

NOTES

TRACING THE "WALL": RELIGION IN THE PUBLIC SCHOOL SYSTEM*

Adopting Jefferson's oft-embellished metaphor, the Supreme Court has held that the First Amendment to the United States Constitution erects "a wall of separation between Church and State."¹ By incorporating this barrier into the Fourteenth Amendment,² the Court has become final arbiter in an area which has long perplexed state tribunals applying similar constitutional provisions.³ One of the most confusing regions through which the wall must be traced is the public school system. In a recent decision, *People of the State of Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County*,⁴ the Court announced two general principles applicable in this field, but did little to provide a standard by which the constitutionality of diverse religious practices could be measured.

The *McCollum* case involved the Champaign, Illinois version of "released time", a system which in various forms has been adopted by approximately 2,200 communities.⁵ The core of all such programs is the "release" of students by the public school, upon parental request, to attend religious classes for a

* *People of State of Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Ill.*, 68 S.Ct. 461 (1948).

This Note deals only with the constitutionality of religious and quasi-religious activities in the public schools. For a list of studies discussing their desirability, pro and con, see *id.* at 473 n.20. The parallel problem of state aid to parochial schools has already been widely discussed. See, e.g., Notes, 60 HARV. L. REV. 793 (1947), 45 MICH. L. REV. 1001 (1947), 22 NOTRE DAME LAW. 400 (1947).

1. See *Reynolds v. United States*, 98 U.S. 145, 164 (1878); 8 THE WRITINGS OF THOMAS JEFFERSON 113 (Washington ed. 1861).

2. The process was accomplished in two stages, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (prohibiting state action abridging religious freedom), and *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 15 (1947) (prohibiting state "establishment of religion"). It was vaguely foreshadowed by dicta in *Meyer v. State of Nebraska*, 262 U.S. 390, 399 (1923), and *Hamilton v. Regents of the University of California*, 293 U.S. 245, 265 (1934) (concurring opinion by Cardozo, J.).

3. All of the state constitutions include some equivalent of the First Amendment, usually in much greater detail. E.g., ILL. CONST. Art. II, § 3, Art. VIII, § 3. These provisions are indexed in 3 REPORT OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE 1766-7, 1799 (1938). And see Note, 96 U. OF PA. L. REV. 230, 234-5 (1947). For examples of the dissimilarity of state court decisions, see Notes, 5 A.L.R. 866 (1920), 141 A.L.R. 1144 (1942).

4. 68 S. Ct. 461 (1948).

5. The growth of this movement is described *id.* at 470-2. For a survey of the various forms in which "released time" now operates, see the studies listed *id.* at 472 n. 17, and DAVIS, WEEKDAY CLASSES IN RELIGIOUS EDUCATION (U.S. Office of Education, Bulletin, No. 3, 1941). Approximately 2,000,000 pupils participate in these programs. 1947 YEARBOOK, INTERNATIONAL COUNCIL OF RELIGIOUS EDUCATION 76 (1947).

short period each week; absences are reported to the school, and pupils not participating must continue their secular studies. In Champaign, the Board of Education had integrated "released time" far more closely with the school system, permitting sectarian instructors to conduct separate sessions for Catholic, Jewish, and Protestant groups in regular classrooms during school hours.⁶ A writ of mandamus ordering the Board to abolish this program was sought by an atheist parent whose son was the only member of his class not participating therein. Finding no direct or appreciable expense to the state and no unconstitutional incursion on the petitioner's religious freedom, the Illinois courts denied the writ.⁷

On appeal, this holding was reversed by the Supreme Court of the United States in an 8-1 decision which evoked four opinions. Speaking for the majority, Mr. Justice Black relied on the Court's dicta in *Everson v. Board of Education of Ewing Township*, where the First Amendment's amorphous provision against laws "respecting the establishment of religion" had been moulded into a firm prohibition: "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions. . . ."⁸ Laying these dicta beside the Champaign plan, the majority found that the two clearly did not square: (1) tax-supported buildings were being "used for the dissemination of religious doctrines"; (2) the State "affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery."⁹ Such

6. There was a high degree of cooperation between the Board and the sponsoring interdenominational religious council. In addition to checking attendance, public school teachers distributed cards on which parents gave permission for their children to participate; religious instructors, while provided and paid by the council, were subject to approval by the superintendent of schools; students not attending the Protestant classes were required to leave the classroom during that period. *McCullum* case, *supra* note 4 at 463-4.

The Champaign program, despite its joint sponsorship, encountered opposition from several sectarian groups, including Baptists, Jews, and Seventh Day Adventists, which filed briefs opposing the program. *Id.* at 473 n. 19. No Jewish classes had been held for several years. *Id.* at 464.

7. 395 Ill. 14, 71 N.E. 2d 161 (1947). The only costs to the school, wear and tear of furniture and negligible use of the teacher's time in handling attendance records, were discounted as *de minimis*. *Id.* at 24-5, 71 N.E. 2d at 165-6. The court rejected charges that pupils not participating were unconstitutionally "segregated" and embarrassed, holding that use of regular classrooms did not distinguish the case from *People ex rel. Latimer v. Board of Education of Chicago*, 394 Ill. 228, 68 N.E. 2d 305 (1946) ("released time" outside schoolbuildings upheld). *McCullum* case, *supra* at 19-23, 71 N.E. 2d at 164-5. Allegations that the Board of Education was exercising its discretion unconstitutionally were summarily dismissed. *Id.* at 27-8, 71 N.E. 2d at 167-8.

8. See 330 U.S. 1, 15-6 (1947) (discussed p. 1116 *infra*). The dissenting Justices had also embraced this principle. *Id.* at 41, 52-3, 59-60.

9. *McCullum* case, *supra* note 4 at 465-6. The only amplifications of these conclusions were statements that school authorities cooperated closely with the religious council,

a conclusion made it unnecessary to consider allegations that rights of religious freedom or equality were restricted, and Mr. Justice Black carefully refrained from enumerating the specific elements which lay beyond the constitutional pale.¹⁰ These omissions raised problems of predictability, which were intensified by Mr. Justice Frankfurter in a separate opinion stressing the *ad hoc* nature of the Court's holding.¹¹ Justices Rutledge and Burton further beclouded the crystal ball by joining in both opinions, while Mr. Justice Jackson not only concurred with Mr. Justice Frankfurter but also opined that the Court should have rejected the appeal on jurisdictional grounds.¹² Only Mr. Justice Reed, however, failed to agree that the Champaign program came within the prohibition of the *Everson* dicta.¹³

If the "wall of separation" followed an unswerving line, the reticence of the majority and qualifications by concurring Justices would be relatively immaterial, for logical extension of the two majority doctrines would seem to foreclose any religious activity in public buildings or during school hours.¹⁴ But this judicial masonry, while it may be "impregnable",¹⁵ has already proved far from immovable. In the *Everson* case itself, the majority expediently shifted the locus of its newly-erected wall to uphold state payment of bus-fares to children attending parochial schools, as serving a valid "public purpose", even though these schools were incidentally benefitted thereby.¹⁶ The

that the school system was "integrated with the program", and that "pupils compelled by law to go to school for secular education are released in part from their legal duty." *Id.* at 464.

10. *McCullum* case, *supra* note 4 at 463 n. 1, 464. And see note 9 *supra*.

11. *Id.* at 466. Concluding that religious education in Champaign was "patently woven into the working scheme of the school," the Justice nevertheless cautioned that "different forms which 'released time' has taken . . . may be found unexceptionable." *Id.* at 473, 475. He listed aspects in which the programs differ, *id.* at 472 n. 17, but did not indicate which, if any, were innocuous.

Mr. Justice Frankfurter concluded his dissertation with the time-honored proverb quoted by Robert Frost, "Good fences make good neighbors." He might appropriately have added the first line of that poem, "Something there is that doesn't love a wall."

12. *Id.* at 475. Mr. Justice Jackson based his jurisdictional argument on findings that the program did not involve additional taxes or restrictions on religious freedom, and warned against interfering with local schools in the absence of these two elements. See note 43 *infra*. Since the complaint sought abolition of all religious teaching, he also objected to remanding the case without expressly limiting the Court's decision to "released time". *Id.* at 476.

13. *Id.* at 478. See p. 1121 *infra*. The Justice found it "difficult to extract from the opinions any conclusions as to what is in the Champaign plan that is unconstitutional," *id.* at 479, and remarked that "a rule of law should not be drawn from a figure of speech." *Id.* at 482.

14. The same result would be achieved by stringent application of the *Everson* dicta. See Note, 47 *COL. L. REV.* 1346 (1947).

15. See note 17 *infra*.

16. 330 U.S. 1 (1947). Five Justices, speaking through Mr. Justice Black, admitted that these payments "undoubtedly" facilitated attendance of children who otherwise might not have gone to parochial schools, but held nevertheless that such legislation "does no

possibility that the Court may find similar deviations desirable to preserve borderline religious influences in public schools raises the problem of whether such practices can be logically reconciled with the *McCullum* decision.

Where, as in the *Everson* case, some overriding "public purpose" can be detected, exceptions are easily employed in bending the wall to preserve practices not specifically outlawed by the *McCullum* doctrine.¹⁷ In the name of "cultural education", for instance, the Court could permit the secular study of religious literature, painting, and music, unless such classes are used as vehicles for affirmative propagation of religion.¹⁸ Similarly, courses in comparative theology might well be sanctioned. But this exception would not validate sectarian influences, such as religious garb for teachers,¹⁹ which lack sufficient cultural value to justify their presence in the classroom.

While practices directly contrary to the *McCullum* enunciations are more difficult to sustain, the *Everson* case suggests a method of limiting even the unqualified statement that tax-supported buildings cannot be used "for the dissemination of religious doctrines." In many communities, particularly where no other meeting-houses are available, sundry organizations have been permitted to use school buildings so long as there is no added expense to the

more than . . . help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 17-S. This conclusion reminded Mr. Justice Jackson of Byron's Julia, who, "whispering 'I will ne'er consent,'—consented." *Id.* at 19. Mr. Justice Rutledge, with whom Justices Frankfurter, Jackson and Burton agreed, dissented on the ground that a criterion of whether child or church was the primary recipient of aid (the so-called "child benefit theory") infringed the basic principle of separation and provided no logical stopping-point. *Id.* at 28, 29, 47-S.

