed, the effect being that incorporation as to such matter was for the time being in abeyance.

The upper part of the province of Louisiana, designated by the act of March 26, 1804 (2 Stat. at L. 283, chap. 38), as the district of Louisiana, and by the act of March 3, 1805 (2 Stat. at L. 331, chap. 31), as the territory of Louisiana, was created the territory of Mis- [182 U.S. 244, 333] souri on June 4, 1812. 2 Stat. at L. 743, chap. 95. By this latter act, though the ordinance of 1787 was not in express terms extended over the territory,-probably owing to the slavery agitation,-the inhabitants of the territory were accorded substantially all the rights of the inhabitants of the Northwest Territory. Citizenship was in effect recognized in the 9th section, while the 14th section contained an elaborate declaration of the rights secured to the people of the territory.

Pausing to analyze the practical construction which resulted from the acquisition of the vast domain covered by the Louisiana purchase, it indubitably results, first, that it was conceded by every shade of opinion that the government of the United States had the undoubted right to acquire, hold, and govern the territory as a possession, and that incorporation into the United States could under no circumstances arise solely from a treaty of cession, even although it contained provisions for the accomplishment of

such result; second, it was strenuously denied by many eminent men that, in acquiring territory, citizenship could be conferred upon the inhabitants within the acquired territory; in other words, that the territory could be incorporated into the United States without an amendment to the Constitution; and, third, that the opinion which prevailed was that, although the treaty might stipulate for incorporation and citizenship under the Constitution, such agreements by the treaty-making power were but promises depending for their fulfilment on the furture action of Congress. In accordance with this view the territory acquired by the Louisiana purchase was governed as a mere dependency until, conformably to the suggestion of Mr. Jefferson, it was by the action of Congress incorporated as a territory into the United States, and the same rights were conferred in the same mode by which other territories had previously been incorporated, that is, by bestowing the privileges of citizenship and the rights and immunities which pertained to the Northwest Territory.

Florida was ceded by treaty signed on February 22, 1819. 8 Stat. at L. 252. While drafted in accordance with the precedent afforded by the treaty ceding Louisiana, the Florida treaty was slightly modified in its phraseology, probably to meet the view [182 U.S. 244, 334] that under the Constitution Congress had the right to determine the time when incorporation was to arise. Acting under the precedent afforded by the Louisiana case, Congress adopted a plan of government which was wholly inconsistent with the theory that the territory had been incorporated. General Jackson was appointed governor under this act, and exercised a degree of authority entirely in conflict with the conception that the territory was a part of the United States, in the sense of incorporation, and that those provisions of the Constitution which would have been applicable under that hypothesis were then in force. It will serve no useful purpose to go through the gradations of legislation adopted as to Florida. Suffice it to say that in 1822 (3 Stat. at L. 654, chap. 13), an act was passed as in the case of Missouri, and presumably for the same reason, which, while not referring to the Northwest Territory ordinance, in effect endowed the inhabitants of that territory with the rights granted by such ordinance.

This treaty also, it is to be remarked, contained discriminatory commercial provisions incompatible with the conception of immediate incorporation arising from the treaty, and they were enforced by the executive officers of the government.

The intensity of the political differences which existed at the outbreak of hostilities with Mexico and at the termination of the war with that country, and the subject around which such conflicts of opinion centered, probably explain why the treaty of peace with Mexico departed from the form adopted in the previous treaties concerning Florida and Louisiana. That treaty, instead of expressing a cession in the form previously adopted, whether intentionally or not I am unable, of course, to say, resorted to the expedient suggested by Attorney General Lincoln to President Jefferson, and accomplished the cession by changing the boundaries of the two countries; in other words, by bringing the acquired territory within the described boundaries of the United States. The treaty, besides, contained a stipulation for rights of citizenship; in other words, a provision equivalent in terms to those used in the previous treaties to which I have referred. The controversy which was then flagrant on the subject of slavery prevented the passage of [182 U.S. 244, 335] bill giving California a territorial form of government, and California, after considerable delay, was therefore directly admitted into the Union as a state. After the ratification of the treaty various laws were enacted by Congress, which in effect treated the territory as acquired by the United States; and the executive officers of the government, conceiving that these acts were an implied or express ratification of the provisions of the treaty by Congress, acted upon the assumption that the provisions of the treaty were thus made operative, and hence incorporation had thus become efficacious.

Ascertaining the general rule from the provisions of this latter treaty and the practical execution which it received, it will be seen that the precedents established in the cases of Louisiana and Florida were

departed from to a certain extent; that is, the rule was considered to be that where the treaty, in express terms, brought the territory within the boundaries of the United States and provided for incorporation, and the treaty was expressly or impliedly recognized by Congress, the provisions of the treaty ought to be given immediate effect. But this did not conflict with the general principles of the law of nations which I have at the outset stated, but enforced it, since the action taken assumed, not that incorporation was brought about by the treat-making power wholly without the consent of Congress, but only that, as the treaty provided for incorporation in express terms, and Congress had acted without repudiating it, its provisions should be at once enforced.

Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation, and was acted upon exactly in accord with the practical construction applied in the case of the acquisitions from Mexico, as just stated. However, the treaty ceding Alaska contained an express provision excluding from citizenship the uncivilized native tribes, and it has been nowhere contended that this condition of exclusion was inoperative because of the want of power under the Constitution in the treaty-making authority to so provide, which must be the case if the limitation on the treaty- making power, which is here asserted, be well founded. The treaty concerning Alaska, therefore, adds [182 U.S. 244, 336] cogency to the conception established by every act of the government from the foundation,-that the condition of a treaty, when expressly or impliedly ratified by Congress, becomes the measure by which the rights arising from the treaty are to be adjusted.

The demonstration which it seems to me is afforded by the review which has preceded is, besides, sustained by various other acts of the government which to me are wholly inexplicable except upon the theory that it was admitted that the government of the United States had the power to acquire and hold territory without immediately incorporating it. Take, for instance, the simultaneous acquisition and admission of Texas, which was admitted into the Union as a state by joint resolution of Congress, instead of by treaty. To what grant of power under the Constitution can this action be referred, unless it be admitted that Congress is vested with the right to determine when incorporation arises? It cannot be traced to the authority conferred on Congress to admit new states, for to adopt that theory would be to presuppose that this power gave the prerogative of conferring statehood on wholly foreign territory. But this I have incidentally shown is a mistaken conception. Hence, it must be that the action of Congress at one and the same time fulfilled the function of incorporation; and, this being so, the privilege of statehood was added. But I shall not prolong this opinion by occupying time in referring to the many other acts of the government which further refute the correctness of the propositions which are here insisted on and which I have previously shown to be without merit. In concluding my appreciation of the history of the government, attention is called to the 13th Amendment to the Constitution, which to my mind seems to be conclusive. The 1st section of the amendment, the italics being mine, reads as follows: 'Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.' Obviously this provision recognized that there may be places subject to the jurisdiction of the United States, but which are not [182 U.S. 244, 337] incorporated into it, and hence are not within the United States in the completest sense of those words.

Let me now proceed to show that the decisions of this court, without a single exception, are absolutely in accord with the true rule as evolved from a correct construction of the Constitution as a matter of first impression, and as shown by the history of the government which has been previously epitomized. As it is appropriate here, I repeat the quotation which has heretofore been made from the opinion, delivered by Mr. Chief Justice Marshall, in American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242, where, considering the Florida treaty, the court said (p. 542, L. ed. p. 255):

> 'The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose.'

In Fleming v. Page the court, speaking through Mr. Chief Justice Taney, discussing the acts of the military forces of the United States while holding possession of Mexican territory, said (9 How. 614, 13 L. ed. 281):

> 'The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority.'

In Cross v. Harrison, 16 How. 164, 14 L. ed. 889, the question for decision, as I have previously observed, was as to the legality of certain duties collected both before and after the ratification of the treaty of peace, on foreign merchandise imported into California. Part of the duties collected were assessed upon importations made by local officials before notice had been received of the ratification of the treaty of peace, and when duties were laid under a tariff which had been promulgated by the President. Other duties were imposed subsequent to the receipt of notification of the ratification, and these latter duties were laid [182 U.S. 244, 338] according to the tariff as provided in the laws of the United States. All the exactions were upheld. The court decided that, prior to and up to the receipt of notice of the ratification of the treaty, the local government lawfully imposed the tariff then in force in California, although it differed from that provided by Congress, and that subsequent to the receipt of notice of the ratification of the treaty the duty prescribed by the act of Congress, which the President had ordered the local officials to enforce, could be lawfully collected. The opinion undoubtedly expressed the thought that by the ratification of the treaty in question, which, as I have shown, not only included the ceded territory within the boundaries of the United States, but also expressly provided for incorporation, the territory had become a part of the United States, and the body of the opinion quoted the letter of the Secretary of the Treasury, which referred to the enactment of laws of Congress by which the treaty had been impliedly ratified. The decision of the court as to duties imposed subsequent to the receipt of notice of the ratification of the treaty of peace undoubtedly took the fact I have just stated into view, and, in addition, was unmistakably proceeded upon the nature of the rights which the treaty conferred. No comment can obscure or do away with the patent fact, namely, that it was unequivocally decided that if different provisions had been found in the treaty a contrary result would have followed. Thus, speaking through Mr. Justice Wayne, the court said (16 How. 197, 14 L. ed. 903):

> 'By the ratification of the treaty California became a part of the United States. And, as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage.'

It is, then, as I think, indubitably settled by the principles of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been executed from the beginning, and by an unbroken lien of decisions of this court, first announced by Marshall and followed and lucidly expounded [182 U.S. 244, 339] by Taney, that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand, when it has expressed in

the treaty the conditions favorable to incorporation they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfilment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.

Does, then, the treaty in question contain a provision for incorporation, or does it, on the contrary, stipulate that incorporation shall not take place from the mere effect of the treaty and until Congress has so determined?-is then the only question remaining for consideration.

The provisions of the treaty with respect to the status of Porto Rico and its inhabitants are as follows:

Article II.

Spain cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam, in the Marianas or Ladrones.

Article IX.

Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may pre- [182 U.S. 244, 340] serve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

Article X.

The inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion.

It is to me obvious that the above-quoted provisions of the treaty do not stipulate for incorporation, but, on the contrary, expressly provide that the 'civil rights and political status of the native inhabitants of the territories hereby ceded' shall be determined by Congress. When the rights to which this careful provision refers are put in juxtaposition with those which have been deemed essential from the foundation of the government to bring about incorporation, all of which have been previously referred to, I cannot doubt that the express purpose of the treaty was not only to leave the status of the territory to be determined by Congress, but to prevent the treaty from operating to the contrary. Of course, it is evident that the express or implied acquiescence by Congress in a treaty so framed cannot import that a result was brought about which the treaty itself-giving effect to its provisions-could not produce. And, in addition, the provisions of the act by which the duty here in question was imposed, taken as a whole,

seem to me plainly to manifest the intention of Congress that, for the present at least, Porto Rico is not to be incorporated into the United States.

The fact that the act directs the officers to swear to support the Constitution does not militate against this view, for, as I have conceded, whether the island be incorporated or not, the applicable provisions of the Constitution are there in force. A [182 U.S. 244, 341] further analysis of the provisions of the act seems to me not to be required in view of the fact that as the act was reported from the committee it contained a provision conferring citizenship upon the inhabitants of Porto Rico, and this was stricken out in the Senate. The argument, therefore, can only be that rights were conferred, which, after consideration, it was determined should not be granted. Moreover I fail to see how it is possible, on the one hand, to declare that Congress in passing the act had exceeded its powers by treating Porto Rico as not incorporated into the United States, and, at the same time, it be said that the provisions of the act itself amount to an incorporation of Porto Rico into the United States, although the treaty had not previously done so. It in reason cannot be that the act is void because it seeks to keep the island disincorporated, and, at the same time, that material provisions are not to be enforced because the act does incorporate. Two irreconcilable views of that act cannot be taken at the same time, the consequence being to cause it to be unconstitutional.

In what has preceded I have in effect considered every substantial proposition, and have either conceded or reviewed every authority referred to as establishing that immediate incorporation resulted from the treaty of cession which is under consideration. Indeed, the whole argument in favor of the view that immediate incorporation followed upon the ratification of the treaty in its last analysis necessarily comes to this: Since it has been decided that incorporation flows from a treaty which provides for that result, when its provisions have been expressly or impliedly approved by Congress, it must follow that the same effect flows from a treaty which expressly stipulates to the contrary, even although the condition to that end has been approved by Congress. That is to say, the argument is this: Because a provision for incorporation when ratified incorporates, therefore a provision against incorporation must also produce the very consequence which it expressly provides against.

The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, [182 U.S. 244, 342] because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico.

Incidentally I have heretofore pointed out that the arguments of expediency pressed with so much earnestness and ability concern the legislative, and not the judicial, department of the government. But it may be observed that, even if the disastrous consequences which are foreshadowed as arising from conceding that the government of the United States may hold property without incorporation were to tempt me to depart from what seems to me to be the plain line of judicial duty, reason admonishes me that so doing would not serve to prevent the grave evils which it is insisted must come, but, on the contrary, would only render them more dangerous. This must be the result, since, as already said, it seems to me it is not open to serious dispute that the military arm of the government of the United States may hold and occupy conquered territory without incorporation for such length of time as may seem appropriate to Congress in the exercise of its discretion. The denial of the right of the civil power to do so would not, therefore, prevent the holding of territory by the United States if it was deemed best

by the political department of the government, but would simply necessitate that it should be exercised by the military instead of by the civil power.

And to me it further seems apparent that another and more disastrous result than that just stated would follow as a consequence of an attempt to cause judicial judgment to invade the domain of legislative discretion. Quite recently one of the stipulations contained in the treaty with Spain which is now under consideration came under review by this court. By the provision in question Spain relinquished 'all claim of sover- [182 U.S. 244, 343] eignty over and title to Cuba.' It was further provided in the treaty as follows:

> 'And as the island is upon the evacuation by Spain to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, and for the protection of life and property.'

It cannot, it is submitted, be questioned that, under this provision of the treaty, as long as the occupation of the United States lasts, the benign sovereignty of the United States extends over and dominates the island of Cuba. Likewise, it is not, it seems to me, questionable that the period when that sovereignty is to cease is to be determined by the legislative department of the government of the United States in the exercise of the great duties imposed upon it, and with the sense of the responsibility which it owes to the people of the United States, and the high respect which it of course feels for all the moral obligations by which the government of the United States may, either expressly or impliedly, be bound. Considering the provisions of this treaty, and reviewing the pledges of this government extraneous to that instrument, by which the sovereignty of Cuba is to be held by the United States for the benefit of the people of Cuba and for their account, to be relinquished to them when the conditions justify its accomplishment, this court uranimously held in Neely v. Henkel, 180 U.S. 109 , ante, 302, 21 Sup. Ct. Rep. 302, that Cuba was not incorporated into the United States, and was a foreign country. It follows from this decision that it is lawful for the United States to take possession of and hold in the exercise of its sovereign power a particular territory, without incorporating it into the United States, if there be obligations of honor and good faith which, although not expressed in the treaty, nevertheless sacredly bind the United States to terminate the dominion and control when, in its political discretion, the situation is ripe to enable it to do so. Conceding, then, for the purpose of the argument, it to be true that it would be a violation of duty under the Constitution for the legislative department, in the exercise of its discretion, to accept a cession of and permanently hold territory which is not [182 U.S. 244, 344] intended to be incorporated, the presumption necessarily must be that that department, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to its duty under the Constitution, and therefore, when the unfitness of particular territory for incorporation is demonstrated, the occupation will terminate. I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of every department of the government of the United States to support and defend the Constitution.

But if it can be supposed-which, of course, I do not think to be conceivable-that the judiciary would be authorized to draw to itself by an act of usurpation purely political functions, upon the theory that if such wrong is not committed a greater harm will arise, because the other departments of the government will forget their duty to the Constitution and wantonly transcend its limitations, I am further admonished that any judicial action in this case which would be predicated upon such an unwarranted conception would be absolutely unavailing. It cannot be denied that under the rule clearly settled in Neely v. Henkel, 180 U.S. 109 , ante, 302, 21 Sup. Ct. Rep. 302, the sovereignty of the United States may be extended over foreign territory to remain paramount until, in the discretion of the political

department of the government of the United States, it be relinquished. This method, then, of dealing with foreign territory, would in any event be available. Thus, the enthralling of the treaty-making power, which would result from holding that no territory could be acquired by treaty of cession without immediate incorporation, would only result in compelling a resort to the subterfuge of relinquishment of sovereignty, and thus indirection would take the place of directness of action,-a course which would be incompatible with the dignity and honor of the government.

I am authorized to say that Mr. Justice Shiras and Mr. Justice McKenna concur in this opinion.

Mr. Justice Gray, concurring: [182 U.S. 244, 345] Concurring in the judgment of affirmance in this case, and in substance agreeing with the opinion of Mr. Justice White, I will sum up the reasons for my concurrence in a few propositions which may also indicate my position in other cases now standing for judgment.

The cases now before the court do not touch the authority of the United States over the territories in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, and the territories of Alaska and Hawaii; but they relate to territory in the broader sense, acquired by the United States by war with a foreign state.

As Chief Justice Marshall said: 'The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose.' American Ins. Co. v. 356 Bales of Cotton (1828) 1 Pet. 511, 542, 7 L. ed. 242, 255.

The civil government of the United States cannot extend immediately, and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the President as Commander in Chief. Civil government cannot take effect at once, as soon as possession is acquired under military authority, or even as soon as that possession is confirmed by treaty. It can only be put in operation by the action of the appropriate political department of the government, at such time and in such degree as that department may determine. There must, of necessity, be a transition period.

In a conquered territory, civil government must take effect either by the action of the treaty-making power, or by that of [182 U.S. 244, 346] the Congress of the United States. The office of a treaty of cession ordinarily is to put an end to all authority of the foreign government over the territory, and to subject the territory to the disposition of the government of the United States.

The government and disposition of territory so acquired belong to the government of the United States, consisting of the President, the Senate, elected by the states, and the House of Representatives, chosen by and immediately representing the people of the United States. Treaties by which territory is acquired from a foreign state usually recognize this.

It is clearly recognized in the recent treaty with Spain, especially in the 9th article, by which 'the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.'

By the 4th and 13th articles of the treaty, the United States agree that for ten years Spanish ships and merchandise shall be admitted to the ports of the Philippine islands on the same terms as ships and merchandise of the United States, and Spanish scientific, literary, and artistic works not subversive of public order shall continue to be admitted free of duty into all the ceded territories. Neither of these provisions could be carried out if the Constitution required the customs regulations of the United States to apply in those territories.

In the absence of congressional legislation, the regulation of the revenue of the conquered territory, even after the treaty of cession, remains with the executive and military authority.

So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory, in the sense of the revenue laws; but those laws concerning 'foreign countries' remain applicable to the conquered territory until changed by Congress. Such was the unanimous opinion of this court, as declared by Chief Justice Taney in Fleming v. Page, 9 How. 603, 617, 13 L. ed. 276, 281.

If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution. [182 U.S. 244, 347] Such was the effect of the act of Congress of April 12, 1900 (31 Stat. at L. chap. 191), entitled 'An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes.' By the 3d section of that act, it was expressly declared that the duties thereby established on merchandise and articles going into Porto Rico from the United States, or coming into the United States from Porto Rico, should cease in any event on March 1, 1902, and sooner if the legislative assembly of Porto Rico should enact and put into operation a system of local taxation to meet the necessities of the government established by that act.

The system of duties temporarily established by that act during the transition period was within the authority of Congress under the Constitution of the United States.

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan, Mr. Justice Brewer, and Mr. Justice Peckham, dissenting:

This is an action brought to recover moneys exacted by the collector of customs at the port of New York as import duties on two shipments of fruit from ports in the island of Porto Rico to the port of New York in November, 1900

The treaty ceding Porto Rico to the United States was ratified by the Senate February 6, 1899; Congress passed an act to carry out its obligations March 3, 1899; and the ratifications were exchanged, and the treaty proclaimed April 11, 1899. Then followed the act approved April 12, 1900. 31 Stat. at L. 77, chap. 191.

Mr. Justice Harlan, Mr. Justice Brewer, Mr. Justice Peckham, and myself are unable to concur in the opinions and judgment of the court in this case. The majority widely differ in the reasoning by which the conclusion is reached, although there seems to be concurrence in the view that Porto Rico belongs to the United States, but nevertheless, and notwithstanding the act of Congress, is not a part of the United States subject to the provisions of the Constitution in respect of the levy of taxes, duties, imposts, and excises. [182 U.S. 244, 348] The inquiry is whether the act of April 12, 1900, so far as it requires the payment of import duties on merchandise brought from a port of Porto Rico as a condition of entry into other ports of the United States, is consistent with the Federal Constitution.

The act creates a civil government for Porto Rico, with a governor, secretary, attorney general, and other officers, appointed by the President, by and with the advice and consent of the Senate, who, together with five other persons, likewise so appointed and confirmed, are constituted an executive council; local legislative powers are vested in a legislative assembly consisting of the executive council and a house of delegates to be elected; courts are provided for, and, among other things, Porto Rico is constituted a judicial district, with a district judge, attorney, and marshal, to be appointed by the President for the term of four years. The district court is to be called the district court of the United States for Porto Rico, and to possess, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States. The act also provides that 'writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied.'

It was also provided that the inhabitants continuing to reside in Porto Rico, who were Spanish subjects on April 11, 1899, and their children born subsequent thereto (except such as should elect to preserve their allegiance to the Crown of Spain), together with citizens of the United States residing in Porto Rico, should 'constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such.' [182 U.S. 244, 349] All officials authorized by the act are required to, 'before entering upon the duties of their respective offices, take an oath to support the Constitution of the United States and the laws of Porto Rico.'