17. Far from admitting that its holding created an exception, the *Everson* majority insisted that the "wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here." *Id.* at 18. But since state payment for transportation reduces the cost of attending a parochial school established to propagate religious beliefs as well as to provide secular education, it seems unrealistic to deny that religion is aided thereby. See Mr. Justice Rutledge's dissent, *id.* at 46. The conclusion that incidental aid to religion will not prevent state action to advance the "general welfare" seems tantamount to an exception from complete separation of Church and State.

18. This type of study does not directly contravene the *McCullum* majority's prohibition against aiding sectarian groups to provide pupils for their religious classes. But the emotional impact of religious art makes some distinction from the *Everson* dicta necessary. In his *McCullum* opinion, *supra* note 4 at 477, Mr. Justice Jackson stressed the need for such a distinction and the desirability of such education; the silence of other Justices on this point may be attributed to the risk of *expressio unius est exclusio alterius*.

Classes differ so extensively that each type would still have to be judged independently. It would be questionable, for example, whether the Bible could be used as a textbook. Compare *Pfeiffer v. Board of Education of Detroit*, 118 Mich. 560, 77 N.W. 250 (1898) (permitting use) with *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N.W. 967 (1890) (forbidding such use).

19. State courts have differed on this particular practice. Compare *O'Connor v. Hendrick*, 184 N.Y. 421, 77 N.E. 612 (1906) (upholding order prohibiting such attire as in line with constitutional policy) with *Gerhardt v. Heid*, 66 N.D. 444, 267 N.W. 127 (1936) (religious garb permitted). The problem usually arises in conjunction with numerous influences, such as a crucifix in the classroom, which have survived the incorpora-

public or interference with school programs.²⁰ Invoking the established tenet that a state should be neutral rather than hostile toward religion,²¹ the Court might hold that, whenever these buildings are opened to all comers, the state is offering a public service to which sectarian and secular groups may have access on equal terms.²²

But the "public purpose" exception seems unavailable to preserve "released time," even in forms less extensive than the Champaign program. Although such a system may foster morality or assist parents to educate their children as they see fit, the *McCullum* decision indicates that neither of these secular functions can redeem any version of "released time" which "aids" religion.²³ And even a minimum program such as that authorized by statute in New York,²⁴ which does not utilize public property or approach the Champaign degree of integration,²⁵ seems to collide with the majority's prohibition against

tion of a parochial school into the public school system. *E.g.*, *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W. 2d 609 (1941); *Knowlton v. Baumhover*, 182 Iowa 691, 166 N.W. 202 (1918).

20. *E.g.*, *Goodman v. Board of Education*, 48 Cal. App. 2d 731, 120 P. 2d 665 (1941) (political meetings); *Nichols v. School Directors*, 93 Ill. 61, 34 Am. Rep. 160 (1879) (religious meetings). 8 states have statutes permitting such use for religious as well as other purposes, *e.g.*, ILL. STAT. c. 122, § 6-43 (Smith-Hurd, 1946), while 16 exclude religious activities although certain private uses are permitted, *e.g.*, N.Y. EDUC. LAW § 414 (1947). See Note, 161 A.L.R. 1308 (1946).

21. See the *McCullum* case, *supra* note 4 at 465; *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 18 (1947).

22. See *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 16 (1947): "We must be careful . . . that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."

23. No other ground for an exception is apparent. The majority opinion was silent on both functions, but both were as beneficial in the Champaign program as in any other form of "released time". And regardless of the *McCullum* decision, arguments based on these functions seem tenuous. As to morality, see p. 1120 *infra*. And even though parents have a constitutional right to send their children to parochial instead of public schools, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), it does not necessarily follow that those failing to exercise this option can obtain release of their children for religious training during school hours. The rest of the week is available for religious education, a factor which distinguishes the *Pierce* rationale and also the accepted practice of releasing students on holy days. The *Pierce* analogy, moreover, does not justify preferring religion over any other activity towards which the state is "neutral", a result implicit in the requirement that other students continue their secular studies.

24. See N.Y. EDUC. LAW § 3210 (1947). 11 states (but not Illinois) have similar statutes, a distinction which may enable programs so authorized to escape at least the majority's *McCullum* argument that pupils in Champaign were released from a legal duty (see note 9 *supra*).

25. See Regulation of the New York State Commissioner of Education, July 4, 1940. Long before statutory authorization, this program was upheld in *People ex rel. Lewis v. Graves*, 245 N.Y. 195, 156 N.E. 663 (1927). In New York City, any announcement concerning the program or comment by teachers on a pupil's attendance at religious classes are forbidden, although, as in all "released time" programs, attendance reports must still

employing the compulsory school system to aid in proselyting pupils for religious classes: religion can compete more successfully with arithmetic than with recreation, and the benediction of the state is afforded by accepting religious education in lieu of secular studies.²⁶ Also dubious is the constitutionality of drawing lines between sectarian groups during school hours, an element present in the *McCullum* case but not discussed by the majority.²⁷ While these objections would not apply if all students were dismissed regardless of whether they attended the religious classes (a system known as "dismissed time"),²⁸ it would be difficult to distinguish any form of "released time" without at least modifying the *McCullum* doctrine.²⁹

Equally endangered by the majority opinion is the practice, current in thirty-six states and required by statute in twelve, of reading the King James Bible and often reciting the Lord's Prayer at school exercises.³⁰ Although

be submitted to the school and students not participating must continue their secular studies. Rules, Board of Education of the City of New York, Nov. 13, 1940.

26. Such assistance seems to be the primary reason for "released time". See Williamson, *Religion and the Public Schools*, *The Churchman*, August, 1947, p. 10, 11: "The only construction that can be placed upon Protestant advocacy of sectarianism in public school education is an admission of weakness. . . . If Sunday school attendance has fallen off to an alarming extent, what is the reason for it?"

Letters from a superintendent of schools are often written to exert influence on behalf of "released time", as in Neosho, Mo.: "The officials of the public schools heartily endorse the program of the Week-Day Church School. They believe it will contribute much to the cultural, moral, and spiritual life of your child." Quoted in DAVIS, *op. cit. supra* note 5, at 39.

27. The majority expressly dismissed this question as unnecessary to the decision. *McCullum* case, *supra* note 4 at 463 n. 1. Mr. Justice Frankfurter objected that the Champaign arrangement unconstitutionally "presents powerful elements of inherent pressure by the school system" and "sharpens the consciousness of religious differences." *Id.* at 473. Justices Jackson and Reed, on the other hand, doubted that the Constitution protects pupils from the "embarrassment that always attends nonconformity." *Id.* at 476, 480. *Quaere* whether the state may assist a program which results in embarrassment for religious reasons during school hours. See note 33 *infra*.

28. See DAVIS, *op. cit. supra* note 5, at 22. Under such a program, the alternatives to religious education are of the individual's own choosing, and there is no school-sponsored segregation of those not participating, since everyone is excused.

29. Mr. Justice Reed so interpreted the majority opinion. *McCullum* case, *supra* note 4 at 479, 485 (1948). *But cf.* Mr. Justice Frankfurter's opinion, *supra* note 11. For possible techniques of upholding some forms of "released time", see p. 1121 *infra*. A decision favorable to the New York plan would obfuscate the status of programs lying between the New York and Champaign extremes. Particularly awkward to uphold would be those which, although not using school buildings, involve direct expenditures by the state for preparation and mailing of parent request cards. Such programs have been sanctioned, however, in *Gordon v. Board of Education of Los Angeles*, 178 P.2d 488 (Cal. App. 1947), and *People ex rel. Latimer v. Board of Education of Chicago*, 394 Ill. 228, 68 N.E.2d 305 (1946). *Contra*: *Stein v. Brown*, 125 Misc. 692, 211 N.Y.S. 822 (Sup. Ct. 1925).

30. *E.g.*, ARK. STAT. § 3614 (Pope, 1937) (daily Bible reading without comment required, but children objecting may be excused on parental request). In addition, six other states specify that the Bible may be read in, or shall not be excluded from, the public schools. *E.g.*, IND. STAT. § 28-5101 (Burns, 1933). For compilation of these statutes and a sum-

usually condoned by state courts when attendance is not compulsory and there is no sectarian comment on the Scriptures,³¹ these exercises seem clearly contrary to the *McCullum* rationale: tax-supported property and the school system are being utilized to provide a forum and audience for ceremonies essentially religious in nature.³² And even "voluntary" exercises expose non-participants to religious prejudice to a degree which, as with "released time", seems to violate at least the spirit of the *Everson* prohibition against influencing attendance at church services.³³ Moreover, directly utilizing religion to accomplish the public purpose of inculcating moral principles seems constitutionally far more precarious than incidentally "aiding" religion in the process of performing a purely secular function such as fire prevention³⁴—although reluctance to overturn so prevalent a practice may lead the Court to hold that the morality fostered by these ceremonies expiates their religious content. And since civic morality is a precept of almost all sects, classifying it as an overriding justification might open the doctrinal floodgates for infinitely greater aid to religion.

In the absence of a logically tenable "public purpose", any religious influence in the public schools must run the gauntlet of the *Everson* dicta, which are now enshrined as the Court's official interpretation of the First Amendment.³⁵ Stringent application of these dicta would bar any aid whatsoever to one or all religions³⁶ even if the *McCullum* enunciations were restricted to the context of the Campaign program.

One method of qualifying the *Everson* absolute throughout would be to

mary of diverse practices in various states, see KEESECKER, LEGAL STATUS OF BIBLE READING AND RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS 2-10 (U.S. Office of Education, Bulletin No. 14, 1930). The situation has changed remarkably little since 1930.

31. For a summary of state decisions, see KEESECKER, *op. cit. supra* note 30, at 10-29, and Notes, 5 A.L.R. 866 (1920), 141 A.L.R. 1144 (1942). For criticism of these decisions, see Note, 47 COL. L. REV. 1346 (1947).

32. State courts have usually upheld these practices on grounds that the Bible is not sectarian, *e.g.*, *Hackett v. Brooksville Graded School District*, 120 Ky. 608, 631, 87 S.W. 792, 798 (1905); see cases in articles listed note 31 *supra*. But Protestants and Catholics disagree as to the correct version, while non-Christians would certainly find the New Testament sectarian. And regardless of this distinction, the *Everson* test applies even to non-sectarian religious exercises. Prayers and hymns are by definition religious, while the moral teachings and literary stature of the Bible do not lessen its religious character.