The 2d, 3d, 4th, 5th and 38th sections of the act are printed in the margin. 14 [182 U.S. 244, 350] It will be seen that duties are imposed upon 'merchandise coming into Porto Rico from the United States:' 'merchandise [182 U.S. 244, 351] coming into the United States from Porto Rico;' taxes upon 'articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn from consumption or sale' 'equal to the internal-revenue tax imposed in the United States upon like articles of domestic manufacture;' and 'on all articles of merchandise of United States manufacture coming into Porto Rico,' 'a tax equal in rate and amount to the internal-revenue tax imposed in Porto Rico upon the like articles of Porto Rican manufacture.'

And it is also provided that all duties collected in Porto Rico on imports from foreign countries and on 'merchandise coming into Porto Rico from the United States,' and 'the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Porto Rico,' shall be held as a separate fund and placed 'at the disposal of the President to be used for the government and benefit of Porto Rico' until the local government is organized, when 'all collections of taxes and duties under this act shall be paid into the treasury of Porto Rico, instead of being paid into the Treasury of the United States.'

The 1st clause of 8 of article 1 of the Constitution [182 U.S. 244, 352] provides: 'The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.'

Clauses 4, 5, and 6 of 9 are:

> 'No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

> 'No tax or duty shall be laid on articles exported from any state.
>
> 'No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.'

This act on its face does not comply with the rule of uniformity, and that fact is admitted.

The uniformity required by the Constitution is a geographical uniformity, and is only attained when the tax operates with the same force and effect in every place where the subject of it is found. Knowlton v. Moore, 178 U.S. 41 , 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Head Money Cases, 112 U.S. 594 , sub nom. Edye v. Robertson, 28 L. ed. 802, 5 Sup. Ct. Rep. 247. But it is said that Congress in attempting to levy these duties was not exercising power derived from the 1st clause of 8, or restricted by it, because in dealing with the territories Congress exercises unlimited powers of government, and, moreover, that these duties are merely local taxes.

This court, in 1820, when Marshall was Chief Justice, and Washington, William Johnson, Livingston, Todd, Duvall, and Story were his associates, took a different view of the power of Congress in the matter of laying and collecting taxes, duties, imposts, and excises in the territories, and its ruling in Loughborough v. Blake, 5 Wheat. 317, 5 L. ed. 98, has never been overruled.

It is said in one of the opinions of the majority that the Chief Justice 'made certain observations which have occasioned some embarrassment in other cases.' Manifestly this is so in this case, for it is necessary to overrule that decision in order to reach the result herein announced. [182 U.S. 244, 353] The question in Loughborough v. Blake was whether Congress had the right to impose a direct tax on the District of Columbia apart from the grant of exclusive legislation, which carried the power to levy local taxes. The court held that Congress had such power under the clause in question. The reasoning of Chief Justice Marshall was directed to show that the grant of the power 'to lay and collect taxes, duties, imposts, and excises,' because it was general and without limitation as to place, consequently extended 'to all places over which the government extends,' and he declared that, if this could be doubted, the doubt was removed by the subsequent words, which modified the grant, 'but all duties, imposts, and excises shall be uniform throughout the United States.' He then said: 'It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States.'

It is wholly inadmissible to reject the process of reasoning by which the Chief Justice reached and tested the soundness of his conclusion, as merely obiter.

Nor is there any intimation that the ruling turned on the theory that the Constitution irrevocably adhered to the soil of Maryland and Virginia, and therefore accompanied the parts which were ceded to form the District, or that 'the tie' be- [182 U.S. 244, 354] tween those states and the Constitution 'could not be

dissolved without at least the consent of the Federal and state governments to a formal separation,' and that this was not given by the cession and its acceptance in accordance with the constitutional provision itself, and hence that Congress was restricted in the exercise of its powers in the District, while not so in the territories.

So far from that, the Chief Justice held the territories as well as the District to be part of the United States for the purposes of national taxation, and repeated in effect what he had already said in M'Culloch v. Maryland, 4 Wheat. 408, 4 L. ed. 602; 'Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported.'

Conceding that the power to tax for the purposes of territorial government is implied from the power to govern territory, whether the latter power is attributed to the power to acquire or the power to make needful rules and regulations, these particular duties are nevertheless not local in their nature, but are imposed as in the exercise of national powers. The levy is clearly a regulation of commerce, and a regulation affecting the states and their people as well as this territory and its people. The power of Congress to act directly on the rights and interests of the people of the states can only exist if and as granted by the Constitution. And by the Constitution Congress is vested with power 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' The territories are indeed not mentioned by name, and yet commerce between the territories and foreign nations is covered by the clause, which would seem to have been intended to embrace the entire internal as well as foreign commerce of the country.

It is evident that Congress cannot regulate commerce between a territory and the states and other territories in the exercise of the bare power to govern the particular territory, and as this act was framed to operate and does operate on the people of the states, the power to so legislate is apparently [182 U.S. 244, 355] rested on the assumption that the right to regulate commerce between the states and territories comes within the commerce clause by necessary implication. Stoutenburgh v. Hennick, 129 U.S. 141 , 32 L. ed. 637, 9 Sup. Ct. Rep. 256.

Accordingly the act of Congress of August 8, 1890, entitled 'An Act to Limit the Effect of the Regulations of Commerce between the Several States, and with Foreign Countries in Certain Cases,' applied in terms to the territories as well as to the states. [26 Stat. at L. 313, chap. 728.]

In any point of view, the imposition of duties on commerce operates to regulate commerce, and is not a matter of local legislation; and it follows that the levy of these duties was in the exercise of the national power to do so, and subject to the requirement of geographical uniformity.

The fact that the proceeds are devoted by the act to the use of the territory does not make national taxes, local. Nobody disputes the source of the power to lay and collect, duties geographically uniform, and apply the proceeds by a proper appropriation act to the relief of a particular territory, but the destination of the proceeds would not change the source of the power to lay and collect. And that suggestion certainly is not strengthened when based on the diversion of duties collected from all parts of the United States to a territorial treasury before reaching the Treasury of the United States. Clause 7 of 9 of article 1 provides that 'no money shall be drawn from the Treasury, but in consequence of appropriations made by law,' and the proposition that this may be rendered inapplicable if the money is not permitted to be paid in so as to be susceptible of being drawn out is somewhat startling.

It is also urged that Chief Justice Marshall was entirely in fault because, while the grant was general and without limitation as to place, the words, 'throughout the United States,' imposed a limitation as to place

so far as the rule of uniformity was concerned, namely, a limitation to the states as such.

Undoubtedly the view of the Chief Justice was utterly inconsistent with that contention, and, in addition to what has been quoted, he further remarked: 'If it be said that the principle of uniformity, estab lished in the Constitution, secures the District from oppression in the imposition of indirect taxes, it is [182 U.S. 244, 356] not less true that the principle of apportionment, also established in the Constitution, secures the District from any oppressive exercise of the power to lay and collect direct taxes.' [5 Wheat. 325, 5 L. ed. 100.] It must be borne in mind that the grant was of the absolute power of taxation for national purposes, wholly unlimited as to place, and subject to only one exception and two qualifications. The exception was that exports could not be taxed at all. The qualifications were that direct taxes must be imposed by the rule of apportionment, and indirect taxes by the rule of uniformity. License Tax Cases, 5 Wall. 462, 18 L. ed. 497. But as the power necessarily could be exercised throughout every part of the national domain, state, territory, District, the exception and the qualifications attended its exercise. That is to say, the protection extended to the people of the states extended also to the people of the District and the territories.

In Knowlton v. Moore, 178 U.S. 41 , 44 L. ed. 969, 20 Sup. Ct. Rep. 747, it is shown that the words, 'throughout the United States,' are but a qualification introduced for the purpose of rendering the uniformity prescribed, geographical, and not intrinsic, as would have resulted if they had not been used.

As the grant of the power to lay taxes and duties was unqualified as to place, and the words were added for the sole purpose of preventing the uniformity required from being intrinsic, the intention thereby to circumscribe the area within which the power could operate not only cannot be imputed, but the contrary presumption must prevail.

Taking the words in their natural meaning,-in the sense in which they are frequently and commonly used,-no reason is perceived for disagreeing with the Chief Justice in the view that they were used in this clause to designate the geographical unity known as 'The United States,' 'our great republic, which is composed of states and territories.'

Other parts of the Constitution furnish illustrations of the correctness of this view. Thus, the Constitution vests Congress with the power 'to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the United States.' [182 U.S. 244, 357] This applies to the territories as well as the states, and has always been recognized in legislation as binding.

Aliens in the territories are made citizens of the United States, and bankrupts residing in the territories are discharged from debts owing citizens of the states, pursuant to uniform rules and laws enacted by Congress in the exercise of this power.

The 14th Amendment provides that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside;' and this court naturally held, in the Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394, that the United States included the District and the territories. Mr. Justice Miller observed: 'It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the states composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided.' And he said the question was put at rest by the amendment, and the distinction between citizenship of the United States and citizenship of a state was clearly recognized and established. 'Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the

state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.'

No person is eligible to the office of President unless he has 'attained the age of thirty-five years, and been fourteen years a resident within the United States.' Clause 5, 1, art. 2.

Would a native-born citizen of Massachusetts be ineligible if he had taken up his residence and resided in one of the territories for so many years that he had not resided altogether fourteen years in the states? When voted for he must be a citizen of one of the states (clause 3, 1, art. 2; art. 12), but as to length of time must residence in the territories be counted against him? [182 U.S. 244, 358] The 15th Amendment declares that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.' Where does that prohibition on the United States especially apply if not in the territories?

The 13th Amendment says that neither slavery nor involuntary servitude 'shall exist within the United States or any place subject to their jurisdiction.' Clearly this prohibition would have operated in the territories if the concluding words had not been added. The history of the times shows that the addition was made in view of the then condition of the country,-the amendment passed the house January 31, 1865,-and it is, moreover, otherwise applicable than to the territories. Besides, generally speaking, when words are used simply out of abundant caution, the fact carries little weight.

Other illustrations might be adduced, but it is unnecessary to prolong this opinion by giving them.

I repeat that no satisfactory ground has been suggested for restricting the words 'throughout the United States,' as qualifying the power to impose duties, to the states, and that conclusion is the more to be avoided when we reflect that it rests, in the last analysis, on the assertion of the possession by Congress of unlimited power over the territories.

The government of the United States is the government ordained by the Constitution, and possesses the powers conferred by the Constitution. 'This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?' Marbury v. Madison, 1 Cranch, 176, 2 L. ed. 73. The opinion of the court, by Chief Justice Marshall, in that case, was delivered at [182 U.S. 244, 359] the February term, 1803, and at the October term, 1885, the court, in Yick Wo v. Hopkins, 118 U.S. 356 , 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, speaking through Mr. Justice Matthews, said: 'When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power.'

From Marbury v. Madison to the present day, no utterance of this court has intimated a doubt that in its operation on the people, by whom and for whom it was established, the national government is a government of enumerated powers, the exercise of which is restricted to the use of means appropriate and plainly adapted to constitutional ends, and which are 'not prohibited, but consist with the letter and

spirit of the Constitution.'

The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end of the question.

To hold otherwise is to overthrow the basis of our constitutional law, and moreover, in effect, to reassert the proposition that the states, and not the people, created the government.

It is again to antagonize Chief Justice Marshall, when he said: 'The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit. This government is acknowledged by all to be one of enumerated powers.' 4 Wheat. 404, 4 L. ed. 601.

The prohibitory clauses of the Constitution are many, and [182 U.S. 244, 360] they have been repeatedly given effect by this court in respect of the territories and the District of Columbia.

The underlying principle is indicated by Chief Justice Taney, in The Passenger Cases, 7 How. 492, 12 L. ed. 790, where he maintained the right of the American citizen to free transit in these words: 'Living, as we do, under a common government charged with the great concerns of the whole Union, every citizen of the United States, from the most remote states or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every state and territory of the Union. . . . For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states.'

In Cross v. Harrison, 16 How. 197, 14 L. ed. 903, it was held that by the ratification of the treaty with Mexico 'California became a part of the United States,' and that 'the right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imposts, and excises shall be uniform throughout the United States.'

In Dred Scott v. Sandford, 19 How. 393, 15 L. ed. 691, the court was unanimous in holding that the power to legislate respecting a territory was limited by the restrictions of the Constitution, or, as Mr. Justice Curtis put it, by 'the express prohibitions on Congress not to do certain things.'

Mr. Justice McLean said: 'No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit.'

Mr. Justice Campbell: 'I look in vain, among the discussions of the time, for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, [182 U.S. 244, 361] whose subject comprehended an empire, and which had no restriction but the discretion of Congress.'

Chief Justice Taney: 'The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the states, but the words are general, and extend to the whole territory

over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government, as well as that covered by states. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a territory, so far as these rights are concerned, on the same footing with citizens of the states, and guards them as firmly and plainly against any inroads which the general government might attempt under the plea of implied or incidental powers.'

Many of the later cases were brought from territories over which Congress had professed to 'extend the Constitution,' or from the District after similar provision, but the decisions did not rest upon the view that the restrictions on Congress were self-imposed, and might be withdrawn at the pleasure of that body.

Capital Traction Co. v. Hof, 174 U.S. 1 , 43 L. ed. 873, 19 Sup. Ct. Rep. 580, is a fair illustration, for it was there ruled, citing Webster v. Reid, 11 How. 437, 13 L. ed. 761; Callan v. Wilson, 127 U.S. 550 , 32 L. ed. 226, 8 Sup. Ct. Rep. 1301; Thompson v. Utah, 170 U.S. 343 , 42 L. ed. 1061, 18 Sup. Ct. Rep. 620, that 'it is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia.'

No reference whatever was made to 34 of the act of February 21, 1871 ( 16 Stat. at L. 419, chap. 62), which, in providing for the election of a delegate for the District, closed with the words: 'The person having the greatest number of legal votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given accordingly; and the Constitution and all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States.' [182 U.S. 244, 362] Nor did the court in Bauman v. Ross, 167 U.S. 548 , 42 L. ed. 270, 17 Sup. Ct. Rep. 966, attribute the application of the 5th Amendment to the act of Congress, a although it was cited to another point.

The truth is that, as Judge Edmunds wrote, 'the instances in which Congress has declared, in statutes organizing territories, that the Constitution and laws should be in force there, are no evidence that they were not already there, for Congress and all legislative bodies have often made enactments that in effect merely declared existing law. In such cases they declare a pre-existing truth to ease the doubts of casuists.' Cong. Rec. 56th Cong. 1st Sess., p. 3507.

In Callan v. Wilson, 127 U.S. 540 , 32 L. ed. 223, 8 Sup. Ct. Rep. 1301, which was a criminal prosecution in the District of Columbia, Mr. Justice Harlan, speaking for the court, said: 'There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property,-especially of the privilege of trial by jury in criminal cases.' And further: 'We cannot think that the people of this District have, in that regard, less rights than those accorded to the people of the territories of the United States.'

In Thompson v. Utah, 170 U.S. 343 , 42 L. ed. 1061, 18 Sup. Ct. Rep. 620, it was held that a statute of the state of Utah providing for the trial of criminal cases other than capital, by a jury of eight, was invalid as applied on a trial for a crime committed before Utah was admitted; that it was not 'competent for the state of Utah, upon its admission into the Union, to do in respect of Thompson's crime what the United States could not have done while Utah was a territory;' and that an act of Congress providing for a trial by a jury of eight persons in the territory of Utah would have been in conflict with the Constitution.

Article 6 of the Constitution ordains: 'This Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.'

And, as Mr. Justice Curtis observed in United States v. Morris, [182 U.S. 244, 363] 1 Curt. C. C. 50, Fed. Cas. No. 15,815, 'nothing can be clearer than the intention to have the Constitution, laws, and treaties of the United States in equal force throughout every part of the terribory of the United States, alike in all places, at all times.'

But it is said that an opposite result will be reached if the opinion of Chief Justice Marshall in American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed 242, be read 'in connection with art. 3, 1 and 2 of the Constitution, vesting 'the judicial power of the United States' in 'one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior,'' etc. And it is argued: 'As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution, and upon territory which is not part of the United States within the meaning of the Constitution.'

And further, that if the territories 'be a part of the United States, it is difficult to see how Congress could create courts in such territories, except under the judicial clause of the Constitution.'

By the 9th clause of 8 of article 1, Congress is vested with power 'to constitute tribunals inferior to the Supreme Court,' while by 1 of article 3 the power is granted to it to establish inferior courts in which the judicial power of the government treated of in that article is vested.

That power was to be exerted over the controversies therein named, and did not relate to the general administration of justice in the territories, which was committed to courts established as part of the territorial government.

What the Chief Justice said was: 'These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that [182 U.S. 244, 364] clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States.'

The Chief Justice was dealing with the subject in view of the nature of the judicial department of the government and the distinction between Federal and state jurisdiction, and the conclusion was, to use the language of Mr. Justice Harlan in McAllister v. United States, 141 U.S. 174 , 35 L. ed. 693, 11 Sup. Ct. Rep. 949, 'that courts in the territories, created under the plenary municipal authority that Congress possesses over the territories of the United States, are not courts of the United States created under the authority conferred by that article.'

But it did not therefore follow that the territories were not parts of the United States, and that the power of Congress in general over them was unlimited; nor was there in any of the discussions on this subject the least intimation to that effect.

And this may justly be said of expressions in some other cases supposed to give color to this doctrine of absolute dominion in dealing with civil rights.

In Murphy v. Ramsey, 114 U.S. 15 , 29 L. ed. 47, 5 Sup. Ct. Rep. 747, Mr. Justice Matthews said: 'The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, state and national. Their political rights are franchises, which they hold as privileges in the legislative discretion of the Congress of the United States.'

In the Church of Jesus Christ of L. D. S. v. United States, 136 U.S. 44 , 34 L. ed. 491, 10 Sup. Ct. Rep. 803, Mr. Justice Bradley observed: 'Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions. [182 U.S. 244, 365] That able judge was referring to the fact that the Constitution does not expressly declare that its prohibitions operate on the power to govern the territories, but, because of the implication that an express provision to that effect might be essential, three members of the court were constrained to dissent, regarding it, as was said, 'of vital consequence that absolute power should never be conceded as belonging under our system of government to any one of its departments.'

What was ruled in Murphy v. Ramsey is that in places over which Congress has exclusive local jurisdiction its power over the political status is plenary.

Much discussion was had at the bar in respect of the citizenship of the inhabitants of Porto Rico, but we are not required to consider that subject at large in these cases. It will be time enough to seek a ford when, if ever, we are brought to the stream.

Yet although we are confined to the question of the validity of certain duties imposed after the organization of Porto Rico as a territory of the United States, a few observations and some references to adjudged cases may well enough be added in view of the line of argument pursued in the concurring opinion.

In American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 541,- in which, by the way, the court did not accept the views of Mr. Justice Johnson in the circuit court or of Mr. Webster in argument,-Chief Justice Marshall said: 'The course which the argument has taken will require that in deciding this question the court should take into view the relation in which Florida stands to the United States. The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the world is, if a nation be not entriely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. [182 U.S. 244, 366] On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state. On the 2d of February, 1819, Spain ceded Florida to the United States.

The 6th article of the treaty of cession contains the following provision: 'The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.' This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a state. In the meantime, Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.' Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned.' [182 U.S. 244, 367] General Halleck (International Law, 1st ed. chap. 33, 14), after quoting from Chief Justice Marshall, observed:

> 'This is now a well-settled rule of the law of nations, and is universally admitted. Its provisions are clear and simple and easily understood; but it is not so easy to distinguish between what are political and what are municipal laws, and to determine when and how far the constitution and laws of the conqueror change or replace those of the conquered. And in case the government of the new state is a constitutional government, of limited and divided powers, questions necessarily arise respecting the authority, which, in the absence of legislative action, can be exercised in the conquered territory after the cessation of war and the conclusion of a treaty of peace. The determination of these questions depends upon the institutions and laws of the new sovereign, which, though conformable to the general rule of the law of nations, affect the construction and application of that rule to particular cases.'

In United States v. Percheman, 7 Pet. 87, 8 L. ed. 617, the Chief Justice said:

> 'The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? . . . The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property.'

Again, the court in Pollard v. Hagan, 3 How. 225, 11 L. ed. 572:

> 'Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it.'

And in Chicago, R. I. & P. R. Co. v. McGlinn, 114 U.S. 546 , 29 L. ed. 271, 5 Sup. Ct. Rep. 1006: 'It is a general rule of public law, recognized and acted upon by the United States, that whenever [182 U.S. 244, 368] political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the other, but private

property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power-and the latter is involved in the former-to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed.'

When a cession of territory to the United States is completed by the ratification of a treaty, it was stated in Cross v. Harrison, 16 How. 198, 14 L. ed. 903, that the land ceded becomes a part of the United States, and that, as soon as it becomes so, the territory is subject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right; and the latter ceased after the ratification of the treaty. This statement was made by the justice delivering the opinion, as the result of the discussion and argument which he had already set forth. It was his summing up of what he supposed was decided on that subject in the case in which he was writing. [182 U.S. 244, 369] The new master was, in the instance of Porto Rico, the United States, a constitutional government with limited powers, and the terms which the Constitution itself imposed, or which might be imposed in accordance with the Constitution, were the terms on which the new master took possession.

The power of the United States to acquire territory by conquest, by treaty, or by discovery and occupation, is not disputed, nor is the proposition that in all international relations, interests, and responsibilities the United States is a separate, independent, and sovereign nation; but it does not derive its powers from international law, which, though a part of our municipal law, is not a part of the organic law of the land. The source of national power in this country is the Constitution of the United States; and the government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit.