33. See, *e.g.*, *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 351, 92 N.E. 251, 256 (1910): "The exclusion of a pupil from this part of the school exercises . . . subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated." Pressure to attend services of worship seems to come within the *Everson* proscription even more completely than similar assistance to religious education. See note 27 *supra*.

An incidental casualty of this proscription, if any plebe should decide to start his military career in a blaze of notoriety, might be compulsory chapel services at West Point. See Reg. for the U. S. Corps of Cadets 47 (1947).

34. See Note, 47 COL. L. REV. 1346, 1354 (1947).

35. *McCullum* case, *supra* note 4 at 465. And see p. 1115 *supra*.

36. See p. 1115 *supra*, and Note, 47 COL. L. REV. 1346 (1947).

balance the public benefit in each instance against the aid to religion. Inculcation of moral principles, for instance, may well be found to outweigh the sectarian nature of New York "released time" or religious exercises, even though insufficient to qualify as a full-fledged "public purpose" of the *Everson* variety.³⁷ The distinction between these two approaches is primarily verbal, for such a balancing is inevitably a major factor in judicial calculations. But overt acceptance of a completely relative standard would make for even less predictability than the *Everson* rationale, which at least assumes the theoretically objective criterion that aid to religion is permissible only when incidental to the pursuit of legitimate public activity.³⁸

Even more far-reaching is the method suggested in Mr. Justice Reed's dissent, which would remove the need for any propitiating justification where the "aid" was merely a "by-product of organized society" and not "purposeful assistance directly to the church itself or to some religious group . . . performing ecclesiastical functions."³⁹ Such a modification would transcend piecemeal exceptions by shifting the entire wall to a position where practices involving no direct expense to the state, such as "released time" and the use of public buildings for sectarian meetings, could easily be sustained. And direct expenditures, which theoretically are barred by the precept that no tax whatever can be constitutionally "levied to support religious activities," could be validated by a parallel definition of the word "support."⁴⁰ While this approach was not specifically negated by the majority or concurring opinions, the 8-1 decision over Mr. Justice Reed's dissent indicates that the Court would be reluctant to relax its *Everson* prohibition to such an extent. The essence of this concept, however, might well be accepted in diluted form by construing state "neutrality" towards religion, which technically seems to save only those benefits in which all share,⁴¹ broadly enough to uphold desirable types of insignificant aid which could not be logically sustained on less drastic grounds.⁴²

37. Such a "balancing" approach, which would be less hazardous than adopting "morality" as grounds for a general exception, might well be employed by Mr. Justice Frankfurter to support these practices (see note 11 *supra*), but it has not yet been broached by the Court.

38. See notes 16 and 17 *supra*. This doctrinal basis of the "exception" technique creates precedents which hamper future flexibility and afford at least verbal grounds for prediction, however illusory these may be. See Braden, *The Search for Objectivity in Constitutional Law*, 57 *YALE L. J.* 571 (1948).

39. *McCullum* case, *supra* note 4 at 483.

40. Mr. Justice Reed seems to include this alteration in his proposal, for he utilizes his dichotomy between "purposeful assistance" and the "incidental advantages that religious bodies . . . obtain as a by-product of organized society" to preserve all the practices referred to in note 42 *infra*, several of which involved direct expense to the state. *Id.* at 483, 485.

41. See note 22 *supra*.

42. Examples are providing Chaplains for Congress, and the slogan "In God We Trust" on coins, neither of which serves any secular purpose. And tax exemption for religious institutions might be similarly sustained as appropriate to complete separation between church and state, as well as on grounds that all charitable institutions receive the

Even without unqualified acceptance of Mr. Justice Reed's interpretation, opportunities for doctrinal deviations and factual distinctions are sufficiently numerous to give the Court wide leeway in determining the status of borderline practices. The price of this judicial freedom is unpredictability. Indeed, it would be surprising if, in an area as complex as the public school system, the "wall of separation" were conformed to a mathematical curve rather than to the vagaries of judicial predilection.⁴³ As Mr. Justice Frankfurter recognized, the *McColum* decision "demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer."⁴⁴

A NEW AVENUE FOR TAX AVOIDANCE TRANSFERS THROUGH USE OF THE TRUST DEVICE*

When taxpayers, seeking to avoid tax liability, have relied on a tax-dodge trust to separate themselves from property which they control, the courts have refused to be puzzled by the obvious.¹ But by a lapse into technical distinctions in a recent decision, the Court of Appeals for the Tenth Circuit would revive the trust as a device for conveying wealth free of gift and estate taxes.

same negative assistance. But it is unlikely that any of these entrenched practices will be challenged, and no such interpretation is necessary to save most borderline "aids" to religion outside of the public schools. Free lunches and secular textbooks for parochial students, like transportation, come within the "child benefit theory" adopted in the *Everson* case (see note 16 *supra*), as do payments to veterans attending denominational schools; Chaplains in the Armed Forces can be justified on grounds that the government, having taken soldiers away from their homes, is obligated to provide opportunities for worship; "public safety" requires that churches receive assistance such as fire and police protection.

43. See Mr. Justice Jackson's concurring opinion in the *McColum* case, *supra* note 4 at 478: "It is idle to pretend that . . . we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our prepossessions."

44. *Id.* at 466.

* *Commissioner v. Hogle*, 165 F.2d 352 (C.C.A. 10th 1947).

1. A realistic approach to determination of tax liability where a trust is involved is one facet of the current overall legislative and judicial policy to frustrate tax avoidance regardless of the scheme employed to that end. Thus, whether the taxpayer has used an assignment, family partnership, or trust device, if he attempts to escape taxation while retaining a beneficial interest in income, courts have disregarded technicalities when convinced that such economic benefit warranted imposition of the tax. Note, 57 *YALE L. J.* 308, nn. 1, 2 (1947).

For examples of the realistic attitude displayed in tax decisions involving a trust, see

In *Commissioner v. Hogle*,² the taxpayer and his wife set up two margin trading accounts in trust for the benefit of their children. The transaction creating the trust *res* consisted solely of a bookkeeping entry opening these margin accounts in the trust name on the books of a brokerage firm owned by the taxpayer, his wife and children. Although the trusts were irrevocable and the settlors retained no power to alter the beneficial interests, the taxpayer dominated the accounts through complete authority to direct the trading activities.

By successful trading operations, large profits were realized for both trust accounts. In 1942 the Court of Appeals for the Tenth Circuit held the taxpayer, Hogle, liable for income tax on the trust income from margin trading on the grounds that these profits were the direct result of his trading skill and were, in effect, a portion of his personal earnings which he allowed to accrue to the trust.³ Trust income from the investment of past trading profits in productive securities was not, to the same extent, controlled by the taxpayer and therefore was held taxable to the trust, not to the settlor.

Having established Hogle's income tax liability on the net profits of the margin trading account, the Commissioner of Internal Revenue then determined that Hogle was liable for gift taxes on the "transfer" of these funds to

Burnet v. Guggenheim, 288 U.S. 280 (1933) (gift tax); *Porter v. Commissioner*, 288 U.S. 436 (1933) (estate tax); *Helvering v. Clifford*, 309 U.S. 331 (1940) (income tax).

2. *Commissioner v. Hogle*, 165 F.2d 352 (C.C.A. 10th 1947), *affirming* 7 T. C. 936 (1946). Five judges dissented in the Tax Court decision.

3. *Hogle v. Commissioner*, 132 F.2d 66 (C.C.A. 10th 1942).

In general, a settlor of a trust who is not also the cestui can retain various controls over a trust. These may be classified as follows: (1) control over trust corpus, (2) control over trust income, and (3) control over the management or administration of the trust. Examples of (1) are a power of revocation, or a short-term trust with reversion to the settlor. Examples of (2) are power to modify distribution of trust income, or use of trust income to satisfy the settlor's personal obligations. Examples of (3) are power to vote stock comprising the trust corpus, or power to direct the trust investments.

In *Helvering v. Clifford*, 309 U.S. 331 (1940), the landmark case in the field, a settlor of a short-term trust retained administrative powers and authority to control the distribution of trust income to the beneficiary. The Supreme Court held the settlor liable for income tax on the trust income under the broad sweep of INT. REV. CODE § 22(a). This section defines gross income in general terms without specific reference to trusts. The Court did not make clear what combination of controls or degree of power retained was necessary to evoke liability. Numerous subsequent cases have involved application of the general language of the *Clifford* decision to situations where the controls retained varied in number and degree. For a collection of such cases, see Pavenstedt, *The Broadened Scope of Section 22(a): The Evolution of the Clifford Doctrine*, 51 YALE L. J. 213, 251-2 (1941).

For the Treasury's attempt to clarify its position as to the combination of circumstances which will subject the settlor of a controlled trust to income tax liability, see T. D. 5488, 1946-1 CUM. BULL. 19, as amended by T. D. 5567, 1947 INT. REV. BULL. NO. 14 at 2 (1947).

The Clifford case has received a great deal of attention from legal commentators. A number of these articles are collected in GRISWOLD, CASES AND MATERIALS ON FEDERAL

the trust. On appeal, the Court of Appeals for the Tenth Circuit affirmed a Tax Court decision denying this contention, offering as a rationale the theory that the profits were impressed with a trust as they arose, and that accordingly there had been no "transfer" by Hogle upon which the gift tax could be imposed.⁴

But behind the facade of bookkeeping entries and the concept of trust ownership, the taxpayer's children were enriched during the taxable years to the extent of \$356,000. Had no trust been created, Hogle's dealings would have subjected him not only to income tax as the profits arose but also to gift tax as they were transferred to the beneficiaries.⁵ But it would now seem that a trust device insufficient to alter income tax liability may still be effective to negative gift tax liability by preventing the court from finding a donor, a donee, or a taxable transfer.⁶

Such a result clearly controverts the current Supreme Court policy of frustrating intra-family transactions which tend toward tax avoidance;⁷ it conflicts with Congressional intention to make the gift tax applicable both to direct and indirect transfers of property.⁸ Finally, in failing to impose tax

TAXATION 457 n.6 (2d ed. 1946); see also 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 17.17 n.6 (1942); *ibid.* (1946 Supp.).