Doubtless the subjects of the former sovereign are brought by the transfer under the protection of the acquiring power, and are so far forth impressed with its nationality, but it does not follow that they necessarily acquire the full status of citizens. The 9th article of the treaty ceding Porto Rico to the United States provided that Spanish subjects, natives of the Peninsula, residing in the ceded territory, might remain or remove, and in case they remained might preserve their allegiance to the Crown of Spain by making a declaration of their decision to do so, 'in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they reside.'

The same article also contained this paragraph: 'The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress.' This was nothing more than a declaration of the accepted principles of international law applicable to the status of the Spanish subjects and of the native inhabitants. It did not assume that Congress could deprive the inhabitants of ceded territory of rights to which they might be entitled. The grant by Spain could not enlarge the powers of Congress, nor did it [182 U.S. 244, 370] purport to secure from the United States a guaranty of civil or political privileges.

Indeed, a treaty which undertook to take away what the Constitution secured, or to enlarge the Federal

jurisdiction, would be simply void.

> 'It need hardly be said that a treaty cannot change the Constitution, or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government.' The Cherokee Tobacco, 11 Wall. 620, sub nom. 207 Half Pound Papers of Smoking Tobacco v. United States, 20 L. ed. 229.

So, Mr. Justice Field in De Geofroy v. Riggs, 133 U.S. 267 , 33 L. ed. 645, 10 Sup. Ct. Rep. 297: 'The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent.'

And it certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement made with a foreign nation by the President and two thirds of a quorum of the Senate. See 2 Tucker, Const. 354, 355, 356.

In the language of Judge Cooley: 'The Constitution itself never yields to treaty or enactment; it neither changes with time nor does it in theory bend to the force of circumstances. It may be amended according to its own permission; but while it stands it is 'a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.' Its principles cannot, therefore, be set aside in order to meet the supposed necessities of great crises. 'No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

I am not intimating in the least degree that any reason exists for regarding this article to be unconstitutional, but even if it [182 U.S. 244, 371] were, the fact of the cession is a fact accomplished, and this court is concerned only with the question of the power of the government in laying duties in respect of commerce with the territory so ceded.

In the concurring opinion of Mr. Justice White, we find certain important propositions conceded, some of which are denied or not admitted in the other. These are to the effect that 'when an act of any department is challenged because not warranted by the Constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the Constitution, either in express terms or by lawful implication;' that, as every function of the government is derived from the Constitution, 'that instrument is everywhere and at all times potential in so far as its provisions are applicable;' that 'wherever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits;' that where conditions are brought about to which any particular provision of the Constitution applies, its controlling influence cannot be frustrated by the action of any or all of the departments of the government; that the Constitution has conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, but every applicable express limitation of the Constitution is in force, and even where there is no express command which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed though not expressed in so many words; that every provision of the Constitution which is applicable to the territories is controlling therein, and all the limitations of the Constitution applicable to Congress in governing the territories necessarily limit its power; that in the case of the territories, when a provision of the Constitution is invoked, the question is whether the provision relied

on is applicable; and that the power to lay and collect taxes, duties, imposts, and excises, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory [182 U.S. 244, 372] which has been incorporated into and forms a part of the United States.

And it is said that the determination of whether a particular provision is applicable involves an inquiry into the situation of the territory and its relations to the United States, although it does not follow, when the Constitution has withheld all power over a given subject, that such an inquiry is necessary.

The inquiry is stated to be: 'Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?' And the answer being given that it had not, it is held that the rule of uniformity was not applicable.

I submit that that is not the question in this case. The question is whether, when Congress has created a civil government for Porto Rico, has constituted its inhabitants a body politic, has given it a governor and other officers, a legislative assembly, and courts, with right of appeal to this court, Congress can, in the same act and in the exercise of the power conferred by the 1st clause of 8, impose duties on the commerce between Porto Rico and the states and other territories in contravention of the rule of uniformity qualifying the power. If this can be done, it is because the power of Congress over commerce between the states and any of the territories is not restricted by the Constitution. This was the position taken by the Attorney General, with a candor and ability that did him great credit.

But that position is rejected, and the contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions.

The accuracy of this view is supposed to be sustained by the act of 1856 in relation to the protection of citizens of the United States removing guano from unoccupied islands; but I am unable to see why the discharge by the United States of its un- [182 U.S. 244, 373] doubted duty to protect its citizens on terra nullius, whether temporarily engaged in catching and curing fish, or working mines, or taking away manure, furnishes support to the proposition that the power of Congress over the territories of the United States is unrestricted.

Great stress is thrown upon the word 'incorporation,' as if possessed of some occult meaning, but I take it that the act under consideration made Porto Rico, whatever its situation before, an organized territory of the United States. Being such, and the act undertaking to impose duties by virtue of clause 1 of 8, how is it that the rule which qualifies the power does not apply to its exercise in respect of commerce with that territory? The power can only be exercised as prescribed, and even if the rule of uniformity could be treated as a mere regulation of the granted power,-a suggestion to which I do not assent,-the validity of these duties comes up directly, and it is idle to discuss the distinction between a total want of power and a defective exercise of it.

The concurring opinion recognizes the fact that Congress, in dealing with the people of new territories or possessions, is bound to respect the fundamental guaranties of life, liberty, and property, but assumes that Congress is not bound, in those territories or possessions, to follow the rules of taxation prescribed by the Constitution. And yet the power to tax involves the power to destroy, and the levy of duties touches all our people in all places under the jurisdiction of the government.

The logical result is that Congress may prohibit commerce altogether between the states and territories, and may prescribe one rule of taxation in one territory, and a different rule in another.

That theory assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original states and territories, and substitutes for the present system of republiean government a system of domination over distant provinces in the exercise of unrestricted power.

In our judgment, so much of the Porto Rican act as author- [182 U.S. 244, 374] ized the imposition of these duties is invalid, and plaintiffs were entitled to recover.

Some argument was made as to general consequences apprehended to flow from this result, but the language of the Constitution is too plain and unambiguous to permit its meaning to be thus influenced. There is nothing 'in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the Constitution' in giving it a construction not warranted by its words.

Briefs have been presented at this bar, purporting to be on behalf of certain industries, and eloquently setting forth the desirability that our government should possess the power to impose a tariff on the products of newly acquired territories so as to diminish or remove competition. That however, furnishes no basis for judicial judgment, and if the producers of staples in the existing states of this Union believe the Constitution should be amended so as to reach that result, the instrument itself provides how such amendment can be accomplished. The people of all the states are entitled to a voice in the settlement of that subject.

Again, it is objected on behalf of the government that the possession of absolute power is essential to the acquisition of vast and distant territories, and that we should regard the situation as it is to-day, rather than as it was a century ago. 'We must look at the situation as comprehending a possibility-I do not say a probability, but a possibility- that the question might be as to the powers of this government in the acquisition of Egypt and the Soudan, or a section of Central Africa, or a spot in the Antarctic Circle, or a section of the Chinese Empire.'

But it must be remembered that, as Marshall and Story declared, the Constitution was framed for ages to come, and that the sagacious men who framed it were well aware that a mighty future waited on their work. The rising sun to which Franklin referred at the close of the convention, they well knew, was that star of empire whose course Berkeley had sung sixty years before.

They may not, indeed, have deliberately considered a trium- [182 U.S. 244, 375] phal progress of the nation, as such, around the earth, but as Marshall wrote: 'It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exeption.'

This cannot be said, and on the contrary, in order to the successful extension of our institutions, the reasonable presumption is that the limitations on the exertion of arbitrary power would have been made more rigorous.

After all, these arguments are merely political, and 'political reasons have not the requisite certainty to afford rules of judicial interpretation.'

Congress has power to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the Constitution in the government of the United States, or in any department or officer thereof. If the end be legitimate and within the scope of the Constitution, then, to accomplish it, Congress may use 'all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution.'

The grave duty of determining whether an act of Congress does or does not comply with these requirements is only to be discharged by apply in the well-settled rules which govern the interpretation of fundamental law, unaffected by the theoretical opinions of individuals.

Tested by those rules our conviction is that the imposition of these duties cannot be sustained.

Mr. Justice Harlan, dissenting:

I concur in the dissenting opinion of the Chief Justice. The grounds upon which he and Mr. Justice Brewer and Mr. Justice Peckham regard the Foraker act as unconstitutional in the particulars involved in this action meet my entire approval. [182 U.S. 244, 376] Those grounds need not be restated, nor is it necessary to re-examine the authorities cited by the Chief Justice. I agree in holding that Porto Rico- at least after the ratification of the treaty with Spain-became a part of the United States within the meaning of the section of the Constitution enumerating the powers of Congress, and providing the 'all duties, imposts, and excises shall be uniform throughout the United States.'

In view, however, of the importance of the questions in this case, and of the consequences that will follow any conclusion reached by the court, I deem it appropriate-without rediscussing the principal questions presented-to add some observations suggested by certain passages in opinions just delivered in support of the judgment.

In one of those opinions it is said that 'the Constitution was created by the people of the United States, as a union of states, to be governed solely by representatives of the states;' also, that 'we find the Constitution speaking only to states, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them.' I am not sure that I correctly interpret these words. But if it is meant, as I assume it is meant, that, with the exception named, the Constitution was ordained by the states, and is addressed to and operates only on the staes, I cannot accept that view.

In Martin v. Hunter, 1 Wheat. 304, 324, 326, 331, 4 L. ed. 97, 102, 104, this court speaking by Mr. Justice Story, said that 'the Constitution of the United States was ordained and established, not by the states in their sovereign capacities but emphatically, as the preamble of the Constitution declares, by 'the People of the United States.''

In McCulloch v. Maryland, 4 Wheat. 316, 403-406, 4 L. ed. 579, 600, 601, Chief Justice Marshall, speaking for this court, said: 'The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' The assent of the states, in their sovereign capacity, is implied in calling a con- [182 U.S. 244, 377] vention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties. . . . The government of the union, then (whatever may be the influence of this fact on the case) is emphatically and truly a government of the people. In form and

in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit. This government is acknowledged by all to be one of enumerated powers. . . . It is the government of all; its powers are delegated by all; it represents all, and acts for all.'

Although the states are constituent parts of the United States, the government rests upon the authority of the people of the United States, and not on that of the states. Chief Justice Marshall, delivering the unanimous judgment of this court in Cohen v. Virginia, 6 Wheat. 264, 413, 5 L. ed. 257, 293, said: 'That the United States form, for many and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. . . . In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests . . . is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for those objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory.'

In reference to the doctrine that the Constitution was established by and for the states as distinct political organizations, Mr. Webster said: 'The Constitution itself in its very front refutes that. It declares that it is ordained and established by [182 U.S. 244, 378] the People of the United States. So far from saying that it is established by the governments of the several states, it does not even say that it is established by the people of the several states. But it pronounces that it was established by the people of the United States in the aggregate. Doubtless, the people of the several states, taken collectively, constitute the people of the United States. But it is in this their collective capacity, it is as all the people of the United States, that they established the Constitution.'