4. Commissioner v. Hogle, 165 F.2d 352 (C.C.A. 10th 1947).

5. Even having created a trust, Hogle (or his estate) would have incurred liability for gift or estate taxes if the control which subjected the taxpayer to income tax on the trust profits had consisted of a potential beneficial interest in the trust or power to modify distribution of the trust benefits. Porter v. Commissioner, 288 U.S. 436 (1933); INT. REV. CODE § 811(c), (d); see cases cited note 13 *infra*. No good reason suggests a different result when the taxpayer exercises managerial control instead of retaining another type of power if the control retained is sufficient to evoke income tax liability.

6. Although the *Hogle* decision concerned only the trust device, its reasoning might also allow the resurrection of the assignment as a tax avoidance scheme. However, both the Commissioner and the taxpayer apparently assumed that if an assignment were found, the gift tax would be imposed. And as a practical matter, aside from questions of tax liability, an assignment would be an inconvenient device under circumstances similar to those in the instant case.

7. ". . . [W]here the grantor is the trustee and the beneficiaries are members of his family group, special scrutiny of the arrangement is necessary lest what is in reality but one economic unit be multiplied into two or more by devices which, though valid under state law, are not conclusive so far as § 22(a) is concerned." Helvering v. Clifford, 309 U. S. 331, 335 (1940). In the *Hogle* income tax case, the court made specific reference to this policy. Hogle v. Commissioner, 132 F.2d 66, 71 (C.C.A. 10th 1942).

Since the first Hogle trust was created in 1922 before Congress enacted a gift tax, the transactions in trust were not originally intended as a device to avoid gift taxation.

8. "The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. . . ." Revenue Act of 1932, § 501(b), 47 STAT. 245 (1932). INT. REV. CODE § 1000(b) contains identical language.

Revenue Act of 1932, § 501, 47 STAT. 245 (1932), as amended by the Revenue Act of 1934, § 511, 48 STAT. 758 (1934) was applicable to Hogle's margin trading profits for the years 1936-1939. INT. REV. CODE § 1000 was applicable to profits accruing thereafter.

liability on a device which avoids estate and reduces income taxes the decision subverts the very purpose of the gift tax statute.⁹

The court's result can not be justified on the grounds that the Commissioner mistook the proper taxable event in seeking to impose liability as the margin profits accrued. Conceivably it might be argued that the tax should be levied at the time the profits are ultimately distributed to Hogle's children. But this possibility is negated by settled interpretation of the statute making a donor liable for gift tax in the year in which he relinquishes actual dominion and control over the gift.¹⁰ Since Hogle's dominion over the trading income ceased when it was credited to the trust account, tax imposition should not await distribution of the profits if liability is geared to an abandonment of control.¹¹

Nor is the decision warranted by the argument that the tax should have been levied at the time Hogle created the trust.¹² It might be contended that this view is required by the line of cases imposing liability upon a settlor at

See SEN. REP. NO. 665, 72d Cong., 1st Sess. 39-40 (1932); H.R. REP. NO. 708, 72d Cong., 1st Sess. 27-8 (1932).

9. A major purpose of the gift tax was to prevent the escape from estate tax liability via *inter vivos* property transfer. A second aim was to supplement the income tax by discouraging transfers which would split among several persons the future income from donated property. SEN. REP. NO. 665, 72d Cong., 1st Sess. 39-40 (1932); H. R. REP. NO. 708, 72d Cong., 1st Sess. 27-8 (1932); 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION: § 15.04 (1942); see *Smith v. Shaughnessy*, 318 U. S. 176, 179 n.1 (1943).

In the instant case, wealth has escaped death taxes which would burden Hogle's estate absent existence of the trust. Although the gross estate for death tax purposes, as defined by INT. REV. CODE § 811, includes all property to the extent of the decedent's interest therein, the margin trading profits irrevocably credited to the trust or distributed to the beneficiaries would not be subject to the estate tax at Hogle's death. Brief for Petitioner, p. 21, *Commissioner v. Hogle*, 165 F.2d 352 (C.C.A. 10th 1947).

On the other hand, Hogle has successfully removed certain income into lower surtax brackets, thereby reducing his income tax burden. It is true that *Hogle v. Commissioner*, 132 F.2d 66 (C.C.A. 10th 1942), held the margin trading profits taxable to Hogle personally. But when these profits have been credited to the trust and subsequently invested in productive property, the income from the investments is taxed to the trust or to the beneficiaries.

10. The gift tax ". . . is aimed at transfers of . . . title that have the quality of a gift, and a gift is not consummate until put beyond recall." *Burnet v. Guggenheim*, 283 U. S. 280, 286 (1933). 2 PAUL, *op. cit. supra* note 9, §§ 17.04-17.07. See cases cited notes 13, 15, 16 *infra*.

11. Although the court did not specifically consider the question of tax imposition at the time of distribution of the profits to the beneficiaries, the concept of the trust owning the profits as they arose would rule out such possibility.

The fact that future trading losses might dissipate the existing profits should not make the "gift" incomplete before final distribution. The gift tax applies at the time of cessation of the donor's interest although the donee's rights may not have been fixed. *Robinette v. Helvering*, 318 U. S. 184 (1943); *Higgins v. Commissioner*, 129 F.2d 237 (C.C.A. 1st 1942); *Hernstadt v. Hoey*, 47 F. Supp. 874 (S. D. N. Y. 1942).

12. If this argument were valid, the Commissioner and not the court would be at fault in permitting the present avoidance.

the time he relinquishes power to revoke and modify the trust¹³ since Hogle released this power at the outset. But these cases can be distinguished on two grounds. They did not involve a retention of managerial control by the settlors after the other powers were relinquished. Moreover, whereas the settlors there transferred existing productive property, Hogle conveyed only an expectancy in profits to arise in the future. This latter distinction seems especially pertinent in view of the inherent impossibility of valuing the Hogle trust for gift tax purposes at the time of its inception. Such valuation was dependent upon the volume and success of future trading; and the taxpayer had discretion to trade as little or as much as he pleased.¹⁴

Considering the practical and doctrinal obstacles to gift tax imposition either at the trust's inception or at distribution of the trust benefits, the court could frustrate the Hogle tax avoidance device only by finding liability

13. *Tax imposed when settlor relinquished power*: Estate of Sanford v. Commissioner, 308 U.S. 39 (1939); Burnet v. Guggenheim, 288 U.S. 280 (1933); Fletcher Trust Co. v. Commissioner, 141 F.2d 36 (C.C.A. 7th 1944); Blumberg v. Smith, 138 F.2d 956 (C.C.A. 7th 1943); Commissioner v. Prouty, 115 F.2d 331 (C.C.A. 1st 1940); Means v. United States, 39 F.2d 748 (Ct. Cl. 1930); cf. Goodman v. Commissioner, 156 F.2d 218 (C.C.A. 2d 1946); Higgins v. Commissioner, 129 F.2d 237 (C.C.A. 1st 1942); Commissioner v. Solomon, 124 F.2d 86 (C.C.A. 3d 1941); Herzog v. Commissioner, 116 F.2d 591 (C.C.A. 2d 1941); Commissioner v. Allen, 108 F.2d 961 (C.C.A. 3d 1939); Hernstadt v. Hoey, 47 F. Supp. 874 (S. D. N. Y. 1942).

Tax not imposed because settlor still retained power: Rasquin v. Humphreys, 308 U.S. 54 (1939); Hesslein v. Hoey, 91 F.2d 954 (C.C.A. 2d 1937), cert. denied 302 U.S. 756 (1937); Cockrell v. United States, 39 F. Supp. 148 (Ct. Cl. 1941); Harriet W. Rosenau, 37 B. T. A. 468 (1938); cf. Elizabeth S. Hettler, 5 T. C. 1079 (1945); Marguerite F. Schwarzenbach, 4 T. C. 179 (1944).

Since the donee may be personally liable if the donor fails to pay the gift tax, INT. REV. CODE § 1009; Revenue Act of 1932, § 510, 47 STAT. 249 (1932), it would be unfair to impose the tax so long as the donor may alter the donee's receipt of the gift. However, in Hernstadt v. Hoey, 47 F. Supp. 874 (S. D. N. Y. 1942) the tax was imposed although the beneficiaries' interests remained uncertain due to retention of broad powers by the donor's attorney. And in Higgins v. Commissioner, 129 F.2d 237 (C.C.A. 1st 1942), the tax was imposed although a trustee retained power to modify trust benefits after the settlor relinquished control.

The provision in the Revenue Act of 1932, § 501(c), 47 STAT. 245 (1932), expressly making the tax inapplicable if the donor retained power to revoke the trust (either alone or in conjunction with anyone not having an adverse interest in the disposition of the property) was repealed by the Revenue Act of 1934, § 511, 48 STAT. 758 (1934), since Burnet v. Guggenheim, *supra* at 283, held the section to be only declaratory of existing law. SEN. REP. No. 558, 73d Cong., 2d Sess. 50 (1934); H. R. REP. No. 704, 73d Cong., 2d Sess. 40 (1934). Treasury Regulations now contain provisions similar to those in the repealed section. U. S. Treas. Reg. 79, § 501, Art. 3 (1936).