In view of the adjudications of this court I cannot assent to the proposition, whether it be announced in express words or by implication, that the national government is a government of or by the states in union, and that the prohibitions and limitations of the Constitution are addressed only to the states. That is but another form of saying that, like the government created by the Articles of Confederation, the present government is a mere league of states, held together by compact between themselves; whereas, as this court has often declared, it is a government created by the People of the United States, with enumerated powers, and supreme over states and individuals with respect to certain objects, throughout the entire territory over which its jurisdiction extends. If the national government is in any sense a compact, it is a compact between the People of the United States among themselves as constituting in the aggregate the political community by whom the national government was established. The Constitution speaks, not simply to the states in their organized capacities, but to all peoples, whether of states or territories, who are subject to the authority of the United States. Martin v. Hunter, 1 Wheat. 327, 4 L. ed. 103.

In the opinion to which I am referring it is also said that the 'practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct;' that while all power of government may be abused, the same may be said of the power of the government 'under the Constitution as well as outside of it;' that 'if it once be conceded that we are at liberty to acquire foreign territory, a presumption arises that [182 U.S. 244, 379] our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them;' that 'the liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself and little in the interpretation put upon it, to confirm that impression;' that as the states could only delegate to Congress such powers as they themselves

possessed, and as they had no power to acquire new territory, and therefore none to delegate in that connection, the logical inference is that 'if Congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions;' that if 'we assume that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing with them was intended to be restricted by any of the other provisions;' and that 'the execuive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired.'

These are words of weighty import. They involve consequences of the most momentous character. I take leave to say that if the principles thus announced should ever receive the sanction of a majority of this court, a radical and mischievous change in our system of government will be the result. We will, in that event, pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism.

Although from the foundation of the government this court has held steadily to the view that the government of the United States was one of enumerated powers, and that no one of its branches, nor all of its branches combined, could constitutionally exercise powers not granted, or which were not necessarily implied from those expressly granted (Martin v. Hunter, 1 Wheat. 326, 331, 4 L. ed. 102, 104) we are now informed that Congress possesses powers outside of the Constitution, and may deal with new er- [182 U.S. 244, 380] ritory, acquired by treaty or conquest, in the same manner as other nations have been accustomed to act with respect to territories acquired by them. In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our government, or any branch or officer of it, may exert at any time or at any place. Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. If that instrument had contained a word suggesting the possibility of a result of that character it would never have been adopted by the people of the United States. The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces,-the people inhabiting them to enjoy only such rights as Congress chooses to accord to them,-is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution.

The idea prevails with some-indeed, it found expression in agruments at the bar-that we have in this country substantially or practically two national governments; one to be maintained under the Constitution, with all its restrictions; the other to be maintained by Congress outside and independently of that instrument, by exercising such powers as other nations of the earth are accustomed to exercise. It is one thing to give such a latitudinarian construction to the Constitution as will bring the exercise of power by Congress, upon a particular occasion or upon a particular subject, within its provisions. It is quite a different thing to say that Congress may, if it so elects, proceed outside of the Constitution. The glory of our American system [182 U.S. 244, 381] of government is that it was created by a written constitution which protects the people against the exercise of arbitrary, unlimited power, and the limits of which instrument may not be passed by the government it created, or by any branch of it, or even by the people who ordained it, except by amendment or change of its provisions. 'To what purpose,' Chief Justice Marshall said in Marbury v. Madison, 1 Cranch, 137, 176, 2 L. ed. 60, 73, 'are powers limited, and to what purpose is that limitation committed to writting, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited

powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.'

The wise men who framed the Constitution, and the patriotic people who adopted it, were unwilling to depend for their safety upon what, in the opinion referred to, is described as 'certain principles of natural justice inherent in Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests.' They proceeded upon the theory-the wisdom of which experience has vindicated- that the only safe guaranty against governmental oppression was to withhold or restrict the power to oppress. They well remembered that Anglo- Saxons across the ocean had attempted, in defiance of law and justice, to trample upon the rights of Anglo-Saxons on this continent, and had sought, by military force, to establish a government that could at will destroy the privileges that inhere in liberty. They believed that the establishment here of a government that could administer public affairs according to its will, unrestrained by any fundamental law and without regard to the inherent rights of freemen, would be ruinous to the liberties of the people by exposing them to the oppressions of arbitrary power. Hence, the Constitution enumerates the powers which Congress and the other departments may exercise,-leaving unimpaired, to the states or the People, the powers not delegated to the national government nor prohibited to the states. That instrument so expressly declares in [182 U.S. 244, 382] the 10th Article of Amendment. It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution.

Again, it is said that Congress has assumed, in its past history, that the Constitution goes into territories acquired by purchase or conquest only when and as it shall so direct, and we are informed of the liberality of Congress in legislating the Constitution into all our contiguous territories. This is a view of the Constitution that may well cause surprise, if not alarm. Congress, as I have observed, has no existence except by virtue of the Constitution. It is the creature of the Constitution. It has no powers which that instrument has not granted, expressly or by necessary implication. I confess that I cannot grasp the thought that Congress, which lives and moves and has its being in the Constitution, and is consequently the mere creature of that instrument, can, at its pleasure, legislate or exclude its creator from territories which were acquired only by authority of the Constitution.

By the express words of the Constitution, every Senator and Representative is bound, by oath or affirmation, to regard it as the supreme law of the land. When the constitutional convention was in session there was much discussion as to the phraseology of the clause defining the supremacy of the Constitution, laws, and treaties of the United States. At one stage of the proceedings the convention adopted the following clause: 'This Constitution, and the laws of the United States made in pursuance thereof, and all the treaties made under the authority of the United States, shall be the supreme law of the several states and of their citizens and inhabitants, and the judges of the several states shall be bound thereby in their decisions, anything in the constitutions or laws of the several states to the contrary notwithstanding.' This clause was amended, on motion of Mr. Madison, by inserting after the words 'all treaties made' the words 'or which shall be made.' If the clause, so amended had been inserted in the Constitution as finally adopted, per- [182 U.S. 244, 383] haps there would have been some justification for saying that the Constitution, laws, and treaties of the United States constituted the supreme law only in the states, and that outside of the states the will of Congress was supreme. But the framers of the Constitution saw the danger of such a provision, and put into that instrument in place of the above clause the following: 'This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.' Meigs's Growth of the Constitution, 284, 287. That the convention struck out the words 'the supreme law of the several states,'

and inserted 'the supreme law of the land,' is a fact of no little significance. The 'land' referred to manifestly embraced all the peoples and all the territory, whether within or without the states, over which the United States could exercise jurisdiction or authority.

Further, it is admitted that some of the provisions of the Constitution do apply to Porto Rico, and may be invoked as limiting or restricting the authority of Congress, or for the protection of the people of that island. And it is said that there is a clear distinction between such prohibitions 'as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states.' In the enforcement of this suggestion it is said in one of the opinions just delivered: 'Thus, when the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill of that description.' I cannot accept this reasoning as consistent with the Constitution or with sound rules of interpretation. The express prohibition upon the passage by Congress of bills of attainder, or of ex post facto laws, or the granting of titles of nobility, goes no more directly to the root of the power of Congress than does the express prohibition against the imposition by Congress of any [182 U.S. 244, 384] duty, impost, or excise that is not uniform throughout the United States. The opposite theory, I take leave to say, is quite as extraordinary as that which assumes that Congress may exercise powers outside of the Constitution, and may, in its discretion, legislate that instrument into or out of a domestic territory of the United States.

In the opinion to which I have referred it is suggested that conditions may arise when the annexation of distant possessions may be desirable. 'If,' says that opinion, 'those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.' In my judgment, the Constitution does not sustain any such theory of our governmental system. Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition of territory, although such acquisition seemed at the time to be necessary, cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions. The Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued. The People have decreed that it shall be the supreme law of the land at all times. When the acquisition of territory becomes complete, by cession, the Constitution necessarily becomes the supreme law of such new territory, and no power exists in any department of the government to make 'concessions' that are inconsistent with its provisions. The authority to make such concessions implies the existence in Congress of power to declare that constitutional provisions may be ignored under special or [182 U.S. 244, 385] embarrassing circumstances. No such dispensing power exists in any branch of our government. The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the government in order to meet what some may suppose to be extraordinary emergencies. If the Constitution is in force in any territory, it is in force there for every purpose embraced by the objects for which the government was ordained. Its authority cannot be displaced by concessions, even if it be true, as asserted in argument in some of these cases, that if the tariff act took effect in the Philippines of its own force, the inhabitants of Mandanao, who live on imported rice, would starve, because the import duty is many fold more than the ordinary cost of the grain to them. The meaning of the Constitution cannot depend upon accidental circumstances arising out of the products of other countries or of this country. We cannot violate the Constitution in order to serve particular interests in our own or in foreign lands. Even this court, with its tremendous power, must

heed the mandate of the Constitution. No one in official station, to whatever department of the government he belongs, can disobey its commands without violating the obligation of the oath he has taken. By whomsoever and wherever power is exercised in the name and under the authority of the United States, or of any branch of its government, the validity or invalidity of that which is done must be determined by the Constitution.

In De Lima v. Bidwell, just decided, 181 U. S. --, ante, 743, 21 Sup. Ct. Rep. 743, we have held that, upon the ratification of the treaty with Spain, Porto Rico ceased to be a foreign country and became a domestic territory of the United States. We have said in that case that from 1803 to the present time there was not a shred of authority, except a dictum in one case, 'for holding that a district ceded to and in possession of the United States remains for any purpose a foreign territory;' that territory so acquired cannot be 'domestic for one purpose and foreign for another;' and that any judgment to the contrary would be 'pure judicial legislation,' for which there was no warrant in the Constitution or in the powers conferred upon this court. Although, as we have just decided, [182 U.S. 244, 386] Porto Rico ceased, after the ratification of the treaty with Spain, to be a foreign country within the meaning of the tariff act, and became a domestic country,-'a territory of the United States,'-it is said that if Congress so wills it may be controlled and governed outside of the Constitution and by the exertion of the powers which other nations have been accustomed to exercise with respect to territories acquired by them; in other words, we may solve the question of the power of Congress under the Constitution by referring to the powers that may be exercised by other nations. I cannot assent to this view. I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United States, acquired, and which could only have been acquired, in virtue of the Constitution. I cannot agree that it is a domestic territory of the United States for the purpose of preventing the application of the tariff act imposing duties upon imports from foreign countries, but not a part of the United States for the purpose of enforcing the constitutional requirement that all duties, imposts, and excises imposed by Congress 'shall be uniform throughout the United States.' How Porto Rico can be a domestic territory of the United States, as distinctly held in De Lima v. Bidwell, and yet, as is now held, not embraced by the words 'throughout the United States,' is more than I can understand.

We heard much in argument about the 'expanding future of our country.' It was said that the United States is to become what is called a 'world power;' and that if this government intends to keep abreast of the times and be equal to the great destiny that awaits the American people, it must be allowed to exert all the power that other nations are accustomed to exercise. My answer is, that the fathers never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution. If our government needs more power than is conferred upon it by the Constitution, that instrument provides the mode in which it may be amended and additional power thereby obtained. The People of the United States who ordained the Constitution never supposed that a change could be made in our system of govern- [182 U.S. 244, 387] ment by mere judicial interpretation. They never contemplated any such juggling with the words of the Constitution as would authorize the courts to hold that the words 'throughout the United States,' in the taxing clause of the Constitution, do not embrace a domestic 'territory of the United States' having a civil government established by the authority of the United States. This is a distinction which I am unable to make, and which I do not think ought to be made when we are endeavoring to ascertain the meaning of a great instrument of government.

There are other matters to which I desire to refer. In one of the opinions just delivered the case of Neely v. Henkel, 180 U.S. 119 , ante, 302, 21 Sup. Ct. Rep. 302, is cited in support of the proposition that the provision of the Foraker act here involved was consistent with the Constitution. If the contrary had not been asserted I should have said that the judgment in that case did not have the slightest bearing on the question before us. The only inquiry there was whether Cuba was a foreign country or territory within the meaning, not of the tariff act, but of the act of June 6th, 1900 (31 Stat. at L. 656, chap. 793). We

held that it was a foreign country. We could not have held otherwise, because the United States, when recognizing the existence of war between this country and Spain, disclaimed 'any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof,' and asserted 'its determination, when that is accomplished, to leave the government and control of the island to its people.' We said: 'While by the act of April 25th, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several states, to such extent as was necessary to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States, but only for the purpose of compelling the relinquishment by Spain of its authority and government in that island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the government, by the joint resolution of April 20th, 1898, expressly disclaimed any purpose to exercise sovereignty juris- [182 U.S. 244, 388] diction, or control over Cuba 'except for the pacification thereof,' and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view, and, so far as the court is informed by the public history of the relations of this country with that island, nothing has been done inconsistent with the declared object of the war with Spain. Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba. It is true that as between Spain and the United States,-indeed, as between the United States and all foreign nations,-Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba, that island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.' In answer to the suggestion that, under the modes of trial there adopted, Neely, if taken to Cuba, would be denied the rights, privileges, and immunities accorded by our Constitution to persons charged with crime against the United States, we said that the constitutional provisions referred to 'have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.' What use can be made of that case in order to prove that the Constitution is not in force in a territory of the United States acquired by treaty, except as Congress may provide, is more than I can perceive.

There is still another view taken of this case. Conceding [182 U.S. 244, 389] that the national government is one of enumerated powers, to be exerted only for the limited objects defined in the Constitution, and that Congress has no power, except as given by that instrument either expressly or by necessary implication, it is yet said that a new territory, acquired by treaty or conquest, cannot become incorporated into the United States without the consent of Congress. What is meant by such incorporation we are not fully informed, nor are we instructed as to the precise mode in which it is to be accomplished. Of course, no territory can become a state in virtue of a treaty or without the consent of the legislative branch of the government; for only Congress is given power by the Constitution to admit new states. But it is an entirely different question whether a domestic 'territory of the United States,' having an organized civil government established by Congress, is not, for all purposes of government by the nation, under the complete jurisdiction of the United States, and therefore a part of, and incorporated into, the United States, subject to all the authority which the national government may exert over any territory or people. If Porto Rico, although a territory of the United States, may be treated as if it were not a part of the United States, then New Mexico and Arizona may be treated as not parts of the United States, and subject to such legislation as Congress may choose to enact without any reference to the restrictions imposed by the Constitution. The admission that no power can be exercised

under and by authority of the United States except in accordance with the Constitution is of no practical value whatever to constitutional liberty, if, as soon as the admission is made,-as quickly as the words expressing the thought can be uttered,-the Constitution is so liberally interpreted as to produce the same results as those which flow from the theory that Congress may go outside of the Constitution in dealing with newly acquired territories, and give them the benefit of that instrument only when and as it shall direct.

Can it for a moment be doubted that the addition of Porto Rico to the territory of the United States in virtue of the treaty with Spain has been recognized by direct action upon the part of Congress? Has it not legislated in recognition of that treaty, [182 U.S. 244, 390] and appropriated the money which it required this country to pay?

If, by virtue of the ratification of the treaty with Spain, and the appropriation of the amount which that treaty required this country to pay, Porto Rico could not become a part of the United States so as to be embraced by the words 'throughout the United States,' did it not become 'incorporated' into the United States when Congress passed the Foraker act? 31 Stat. at L. 77, chap. 191. What did that act do? It provided a civil government for Porto Rico, with legislative, executive, and judicial departments; also, for the appointment by the President, by and with the advice and consent of the Senate of the United States, of a 'governor, secretary, attorney general, treasurer, auditor, commissioner of the interior, and a commissioner of education.' 17-25. It provided for an executive council, the members of which should be appointed by the President, by and with the advice and consent of the Senate. 18. The governor was required to report all transactions of the government in Porto Rico to the President of the United States. 17. Provision was made for the coins of the United States to take the place of Porto Rican coins . 11. All laws enacted by the Porto Rican legislative assembly were required to be reported to the Congress of the United States, which reserved the power and authority to amend the same. 31. But that was not all. Except as otherwise provided, and except also the internal revenue laws, the statutory laws of the United States, not locally inapplicable, are to have the same force and effect in Porto Rico as in the United States. 14. A judicial department was established in Porto Rico, with a judge to be appointed by the President, by and with the advice and consent of the Senate. 33. The court so established was to be known as the district court of the United States for Porto Rico, from which writs of error and appeals were to be allowed to this court. 34. All judicial process, it was provided, 'shall run in the name of the United States of America, ss: the President of the United States.' 16. And yet it is said that Porto Rico was not 'incorporated' by the Foraker act into the United States so as to be part of the United States within the [182 U.S. 244, 391] meaning of the constitutional requirement that all duties, imposts, and excises imposed by Congress shall be uniform 'throughout the United States.'

It would seem, according to the theories of some, that even if Porto Rico is in and of the United States for many important purposes, it is yet not a part of this country with the privilege of protesting against a rule of taxation which Congress is expressly forbidden by the Constitution from adopting as to any part of the 'United States.' And this result comes from the failure of Congress to use the word 'incorporate' in the Foraker act, although by the same act all power exercised by the civil government in Porto Rico is by authority of the United States, and although this court has been given jurisdiction by writ of error or appeal to re-examine the final judgments of the district court of the United States established by Congress for that territory. Suppose Congress had passed this act: 'Be it enacted by the Senate and House of Representatives in Congress assembled, That Porto Rico be and is hereby incorporated into the United States as a territory,' would such a statute have enlarged the scope or effect of the Foraker act? Would such a statute have accomplished more than the Foraker act has done? Indeed, would not such legislation have been regarded as most extraordinary as well as unnecessary?

I am constrained to say that this idea of 'incorporation' has some occult meaning which my mind does

not apprehend. It is enveloped in some mystery which I am unable to unravel.

In my opinion Porto Rico became, at least after the ratification of the treaty with Spain, a part of and subject to the jurisdiction of the United States in respect of all its territory and people, and that Congress could not thereafter impose any duty, impost, or excise with respect to that island and its inhabitants, which departed from the rule of uniformity established by the Constitution.

## Footnotes

[ Footnote 1 ] Marbury v. Madison, 1 Cranch, 176, 2 L. ed. 73 et seq.; Martin v. Hunter, 1 Wheat. 326, 4 L. ed. 102; New Orleans v. United States, 10 Pet. 662, 736, 9 L. ed. 573, 602; De Geofroy v. Riggs, 133 U.S. 258, 266 , 33 S. L. ed. 642, 644, 10 Sup. Ct. Rep. 295; United States v. Gettysburg Electric R. Co. 160 U.S. 668, 679 , 40 S. L. ed. 576, 580, 16 Sup. Ct. Rep. 427, and cases cited.

[ Footnote 2 ] The City of Panama, 101 U.S. 453, 460 , 25 S. L. ed. 1061, 1064; Fong Yue Ting v. United States, 149 U.S. 716, 738 , 37 S. L. ed. 914, 921, 13 Sup. Ct. Rep. 1016.

[ Footnote 3 ] Monongahela Nav. Co. v. United States, 148 U.S. 312, 336 , 37 S. L. ed. 463, 471, 13 Sup. Ct. Rep. 622; Interstate Commerce Commission v. Brimson, 154 U.S. 447, 479 , 38 S. L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; United States v. Joint Traffic Asso. 171 U.S. 571 , 43 L. ed. 288, 19 Sup. Ct. Rep. 25.

[ Footnote 4 ] United States v. Kagama, 118 U.S. 375, 378 , 30 S. L. ed. 228, 229, 6 Sup. Ct. Rep. 1109; Shively v. Bowlby, 152 U.S. 1, 48 , 38 S. L. ed. 331, 349, 14 Sup. Ct. Rep. 548.

[ Footnote 5 ] Sere v. Pitot, 6 Cranch, 332, 336, 3 L. ed. 240, 241; M'Culloch v. Maryland, 4 Wheat. 316, 421, 4 L. ed. 579, 605; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 542, 7 L. ed. 242, 255; United States v. Gratiot, 14 Pet. 526, 537, 10 L. ed. 573, 578; Scott v. Sandford, 19 How. 448, 15 L. ed. 718; Clinton v. Englebrecht, 13 Wall. 434, 447, 20 L. ed. 659, 662; Hamilton v. Dillin, 21 Wall. 73, 93, 22 L. ed. 528, 532; First Nat. Bank v. Yankton County, 101 U.S. 129, 132 , 25 S. L. ed. 1046, 1047; The City of Panama, 101 U.S. 453 , 457, sub nom. The City of Panama v. Phelps, 25 L. ed. 1061, 1062; Murphy v. Ramsey, 114 U.S. 15, 44 , 29 S. L. ed. 47, 57, 5 Sup. Ct. Rep. 747; United States v. Kagama, 118 U.S. 375, 380 , 30 S. L. ed. 228, 230, 6 Sup. Ct. Rep. 1109; Church of Jesus Christ of L. D. S. v. United States, 136 U.S. 1, 42 , 34 S. L. ed. 478, 490, 10 Sup. Ct. Rep. 792; Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 169 , 36 S. L. ed. 103, 112, 12 Sup. Ct. Rep. 375.

[ Footnote 6 ] Church of Jesus Christ of L. D. S. v. United States, 136 U.S. 1, 44 , 34 S. L. ed. 478, 491, 10 Sup. Ct. Rep. 792.

[ Footnote 7 ] Loughborough v. Blake, 5 Wheat. 317, 322, 5 L. ed. 98, 99; Woodruff v. Parham, 8 Wall. 123, 133, 19 L. ed. 382, 385; Brown v. Houston, 114 U.S. 622, 628 , 29 S. L. ed. 257, 259, 5 Sup. Ct. Rep. 1091; Fairbank v. United States, 181, U. S. 283, ante, 648, 21 Sup. Ct. Rep. 648.