14. In Commissioner v. Marshall, 125 F.2d 943 (C.C.A. 2d 1942), the taxpayer argued that certain contingent remainders were not subject to gift tax at that time because accurate valuation was difficult. In denying this contention, the court said: "Much could be said for such a contention, if the donor . . . had reserved . . . power . . . so that the actual enjoyment or non-enjoyment of the remainders depended on the donor's decision; in such a case there would be no feasible measure of the 'value' . . ." *Id.* at 946-7.

as the profits accrued. Several rationales were available which could have supported such a result. The dominion and control doctrine itself supports tax liability at this time. Where income is distributed to a cestui or is irrevocably accumulated for his benefit before the settlor has relinquished control over the balance of a trust, the gift tax is imposed on that part of the income at the time of such distribution¹⁵ or accumulation.¹⁶ In the instant case, Hogle remained free to control the results of margin trading until the transaction had been consummated.¹⁷ Logically, therefore, under the cessation of control concept he should incur gift tax liability on the profits of any given transaction in the year in which it was completed.¹⁸

Orthodox trust doctrine supplies another line of approach supporting assessment of gift taxes at the time the profits accrued. Since a transfer or declaration in trust is incomplete until the trust *res* comes into existence,¹⁹ if the court had held the margin profits to be trust *res* rather than trust income, the gift tax would have been imposed as the profits arose. A similar

15. *Steckel v. Commissioner*, 154 F.2d 4 (C.C.A. 6th 1946); *William Fleming*, 3 T. C. 974 (1944); *Chas. F. Roeser*, 2 T. C. 298 (1943); *Leonard A. Yerkes*, 47 B. T. A. 431 (1942); *Frieda Schiff Warburg*, P-H 1947 TC MEM. DEC. SERV. ¶47,193 (1947); *Antoinette K. Brown*, P-H 1944 TC MEM. DEC. SERV. ¶44,044 (1944); *Edward S. Moore*, P-H 1942 BTA AND TC MEM. DEC. SERV. ¶42,451 (1942); *cf. Commissioner v. Warner*, 127 F.2d 913 (C.C.A. 9th 1942). *See Evelyn N. Moore*, 1 T. C. 14, 16 (1942). *See T. D. 5010*, 1940-2 CUM. BULL. 293. *Carlton B. Overton*, 6 T. C. 304 (1946), *aff'd* 162 F.2d 155 (C.C.A. 2d 1947), applied the same principles although no trust was involved.

16. *Richardson v. Commissioner*, 151 F.2d 102 (C.C.A. 2d 1945), *cert. denied* 326 U.S. 796 (1946).

17. The exact degree of control retained by the taxpayer can not be determined. For example, whether Hogle could shunt profits between his personal account and the trust account after a trading transaction had been consummated is not clear. However, in situations such as this where a taxpayer is currently trading for more than one account it would be difficult to make sure that a given transaction from the outset was irrevocably earmarked for a particular account. This is especially true where the trader, as in this case, also controls the brokerage firm through which the purchases and sales are made, since even "irrevocable" credits to one account can be switched to another by bookkeeping entry.

18. In the event that Hogle could determine whether profits were to be credited to the trust account or to his personal account after a given transaction was completed, the dominion and control test would lead to tax liability at the time an irrevocable entry was made on the books. *See note 17 supra*.

Even accepting the artificial concept of trust ownership of profits as they accrue, it may then be argued that the trust has received from Hogle a gift of valuable services upon which the tax should be levied. Since the value of these services can best be measured by the profits which they produced, the tax liability on such a gift of services would approximate the liability on a gift of the profits. However, some difference in the tax base results if the gift were considered to be one of services rather than profits. The measurement of the gift of services would be the profits, less interest on the trust corpus used. In such an evaluation technique, it would appear advisable to levy the tax in the year in which the profits accrued rather than in the year the services were rendered.

19. 1 BOGERT, TRUSTS AND TRUSTEES §112 (1935); 1 SCOTT, TRUSTS §§26, 86, 86.2 (1939).

rationale has been employed to defeat income tax avoidance where, as here, a taxpayer created a trust solely of profits to arise in the future.²⁰

Finally, the reasoning of the *Hogle* income tax case would readily support gift tax liability in the present litigation. In the earlier case, the court realistically viewed the trust device as amounting, in substance, to an assignment of the taxpayer's personal trading profits.²¹ Presumably, for gift tax purposes also, an assignment of income in each year of profitable trading could be found.²²

The most satisfactory solution to tax avoidance problems created by use of the trust device must await Congressional action to integrate the income, estate, and gift taxes.²³ In many situations the tax statutes themselves compel anomalous results.²⁴ But while the gift tax is not so closely coordinated

20. *Brainard v. Commissioner*, 91 F.2d 880 (C.C.A. 7th 1937), cert. granted 302 U.S. 682 (1938), dismissed 303 U.S. 665 (1938); Note, 36 MICH. L. REV. 1041 (1938).

A promise to make annual transfers in trust, even if binding, is subject to gift tax only as each transfer is made. John D. Archbold, 42 B. T. A. 453 (1940).

21. "[Trading for the trust] amounted in each of those years to a voluntary assignment of a portion of . . . [Hogle's] personal earnings." *Hogle v. Commissioner*, 132 F.2d 66, 71 (C.C.A. 10th 1942).

22. For discussion of the application of the gift tax to assignments of income, see 2 PAUL, *op. cit. supra* note 9, § 16.12.

23. "[W]ithout further aid from Congress it is perhaps impossible for the courts to work out a complete integration of the three taxes." *Higgins v. Commissioner*, 129 F.2d 237, 239 (C.C.A. 1st 1942). For the courts' difficulties in attempting to integrate the gift, estate, and income taxes as they now stand, see 2 PAUL, *op. cit. supra* note 9, § 17.03.

Commentators have been prolific in proposing various methods of coordinating or integrating the three levies. See generally, ADVISORY COMMITTEE TO THE TREASURY DEPARTMENT, FEDERAL ESTATE AND GIFT TAXES, A PROPOSAL FOR INTEGRATION AND FOR CORRELATION WITH THE INCOME TAX (1947); Polisher, *Recent Developments in Federal Gift Tax*, 50 DICK. L. REV. 49, 68-71 (1946); Griswold, *A Plan For The Coordination of the Income, Estate, and Gift Tax Provisions With Respect to Trusts and Other Transfers*, 56 HARV. L. REV. 337 (1942); Warren, *Correlation of Gift and Estate Taxes*, 55 HARV. L. REV. 1 (1941); Greenfield, *Correlation of Federal Income, Estate and Gift Taxes*, 16 TEMP. L. Q. 194 (1942). The suggestions range from complete integration into one comprehensive income tax, SIMONS, PERSONAL INCOME TAXATION 205-20 (1938), through integration of the estate and gift taxes into one cumulative transfer levy, ADVISORY COMMITTEE TO THE TREASURY, *op. cit. supra*; Altman, *Combining the Gift and Estate Taxes*, 16 TAX MAG. 259 (1938), to a proposal that the Federal government relinquish the estate and gift taxes to the states, COMMITTEE ON POSTWAR TAX POLICY, A TAX PROGRAM FOR A SOLVENT AMERICA 165-6 (1945).

24. For example, a transferor may absolve himself from the income tax on trust income yet remain liable for an estate tax on the trust property. Conversely, he may remain subject to the income tax but escape liability for estate taxes. Compare INT. REV. CODE § 166 with § 811(d). Or he may pay a gift tax on the transfer in trust, INT. REV. CODE § 1000 yet remain subject to the income tax on trust income, INT. REV. CODE § 22(a); T. D. 5488, 1946-1 CUM. BULL. 19, as amended by T. D. 5567, 1947 INT. REV. BULL. No. 14 at 2 (1947); and perhaps find the value of the trust property included in his estate for Federal death tax purposes. INT. REV. CODE § 810(c). See ADVISORY COMMITTEE TO THE TREASURY, *op. cit. supra* note 23, at 7-13.

with the income tax as to be imposed on every occasion where income taxed to a donor is paid to a donee,²⁵ the court should not hesitate to achieve a consistent result where it is not expressly precluded by statute or higher judicial authority. Since the court could have easily found support for coordinating the gift and income taxes on these transactions,²³ it is particularly regrettable that it should have chosen instead to invite tax avoidance transfers.

SAFETY AND OVERTIME PAY: THE MOTOR CARRIER EXEMPTION FROM THE FLSA*

WHILE some half-million members of the interstate trucking industry enjoy other benefits of the Fair Labor Standards Act,¹ employees subject to Interstate Commerce Commission regulation under the Motor Carrier Act are exempted from the Hours provision.² The exemption denies such em-

25. Where income of a controlled trust is taxed to the settlor, the Treasury in many instances prefers to levy the gift tax at the time of the trust's creation instead of imposing separate taxes as income is paid to the beneficiaries. One initial tax on the cestui's total interest is ordinarily productive of greater revenue. 2 PAUL, *op. cit. supra* note 9, § 17.17. But in the instant case, gift tax imposition was impossible at the creation of the trust. See p. 1126 *supra*.

26. Although the court gave no reasons which required an abandonment of the practical approach employed in the *Hogle* income tax case, it might have been influenced by the Tax Court's opinion that the gift tax did not have as broad a scope as § 22(a) of the income tax statute. James A. Hogle, 7 T. C. 986, 990 (1946). This position seems untenable in view of the expressed intention of Congress and the language of the gift tax statute. See notes 8, 9 *supra*.

* *Morris v. McComb*, 68 Sup. Ct. 131 (1947).

1. 52 STAT. 1060 (1938), 29 U.S.C. § 201 *et seq.* (1940). Exemptions from the FLSA have generally been narrowly construed. See *Phillips v. Walling*, 324 U.S. 490 (1945), and cases collected in 1 P-H WAGE AND HOUR ¶ 10, 702.1.

2. The Hours provision, § 7(a) of the FLSA, provides that employees "engaged in commerce or in the production of goods for commerce" shall receive additional compensation for hours worked over forty per week of at least "one and one half times the regular rate. . . ." 52-STAT. 1063 (1938), 29 U.S.C. § 207 (a) (1940).

§ 13 (b) (1) makes the Hours provision inapplicable to "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of § 204 of the Motor Carrier Act, 1935; . . ." 52 STAT. 1068 (1938), 29 U.S.C. § 213(b) (1) (1940).

By § 204 of the Motor Carrier Act, the ICC is required to regulate common and contract carriers with respect to "qualifications and maximum hours of service of employees, and safety of operation and equipment." § 204(a) (1) and (2). And by § 204(a) (3): "To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe

ployees statutory overtime benefits, since the ICC has no equivalent authority to set increased overtime wages. Categorical definition of the scope of the FLSA exemption in terms of ICC jurisdiction has stimulated judicial confusion and conflict between the agencies charged with administering the two acts.³

Attributing the motor carrier exemption to the promotion of highway safety, the Supreme Court in 1940 limited the scope of ICC jurisdiction to employees whose activities "affected safety of operation."⁴ Conflicting determinations of what activities affect safety and what quantum of such activities is required for exemption were made by the ICC and the Wage-Hour Division. The former announced that four classes of employees—drivers, drivers' helpers, mechanics and loaders—devoted a "large" or "substantial part" of their time to activities affecting safety of operations and thus were within its jurisdiction.⁵ The Wage-Hour Division, on the other hand, sub-

qualifications and maximum hours of service of employees, and standards of equipment." 49 STAT. 546 (1935), 49 U.S.C. § 304(a) (1) (2) (3) (1940).

3. See Beardsley, *The Conflict Between Administrative Agencies With Regard to Employees of Interstate Motor Carriers Whose Duties Affect Safety of Operation*, 13 I.C.C. PRACT. J. 510 (1946).

4. *United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940). The Supreme Court reversed a decree ordering the ICC to assert jurisdiction over all employees of motor carriers. Justice Reed's careful review of the legislative history of § 204 of the Motor Carrier Act and his conclusion that Congress did not intend to give the Commission "broad and unusual powers over all employees" seem to have ended further controversy over the matter. *Id.* at 546-9. The Court's position was substantiated by previous holdings to the same effect by both the ICC and the Wage-Hour Division. *Ex Parte No. MC-2*, 3 M.C.C. 665, 667 (1937); *Ex Parte No. MC-28*, 13 M.C.C. 481, 488-9 (1939); *Interpretative Bulletin No. 9*, 1940 WH Man. 168, 169.

In contrast to the limitation of the motor carrier exemption to safety workers, all employees of rail carriers are exempted from the overtime provisions of the Wage-Hour Act because exemption is determined solely by the status of the employer rather than by that of each employee. § 13(b) (2), 52 STAT. 1068 (1938), 29 U.S.C. § 213 (b) (2) (1940).

The ICC did not subject drivers of private interstate motor carriers to regulation until a year and a half after the Wage-Hour Act took effect, *Ex Parte No. MC-3*, 23 M.C.C. 1 (1940). Following the *American Trucking* case, the Wage-Hour Administrator raised the issue of whether an employee whose work admittedly affected safety was to be denied overtime benefits if the ICC had not as yet exercised its power to regulate his hours or qualifications. See *Interpretative Bulletin No. 9*, 1941 WH Man. 294-5. In *Southland Gasoline Co. v. Bayley*, 319 U.S. 44 (1943), the Court specifically rejected the Administrator's position that exercise of power by the ICC was a condition precedent to exemption and held that existence of the power to regulate, without the exercise thereof, brought employees within ICC jurisdiction and thus within the exemption. Consequently many employees found themselves in a "no man's land" between the Wage-Hour Act and the Motor Carrier Act, exempt from the one and not regulated under the other. The Wage-Hour Administrator estimated that in an industry in which there are roughly 600,000 employees, 50,000 helpers, mechanics and loaders were in this "no man's land". Address before the Thirteenth Annual Meeting of the Pennsylvania Motor Truck Ass'n, June 7, 1946, reprinted in 1947 WH Man. 131, 136.

5. In response to a petition by the American Trucking Ass'ns, Inc. following the

divided the activities of the four classes of employees into those which in its opinion affected safety and those which did not, and established certain percentage tests for the amount of "safety" work requisite to ICC jurisdiction.⁶

decision in the *American Trucking Ass'n's* case, note 4 *supra*, the Commission determined which employees, other than drivers, were subject to ICC jurisdiction. Ex Parte No. MC-2, 28 M.C.C. 125 (1941). Pointing to such activities as repairing lights and brakes, the ICC concluded that all mechanics devoted a "large portion of their time" to activities affecting interstate highway safety. *Id.* at 132-3. But at the same time the Commission acknowledged that "less than 1 percent and probably less than one-half of 1 percent of the highway accidents, in which carriers subject to the act are involved, are caused by poor work done by mechanics employed by such carriers." *Id.* at 132. No attempt was made to evaluate the various aspects of mechanical work in terms of their effect upon safety, though the Commission did concede that an employee whose *sole* duties consisted of oiling, gassing, greasing or washing vehicles or one who did only painting, carpentry work or tarpaulin tailoring would not be considered within ICC jurisdiction. *Id.* at 133.

While admitting that "poor loading is the cause of relatively few highway accidents," *id.* at 134, the Commission found that loaders devote a "large part of their time to activities which directly affect" interstate highway safety. The activities of loading and unloading were treated alike as regards the effect on highway safety. *Id.* at 134.

Drivers' helpers were found to devote a "substantial part" of their time to safety activities because they flagged the driver across rail-crossings and assisted him in turning around on busy highways. Also, the helper performed the important function of setting out flares in the event of breakdown and often stayed with the disabled truck while the driver sought help. For good measure armed guards on armored trucks were included, and even 25 young ladies who acted as conductorettes on busses operating out of Seattle were deprived of their statutory overtime benefits because in the event of accident they could help the driver procure aid and protect the vehicle from on-coming traffic. *Id.* at 135-6. These classifications are of crucial importance in light of their incorporation by the *Levinson* decision, note 8 *infra*.

Comprehensive safety regulations, including maximum hours of service and qualifications of drivers, were adopted by the ICC as early as 1937. Ex Parte No. MC-2, 3 M.C.C. 665 (1937). But the Commission has, as yet, found no need for establishing regulations for mechanics, loaders, and helpers.

6. Despite the assumption of jurisdiction by the ICC, note 5 *supra*, the Wage-Hour Administrator in Interpretative Bulletin No. 9 continued to set forth standards of exemption which conflicted with those set by the ICC. Initially the Administrator regarded as exempt only drivers of vehicles operating within interstate commerce. 1940 WH Man. 168, 169. And even they were not exempt in any week in which they devoted over 20% of their time to non-safety work. 1942 WH Man. 377, 379. According to the Administrator, non-safety work included such activities as unloading trucks and loading baggage on busses. *Id.* at 378. Subsequent to the ICC's decision in 28 M.C.C. 125, note 5 *supra*, the Administrator revised his standards to include mechanics, loaders and helpers as safety workers and lowered his percentage figure from 80% exempt activities to 50%. 1944 WH Man. 520, 523. This latter standard conflicted directly with regulation by the ICC of partial-duty drivers of private carriers; see Ex Parte No. MC-3, 23 M.C.C. 1, 31 (1940). As an example of classification by the Administrator, a loader who spent 51% of his time unloading in any one week was not considered exempt under § 13(b) (1) of the FLSA for that week whereas the ICC made no distinction between loading and unloading. See Beardsley, *Wage-Hour Law—Status of Motor Carrier Employees*, 14

Faced with these conflicting interpretations,⁷ the Supreme Court in *Levinson v. Spector Motor Service*⁸ elaborated a formula of exemption which largely incorporated the administrative determinations of the ICC and specifically rejected those of the Wage-Hour Division.⁹ An employee was to be exempt if his duties "as a whole or in substantial part" placed him within one of the classifications of safety workers established by the ICC,¹⁰ and in this allocation the character of the work was the important factor, not the amount or percentage of time spent.¹¹ Basic to the *Levinson* decision was the Court's premise that Congress in enacting the exemption had intentionally rendered the FLSA and the Motor Carrier Act mutually exclusive in order to extend, as far as possible, the ICC's highway safety program.¹²

In the recent case of *Morris v. McComb*,¹³ which preserves intact the *Levinson* test as to the amount and type of safety work, the Court concerned itself with the quantum of interstate activity necessary for exemption. In the *Morris* case, the employees were in other respects within the *Levinson* test,¹⁴ but were engaged in interstate commerce only during a minority of their time. Two of them engaged in no interstate activities whatsoever, and of the total services rendered by their employer less than four percent were

I.C.C. PRACT. J. 615, 616-7 (1947). For a description of the Administrator's approach in applying his 50% test, see 1947 WH Man. 131, 133-5.

7. For discussion of the confusion among the lower courts in regard to the exemption, see Josselson, *Some Aspects of the Motor Carrier Exemption under the Wage Hour Law*, 7 U. OF DETROIT L.J. 1, 4 *et seq.* (1943).

8. 330 U.S. 649 (1947). See also *Walling v. Comet Carriers*, 151 F.2d 107 (C.C.A. 2d 1945), *cert. granted*, 326 U.S. 716 (1946), *dismissed on motion of counsel*, 328 U.S. 819 (1946); and *Pyramid Motor Freight v. Ispass*, 330 U.S. 695 (1947) (remanded for decision in accordance with the principles stated in the *Levinson* case.)

In *Boutell v. Walling*, 327 U.S. 463 (1946), it was held that the exemption applies only to employees of carriers and that employees of a separately incorporated garage owned and operated by a carrier and servicing the carrier's trucks were not exempt. See 20 TEMP. L.Q. 483 (1947).

9. 330 U.S. 649, 676-7 (1947). Note rejection of the 50% test set by the Wage-Hour Administrator. *Id.* at 683-4.

10. See *Pyramid Motor Freight v. Ispass*, 330 U.S. 695, 707 (1947). The Court specifically reserved decision as to power of the ICC to regulate employees, less than a substantial part of whose activities came within the ICC's safety classifications. *Id.* at 707-8. This reservation suggests that the Court might go so far as to exempt an employee who devoted any work at all to safety activities, as defined by the Commission.

11. *Levinson v. Spector Motor Co.*, 330 U.S. 649, 674-5 (1947). For recent cases misapplying the *Levinson* test, see *McDuffie v. Hayes Freight Lines*, 71 F.Supp. 755 (E.D.Ill. 1947) (court reverts to analyzing the work of various mechanics to see if safety is affected); *Reynolds v. Rogers Cartage Co.*, 71 F.Supp. 870, 875 (W.D.Ky. 1947) (test of exemption is whether the employee does any work substantially affecting safety of operation or equipment on the highways).

12. *Levinson v. Spector Motor Co.*, *supra* note 11 at 661-2.

13. 68 Sup. Ct. 131 (1947).

14. *Id.* at 135. The Court limited its holding to full-time drivers and mechanics, employees who satisfy the *Levinson* test as to the amount and type of safety work.

interstate in character.¹⁵ In holding that the "entire classification of the petitioner's drivers and 'mechanics' " was within ICC jurisdiction, the Court lumped together for purposes of exemption employees whose participation in interstate commerce ranged from ninety-seven interstate trips a year to none.¹⁶ Membership in a group, which as a whole engages in a small amount of interstate activity, is now sufficient to bring an employee within the motor carrier exemption.