[ Footnote 8 ] American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242; Benner v. Porter, 9 How. 235, 13 L. ed. 119; Webster v. Reid, 11 How. 437, 460, 13 L. ed. 761, 770; Clinton v. Englebrecht, 13 Wall. 434, 20 L. ed. 659; Reynolds v. United States, 98 U.S. 145 , 25 L. ed. 244; Callan v. Wilson, 127 U.S. 540 , 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; McAllister v. United States, 141 U.S. 174 , 35 L. ed. 693, 11 Sup. Ct. Rep. 949; Springville v. Thomas, 166 U.S. 707 , 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; Bauman v. Ross, 167 U.S. 548 , 42 L. ed. 270, 17 Sup. Ct. Rep. 966; Thompson v. Utah, 170 U.S. 343 , 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; Capital Traction Co. v. Hof, 174 U.S. 1 , 43

L. ed. 873, 19 Sup. Ct. Rep. 580; Black v. Jackson, 177 U.S. 363 , 44 L. ed. 807, 20 Sup. Ct. Rep. 648.

[ Footnote 9 ] Re Ross, 140 U.S. 453, 461 , 462 S., 463, sub nom. Ross v. McIntyre, 35 L. ed. 581, 585, 11 Sup. Ct. Rep. 897.

[ Footnote 10 ] Extract from the Free Soil Party Platform of 1842 (Standwood, Hist. of Presidency, p. 240):

> 'Resolved, That our fathers ordained the Constitution of the United States in order, among other great national objects, to establish justice, promote the general welfare, and secure the blessings of liberty, but expressly denied to the Federal government which they created, all constitutional power to deprive any person of life, liberty, or property without due legal process.
>
> 'Resolved, That, in the judgment of this convention, Congress has no more power to make a slave than to make a king; no more power to institute or establish slavery than to institute or establish a monarchy. No such power can be found among those specifically conferred by the Constitution, or derived by any just implication from them.
>
> 'Resolved, That it is the duty of the Federal government to relieve itself from all responsibility for the existence or continuance of slavery wherever the government possesses constitutional authority to legislate on that subject, and is thus responsible for its existence.
>
> 'Resolved, That the true, and in the judgment of this convention the only safe, means of preventing the extension of slavery into territory now free, is to prohibit its existence in all such territory by an act of Congress.'

[ Footnote 11 ] Excerpt from Declarations Made in the Platform of the Republican Party in 1860 (Stanwood, Hist. of Presidency, p. 293):

> '8. That the normal condition of all the territory of the United States is that of freedom; that as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individual, to give legal existence to slavery in any territory of the United States.'

[ Footnote 12 ] First draft of Mr. Jefferson's proposed amendment to the Constitution: 'The province of Louisiana is incorporated with the United States and made part thereof. The rights of occupancy in the soil and of self-government are confirmed to Indian inhabitants as they now exist.' It then proceeded with other provisions relative to Indian rights and possession and exchange of lands, and forbidding Congress to dispose of the lands otherwise than is therein provided without further amendment to the Constitution. This draft closes thus: 'Except as to that portion thereof which lies south of the latitude of 31ø, which, whenever they deem expedient, they may enact into a territorial government, either separate or as making part with one on the eastern side of the river, vesting the inhabitants thereof with all rights possessed by other territorial citizens of the United States.' Writings of Jefferson, edited by Ford, vol. 8, p. 241.

[ Footnote 13 ] Letter to William Dunbar of July 7, 1803;

> 'Before you receive this you will have heard through the channel of the public papers of the cession of Louisiana by France to the United States. The terms as stated in the National Intelligencer are accurate. That the treaty may be ratified in time, I have found it necessary to convene Congress on the 17th of October, and it is very important for the happiness of the country that they should possess all information which can be obtained respecting it, that they make the best arrangements practicable for its good government. It is most necessary because they will be obliged to ask from the people an amendment of the Constitution authorizing their receiving the province into the Union and providing for its government, and limitations of power which shall be given by that amendment will be unalterable but by the same authority.' Jefferson's Writings, vol. 8, p. 254.

Letter to Wilson Cary Nicholas of September 7, 1803:

> 'I am aware of the force of the observations you make on the power given by the Constitution to Congress to admit new states into the Union without restraining the subject to the territory then constituting the United States. But when I consider that the limits of the United States are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the United States, I cannot help believing that the intention was to permit Congress to admit into the Union new states which should be formed out of the territory for which and under whose authority alone they were then acting. I do not believe it was meant that they might receive England, Ireland, Holland, etc., into it, which would be the case under your construction. When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation where it is found necessary, than to assume it by a construction which would make our powers boundless.' Writings of Jefferson, vol. 8, p. 247.

[ Footnote 14 ] Sec. 2. That on and after the passage of this act the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries: Provided, That on all coffee in the bean or ground imported into Porto Rico there shall be levied and collected a duty of five cents per pound, any law or part of law to the contrary notwithstanding: And provided further, That all Spanish scientific, literary, and artistic works, not subversive of public order in Porto Rico, shall be admitted free of duty into Porto Rico for a period of ten years, reckoning from the eleventh day of April, eighteen hundred and ninety-nine, as provided in said treaty of peace between the United States and Spain: And provided further, That all books and pamphlets printed in the English language shall be admitted into Porto Rico free of duty when imported from the United States.

Sec. 3. That on and after the passage of this act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries; and in addition thereto, upon articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn for consumption or sale, upon payment of a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture; such tax to be paid by internal revenue stamp or stamps to be purchased and provided by the Commissioner of Internal Revenue, and to be procured from the collector of internal revenue at or most convenient to the port of entry of said merchandise in the United States, and to be affixed under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and on all articles of merchandise of United States manufacture coming into Porto Rico, in addition to the duty above

provided, upon payment of a tax equal in rate and amount to the internal revenue tax imposed in Porto Rico upon the like articles of Porto Rican manufacture: Provided, That on and after the date when this act shall take effect all merchandise and articles, except coffee, not dutiable under the tariff laws of the United States, and all merchandise and articles entered in Porto Rico free of duty under orders heretofore made by the Secretary of War, shall be admitted

into the several ports thereof, when imported from the United States, free of duty, all laws or parts of laws to the contrary notwithstanding; and whenever the legislative assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty; and in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and articles going into Porto Rico from the United States or coming into the United states from Porto Rico.

Sec. 4. That the duties and taxes collected in Porto Rico in pursuance of this act, less the cost of collecting the same, and the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Porto Rico, shall not be covered into the general fund of the Treasury, but shall be held as a separate fund, and shall be placed at the disposal of the President to be used for the government and benefit of Porto Rico until the government of Porto Rico herein provided for shall have been organized, when all moneys theretofore collected under the provisions hereof, then unexpended, shall be transferred to the local treasury of Porto Rico, and the Secretary of the Treasury shall designate the several ports and sub-ports of entry into Porto Rico, and shall make such rules and regulations and appoint such agents as may be necessary to collect the duties and taxes authorized to be levied, collected, and paid in Porto Rico by the provisions of this act, and he shall fix the compensation and provide for the payment thereof of all such officers, agents, and assistants as he may find it necessary to employ to carry out the provisions hereof: Provided, however, That as soon as a civil government for Porto Rico shall have been organized in accordance with the provisions of this act, and notice thereof shall have been given to the President, he shall make proclamation thereof, and thereafter all collections of duties and taxes in Porto Rico under the provisions of this act shall be paid into the treasury of Porto Rico, to be expended as required by law for the government and benefit thereof, instead of being paid into the Treasury of the United States.

Sec. 5: That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported from Porto Rico, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal

thereof: Provided, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

...

Sec. 38. That no export duties shall be levied or collected on exports from Porto Rico; but taxes and assessments on property, and license fees for franchises, privileges, and concessions may be imposed

for the purposes of the insular and municipal governments, respectively, as may be provided and defined by act of the legislative assembly; and where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law to provide for expenditures authorized by law, and to protect the public credit, and to reimburse the United States for any moneys which have been or may be expended out of the emergency fund of the War Department for the relief of the industrial conditions of Porto Rico caused by the hurricane of August eighth, eighteen hundred and ninety-nine: Provided, however, That no public indebtedness of Porto Rico or of any municipality thereof shall be authorized or allowed in excess of seven per centum of the aggregate tax valuation of its property.



# § 2201. Creation of remedy

*How Current is This?*

**(a)** In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

**(b)** For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

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## Sec. 2201. - Creation of remedy

**(a)**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

**(b)**

For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act

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- Seventeenth Amendment - Popular Election of Senators
- Eighteenth Amendment - Prohibition of Intoxicating Liquors
- Nineteenth Amendment - Woman's Suffrage Rights
- Twentieth Amendment - Commencement of the Terms of the President, Vice President and Members of Congress.
- Twenty-First Amendment - Repeal of the Eighteenth Amendment
- Twenty-Second Amendment - Presidential Tenure
- Twenty-Third Amendment - Presidential Electors for the District of Columbia
- Twenty-Fourth Amendment - Abolition of the Poll Tax Qualification in Federal Elections
- Twenty-Fifth

Amendment - Presidential Vacancy, Disability, and Inability
- Twenty-Sixth Amendment - Reduction of Voting Age Qualification
- Twenty-Seventh Amendment - Congressional Pay Limitation

- Original Senate Document Available in text and acrobat (.pdf) format from the US Government Printing Office Web Site.
- U.S. Constitution From Cornell Law School.
- U.S. Constitution Search From Emory Law School.
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# U.S. Constitution: Article I

## Article Text | Annotations

### Article I

#### Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

#### Section 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law

direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

**Section 3.**

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United

States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

**Section 4.**

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

**Section 5.**

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

**Section 6.**

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

**Section 7.**

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

**Section 8.**

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

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 the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;--And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

**Section 9.**

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

**Section 10.**

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

# Annotations

**Article I - Legislative Department**

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The Declaration of Independence, the Constitution, & the Bill of Rights

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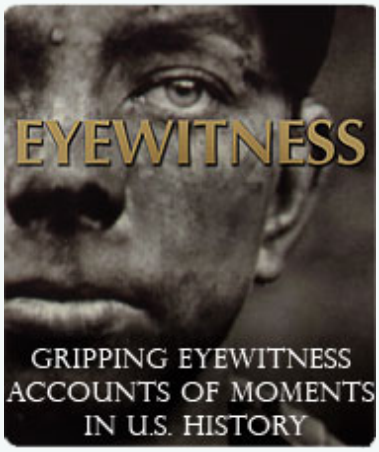


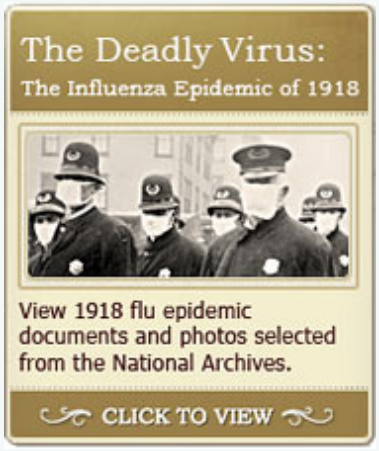



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Pulitzer-Prize winning photographer John H. White's images of 1970s Chicago

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### Highlights

Explore the National Archives Experience

Emancipation Proclamation

President Abraham Lincoln issued the Emancipation Proclamation on January 1, 1863.



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