Three dissenting justices strongly attacked the majority's evaluation of Congressional intent and the Court's consequent uncompromising extension of the safety program at the expense of overtime coverage. By their view employees should not be deprived of the paternalistic benefits of the FLSA because of minute and sporadic amounts of work done within ICC jurisdiction.¹⁷ A fourth justice dissented independently, finding the decision an extreme extension of the *Levinson* case.¹⁸

Whether it be argued that the Congressional intent¹⁹ in exempting motor carrier employees from the coverage of FLSA lay in a desire to avoid ad-

15. *Id.* at 133, 136. During the calendar year immediately preceding the filing of the complaint 43 drivers worked a total of 1903 weeks, 1483 or 75.6% of which were exclusively devoted to inter-plant (intra-state) activity. Transcript of Record, p. 27, *Morris v. McComb supra* note 13. During 319 of these weeks the driver made only one interstate trip, and in 85 weeks only two such trips were made. Brief for Administrator, p. 6, *Morris v. McComb, supra*.

16. 68 Sup. Ct. 131, 136 (1947).

17. *Id.* at 138-9 (1947). Justices Black and Douglas concurred in Justice Murphy's dissent. Justice Black, as a senator, was co-sponsor of the FLSA and explained the exemption provision in question on the Senate floor. 81 CONG. REC. 7875 (1937).

18. 68 Sup. Ct. 131, 140. Justice Rutledge, acknowledging that the *Levinson* case foreshadowed any situation where an employee's work substantially affected interstate safety, found no support in that decision for the instant result.

19. The exemption occasioned only brief debate in the Senate, 81 CONG. REC. 7875 (1937), and none in the House. Senator Black said that ". . . it was the policy of the committee, in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such a way as not to conflict with such regulation. . . . [The exemption] would apply the same principle to *truck drivers* insofar as *hours of labor* are concerned. It is my understanding that the hours have been regulated by the Interstate Commerce Commission recently. . . . The committee were of the opinion . . . that it was exceedingly important that the long hours of *truck drivers* should be regulated in the interest of public safety." (Italics added) *Ibid.* The only discussion concerning the effect of the exemption upon wages was occasioned by Senator Shipstead's inquiry whether the exemption meant that the ICC would now have the power to fix both the wages and hours of truck drivers. In response, Senator Black emphasized that truck drivers would still be governed by the minimum wage provision of the Act and would be exempt only from the maximum hours provision. *Ibid.* No mention was made of the fact that exemption from the hours provision necessarily excluded employees from statutory overtime benefits.

While Congress expressed an intent to exempt truck drivers, it put no similar intent on record in regard to mechanics, loaders or helpers. The effect of the work of these last categories of employees upon safety was not emphasized until four years later. See note 5 *supra*. It is theoretically possible now under the *Levinson* test to exempt a mechanic

ministrative conflict or to promote highway safety, no logical justification would seem to support the statutory exemption. There is no inconsistency whatever between limiting hours in the interests of highway safety and paying extra wages in cases where the overtime has actually been worked;²⁰ and by the same token, there is little likelihood of administrative crossfire where one agency is empowered solely to establish regulations over hours, and the other can only enforce a time and a half wage rate for overtime hours. It was perhaps with this in mind that the Court had shaved down the broad literal exemption by excluding from FLSA only those workers concerned with safety.

But this half-way measure of restricting the scope of the exemption merely aggravated the administrative snarl which Congress had invited when in an attempt to avoid administrative confusion it had defined the jurisdiction of one agency in terms of that of another. Short of judicial repeal of the ill-considered exemption, the Court could only attempt to strike a balance between administrative convenience and the statutory benefits extended by the FLSA. Its choice was to ameliorate administrative complexity by adopting the ICC's broad interpretation of the exemption.

The Court's decision must be evaluated in terms of its actual impact upon the wage position of the employees affected. If they are adequately protected by collective bargaining agreements so that loss of statutory overtime does not place them in an unequal wage position, the Court's solution may be justified as a palliative to the unfortunate administrative tangle created by the statutory exemption. But if, in extending the exemption to embrace all motor carrier employees remotely associated with safety in interstate commerce, the Court has effectively prejudiced their wage position, it may well be censured even though its decision may have made a minor contribution to administrative efficiency; particularly so, if, as it is plausible to argue, Congress intended to exempt only interstate truck drivers.²¹

In any event, Congress would do well to reexamine²² the questionable

who spends 95% of his time greasing trucks and 5% repairing radiators because such an employee is within the ICC's definition of a mechanic and because he is not *solely* engaged in greasing. *Ibid.* Of course, collective bargaining agreements may insure that such a worker is exclusively employed in greasing and thus protect his overtime benefits.

20. The Court itself acknowledged this in *Levinson v. Spector Motor Service*, 330 U.S. 649, 661 (1947).

21. See note 19 *supra*.

22. In 1945, the Wage-Hour Administrator recommended an amendment to § 13(b) (1), which would have narrowed the exemption to motor carrier employees for whom the ICC had actually issued regulations. The proposal was passed by the Senate but pigeon-holed by the House Labor Committee. For discussion of the history of this bill, see *Levinson v. Spector Motor Service*, 330 U.S. 649, 684 n. 27 (1947). Representatives of the American Trucking Ass'ns testified on the proposed measure, suggesting amendments which would have vitiated its adverse economic effect upon the trucking companies. For example, they urged that the "original intent" of Congress be restored by providing that payment of one and one-half times the minimum wage would satisfy the requirement

considerations which were thought to require the blanket exemption, for its results have been an administrative quagmire and possible deprivation of substantive rights.

DETERMINATION OF THE RIGHT TO COMPENSATION FOR ERRONEOUS IMPRISONMENT UNDER THE FEDERAL LAW*

TEN minutes in a locked room grounds an action for false imprisonment; ten years in the penitentiary does not. European civil codes have long allowed compensation to the innocent mistakenly punished by the state,¹ but only recently have remedies based on a qualified waiver of sovereign immunity been devised in the United States to redress the most serious form of false imprisonment—the execution of erroneous judicial sentence. The statutes of California,² New York,³ North Dakota⁴ and Wisconsin⁵ require proceedings before an administrative board or commission; the federal act,⁶ in cases where the error is not corrected by executive pardon, prescribes judicial proceedings. Under neither the state nor federal statutes is compensation automatic on reversal of the criminal conviction, but will be granted only if the claimant is proven “innocent.” The definition of innocence varies

for overtime. This provision would have legislatively overruled *Overnight v. Missel*, 316 U.S. 572 (1942), where the requirement of one and one-half times the employee's rate was established. See Beardsley, *Wage-Hour Law—Status of Motor Carrier Employees*, 14 I.C.C. PRACT. J. 615, 621 (1947).

* *United States v. Keegan*, 71 F. Supp. 623 (S.D. N.Y. 1947).

1. European countries have allowed compensation for improper imprisonment for many years. The remedies vary from judicial to administrative, from highly restrictive to automatic on reversal of the conviction. Some (including Austria, Germany, Norway, Sweden and Denmark) not only compensate for imprisonment following erroneous conviction, but also for detention before trial if the claimant is found not guilty, and for detention followed by release without trial. For a detailed analysis of the European provisions, see BORCHARD, *CONVICTING THE INNOCENT* 375 *et seq.* (1932).

2. Cal. Stat. 1913, c.165, p.245; CAL. PEN. CODE §§ 4900–4906 (Deering, 1940).

3. N. Y. Laws 1946, c.10, p.15.

4. N. D. Laws 1917, c.172, p.237; N. D. REV. CODE, tit.12, c.57, p.823 (1943).

5. Wis. Laws 1913, c.189, p.197; WIS. STAT. § 285.05, p.2949 (1945).

6. 52 STAT. 438 (1938); 18 U.S.C. §§ 729–32 (1940). This statute was drafted by Edwin M. Borchard, then Law Librarian of Congress, now Professor of Law, Yale Law School, and first introduced in 1913. As finally passed, the statute differs widely from the Borchard Bill, which generally followed the acts of California and Wisconsin. The original law specifically placed the burden of proof on petitioner, provided for determination of innocence in the Court of Claims rather than the trial courts, and required the Attorney General to contest by all legal means. Instead of placing a \$5,000 limit and comprehending all damages, it allowed recovery for *pecuniary* loss only.

with the jurisdiction, but the requirements of the federal act are the most stringent, and present the greatest difficulties in interpretation.

The federal statute provides that any person who has served all or part of a sentence imposed by a federal court and is then found not guilty on appeal, rehearing, or a new trial, or is pardoned on the ground of innocence, may sue the United States in the Court of Claims for compensation up to \$5,000. The only evidence admissible on the issue of innocence is either a pardon, or a certificate of innocence issued by the court in which the accused was adjudged not guilty. The certificate or pardon must contain the following recitals or findings:

- a. Petitioner did not commit any of the acts charged; or
- b. his conduct in connection with such charge did not constitute a crime or offense against the United States or the state of local jurisdiction; and
- c. he has not, either intentionally or by wilful misconduct, or negligence, contributed to bring about his arrest or conviction.⁷

Although this statute has been in effect for nine years, only recently was the first request for a certificate of innocence considered⁸ in *United States v. Keegan*.⁹ Keegan was a member of, and legal counsel for, the German-American Bund. After passage of the Selective Service Act, Keegan and other officers of the Bund, collectively by publication of a Bund Command and individually by advice to members, exhorted the group to resist the Act and refuse to do military duty. Keegan was indicted for conspiring to counsel evasion of the Selective Service Act, convicted, and sentenced by a federal district court to five years' imprisonment. The conviction was unanimously affirmed by the circuit court.¹⁰ The Supreme Court reversed¹¹ on the ground that the evidence was insufficient to establish the conspiracy, four justices dissenting and two concurring separately. Keegan's victory was somewhat Pyrrhic, for he had served three years in jail. Seeking compensation for his erroneous conviction, he filed a petition for a certificate of innocence, which was referred to the trial judge who had presided in the criminal proceedings. The Government contested, and the certificate was denied on the grounds

7. The pertinent provisions of the Act are here paraphrased rather than quoted *in extenso*. Omitted are § 731, providing that a claimant must have exhausted all recourse to the courts before receiving the pardon relied on, and § 732, allowing a proceeding *in forma pauperis*.

8. Five unsuccessful actions have been brought in the Court of Claims; two based on pardons and three, two by the same plaintiff, based on a writ of habeas corpus. In none was the statute construed in detail and, as the court in the principal case points out, in two the Court of Claims misread the statutory language. *Prisament v. United States*, 92 Ct. Cl. 434 (1941); *Viles v. United States*, 95 Ct. Cl. 591 (1942); *Hadley v. United States*, 101 Ct. Cl. 112 (1944) (habeas corpus, and statute misread); *Hadley v. United States*, 106 Ct. Cl. 819 (1946) (habeas corpus, and statute misread); *Ekberg v. United States*, 76 F. Supp. 99 (Ct. Cl. 1948).

9. 71 F. Supp. 623 (S.D.N.Y. 1947).

10. *United States v. Keegan*, 141 F.2d 248 (C.C.A. 2d 1944).

11. *Keegan v. United States*, 325 U. S. 478 (1945).

that (1) Keegan was ineligible under the first statutory subsection because he had in fact committed the acts charged, (2) he was barred by the second subsection because counselling evasion constituted a crime against the United States, and (3) his arrest was brought about by his wilful misconduct in promulgating the Bund Command and by his evasive and perjurious testimony before the grand jury, both grounds for denial under the third subsection. In its exhaustive opinion the district court decided, explicitly or implicitly, most of the issues fundamental to any petition for such judicial certificate.

Preliminary to the examination of this case, the court considered whether the language of the statute, in providing that the certificate must contain recitals *a* "or" *b* "and" *c*, meant *a* or (*b* + *c*) as opposed to *c* + (*a* or *b*).¹² Its conclusion, which must be considered dicta since Keegan was found ineligible under all three, was that *a* standing alone would provide sufficient basis for the issuance of a certificate, without reference to negligence or misconduct. But this is a statute waiving sovereign immunity, and the court's interpretation is the less strict of the two.¹³ In addition, if the court is correct it is difficult to see why the statute was not simplified by combining *b* and *c* into one subsection. It would thus seem unlikely that this interpretation will be followed; the requirement of "clean hands" may well be applied uniformly to all claimants, whether they are victims of mistaken identity, or convicted through errors of law.

The court was met at the outset with the problem of whether this was an adversary or *ex parte* proceeding. The right of the Government to contest was not discussed, but from the court's acceptance of the briefs and argument of the United States it must be inferred that this was considered an adversary proceeding. Since the certificate is conclusive evidence in the Court of Claims of all issues except the measure of damages, in the absence of specific language to the contrary the Government clearly has sufficient interest to intervene, even though it may not be a necessary party.¹⁴

The court rejected petitioner's contention that the duty to issue the certificate was purely ministerial on proof of acquittal. It was convinced that its function here was discretionary, and in the light of the legislative history¹⁵

12. The interrelation of the recitals was partially and summarily treated in *Prisament v. United States*, 92 Ct. Cl. 434 (1941). The Court of Claims there denied compensation on a pardon because it failed to contain recitals under both *b* and *c* of the Act. Prisament evidently being a victim of mistaken identity, and thus perhaps more properly eligible under recital *a*, the case is of questionable value.

13. Statutes waiving sovereign immunity are construed with great strictness, and only those who are clearly within their scope may sue. *United States v. Sherwood*, 312 U. S. 584 (1941); *Klamath Indians v. United States*, 296 U. S. 244 (1935); *Blackfeather v. United States*, 190 U. S. 368 (1903).

14. *Ex parte* proceedings were not possible in the Borchard Bill as originally drafted (See note 6 *supra*), but as enacted the statute contains no provision requiring the government to contest.

15. See comments of Edwin M. Borchard on his draft of the Bill, SEN. DOC. NO. 974,

and the detailed recitals required, no other interpretation seems possible. Defeated in his attempt to minimize the problem of proof, petitioner then sought to characterize the proceeding as sufficiently criminal in nature to require the Government to show that by the terms of the statute the certificate should not issue. But, pointing to the petitioner as the moving force in the action, and citing the collection of damages as the objective of the proceeding, the court held the suit to be essentially civil in character, with the burden of proof on petitioner. Orthodox doctrines of sovereign sacrosanctity would further seem to support the result reached by the court on this issue.

The decision does not contain a definitive interpretation of the three recitals required in a certificate, but each was covered insofar as it bore on the issues of this case. The court found that recital *a* was phrased to cover cases of mistaken identity,¹⁶ and was clearly inapplicable to Keegan who did, in fact, commit the acts charged. This result is not inconsistent with the Supreme Court's opinion, since the reversal was only on the ground that the acts charged, and committed by Keegan, were not sufficient to evidence the alleged conspiracy. "Acts charged" in this subsection thus seems to be construed as "overt acts" rather than the "offenses" charged. This appears tenable, for otherwise the provision would be superfluous, "offenses" being covered by subsection *b*, which uses the word in its own right.

In determining, under subsection *b*, whether Keegan's conduct constituted a crime, the court was faced both with the reversal on the ground that conspiracy was not established, and the Supreme Court's added dictum that the substantive crime of counselling evasion was not proved beyond a reasonable doubt.¹⁷ The court first cautiously pointed to the difference in the effect of holdings and dicta, but then held that even were the dictum binding, the evidence was sufficient to create in the court's mind so strong a belief that Keegan was guilty of counselling evasion that his innocence could not be certified. Such independence in the trial court indicates in some measure the gulf between a finding of "not guilty" in criminal proceedings, and a determination of "innocence" in a statutory action for compensation. But

62d Cong., 3d Sess. 33 (1913), also letter of Att'y Gen. Homer Cummings to the Chairman of the Judiciary Committee, SEN. REP. No. 202, 75th Cong., 1st Sess. 3 (1937).

16. Cf. *Campbell v. New York*, 186 Misc. 586, 62 N.Y.S. 2d 638 (Ct. Cl. 1946); also New York Legislature Special Act entitled CLAIM OF BERTRAM CAMPBELL, N.Y. Laws 1946, c.1, §§ 1, 2. Campbell, a successful stock broker, was mistakenly convicted of forging a check, and was imprisoned for three years. The forger was later found, and Campbell, then on parole, was exonerated. He had been unable to resume his former position, and was just able to support his family. As the New York Compensation Law (note 3 *supra*) had been passed since his conviction, the Legislature passed a special act conferring jurisdiction of this case on the Court of Claims. He was awarded \$40,000 pecuniary damages and \$75,000 for loss of reputation and mental anguish. For a collection of sixty-five similar miscarriages of justice see BORCHARD, CONVICTING THE INNOCENT, note 1 *supra*.

17. *Keegan v. United States*, 325 U.S. 478, 494-5 (1945).

this disparity would have been more dramatically illustrated had the court chosen to premise the certificate denial on its belief that Keegan was actually guilty of conspiracy. In other situations it is well settled that findings in a criminal proceeding are not *res judicata* in a civil suit,¹⁸ and as subsection *b* provides in effect that belief that an uncharged crime was committed is grounds for refusal of a certificate, it might consistently be held that belief that the charged crime was in fact committed is likewise grounds for denial. Such reconsideration of the criminal offense itself would seem necessary to prevent recovery by those whose "innocence is based on technical or procedural grounds."¹⁹

The misconduct on which the court refused recital *c* indicates in general the requirements of this subsection. Conduct which increases suspicion of guilt, such as perjury before the grand jury, would be sufficient. In addition apparently any conduct, such as the publication of the Bund Command, which is of such questionable lawfulness as reasonably to justify arrest and indictment, will similarly prevent recovery. It is notable that, in accord with the limited purpose of Congress, the misconduct or negligence need only contribute to the arrest, and may be totally unconnected with the conviction.²⁰

Conceptually, the judicial application of this sharply restricted definition of "innocence" is novel. The somewhat analogous proceeding for the recovery of a fine erroneously levied requires only a showing of (1) the erroneous conviction, and (2) the involuntary payment.²¹ Here, evidence extrinsic to the charged offense is required, and this not to establish the well known status of "not guilty" but to show varying degrees of innocence. The silence of the statute on vital points of procedure complicates the problem of treating a man as guilty until proven innocent, in the face of the firmly imbedded contrary assumption of the criminal law. However, the right to sue the sovereign is granted only on the sovereign's terms,²² and the court applied the

18. *Helvering v. Mitchell*, 303 U.S. 391 (1938). But only if the proceeding is assumed to be civil, not criminal. The close relationship of this statutory action with the previous criminal trial and the punishment there exacted, in juxtaposition with its civil nature as a suit for damages, makes certification proceedings *sui generis* and without direct precedent.

19. H. R. REP. No. 2299, 75th Cong., 3d Sess. (1938). This civil retrial of the charge would prevent recovery of compensation on the same evidence which the identical court found sufficient to support a verdict of guilty. For statutes yielding similar results, see N. D. Laws, note 4 *supra*, and Wis. Laws, note 5 *supra* (findings of the board to be based only on such evidence and circumstances as have been discovered since the trial and conviction).

20. As in the California statute, note 2 *supra*.

21. *United States v. Mossew*, 268 Fed. 383 (N.D.N.Y. 1920); *United States v. Rothstein*, 187 Fed. 268 (C.C.A.7th 1911); *Devlin v. United States*, 12 Ct. Cl. 266 (1876).

22. *Reid v. United States*, 211 U.S. 529 (1909); *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907); *Finn v. United States*, 123 U.S. 227 (1887).

standards clearly required by the wording and legislative history of the statute.

The consequences of Keegan's petition perhaps explain the exceedingly rare invocation of this statute. On conviction of a felony, the right to practice a profession is usually forfeit; upon reversal it may be restored by an appropriate proceeding. Keegan was disbarred in New Jersey, and might well have expected reinstatement on the basis of the Supreme Court's opinion acquitting him. In the face of the district court's refusal to certify his innocence, his chance of reinstatement would seem small indeed. His general reputation will likewise remain impaired. Faced with the task of proving a host of negatives, only those who are either clearly and completely unoffending, or are unconcerned over their reputations, dare ask for redress. Unless the definitions of "not guilty" and "innocent" are made more nearly coextensive by amendment to the statute, the vast majority of those erroneously imprisoned by federal courts will neither secure nor request compensation.