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## Recent Cases

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## Recent Cases

### ADMINISTRATIVE LAW—STANDING OF POLITICAL SUBDIVISIONS TO SECURE JUDICIAL REVIEW OF NON-CONTESTED CASES IN MISSOURI

*State ex rel. St. Francois County School Dist. v. Lalumondier*<sup>1</sup>

The St. Francois County assessor reduced the valuation of certain tracts of land owned by the St. Joe Minerals Corporation from \$898,000 to \$285,000. The county board of equalization sustained the reduction by a 2-2 secret vote. The St. Francois County School District requested another vote be taken by the entire board.<sup>2</sup> A meeting of the board was announced, but was later cancelled. Thereafter, the school district learned that two of the board members participating in the secret vote allegedly had financial interests in the corporation.<sup>3</sup> The school district sought a writ of certiorari to the county board of equalization under the provisions of section 536.150, RSMo 1969.<sup>4</sup> The circuit court granted the county board's motion to dismiss. The Missouri Supreme Court affirmed the dismissal, holding that "school districts do not have standing to obtain a review of alleged underassessments of property by the county board [of equalization]."<sup>5</sup>

The standing of governmental entities or officials to seek review of the action of other governmental bodies has received surprisingly little attention, despite the frequency with which the problem occurs.<sup>6</sup> Most often the question arises in cases, such as *Lalumondier*,

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1. 518 S.W.2d 638 (Mo. 1975).

2. The county board of equalization consists of the three county judges, the county assessor, and the county surveyor. § 138.010(1), RSMo 1969.

3. 518 S.W.2d at 639 (Mo. 1975).

4. The section (now Rule 100.08) provides in part:

1. When any administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person, including the denial or revocation of a license, and there is no other provision for judicial inquiry into or review of such decision, such decision may be reviewed by suit for injunction, *certiorari*, mandamus, prohibition or other appropriate action. . . .

5. 518 S.W.2d at 643.

6. The only scholarly attempt to deal with the problem in any depth is F. Davis, *Standing of a Public Official to Challenge Agency Decisions: A Unique Problem of State Administrative Law*, 16 AD. L. REV. 163 (1964). See also 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.15 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 537-43 (1965); 2 F. COOPER, STATE ADMINISTRATIVE LAW, 545-51 (1965).

involving challenges to tax assessments.<sup>7</sup> Because such standing is usually granted by statute in some states specifically to officials<sup>8</sup> or to political subdivisions of the state directly affected by the assessment,<sup>9</sup> the courts usually reach a solution based on statutory interpretation. Where such standing is not explicitly granted by statute, most courts deny it to both officials and the governmental entity.<sup>10</sup> Missouri, however, along with a few other states, has made an exception in regard to certain political subdivisions.

In the leading case of *In re St. Joseph Lead Company*<sup>11</sup> the Missouri Supreme Court held that a county had standing to seek review of a decision of the State Tax Commission reducing assessments. In *St. Joseph Lead* the taxpayer appealed its assessment to the county board of equalization without success, and subsequently pursued its appeal to the State Tax Commission. The Commission reversed the county board's determination and reduced the assessment by half. The county and several intervenor school districts then sought review in the courts under the provisions of section 536.100 of the Administrative Procedure Act relating to judicial review of "contested cases."<sup>12</sup> The court, while expressly withholding judgment as to the standing of a school district in the action,<sup>13</sup> held that a county was a "person aggrieved" within the meaning of the statute.<sup>14</sup>

The General Assembly has the discretion to grant or withhold the right to seek judicial review of tax assessments.<sup>15</sup> In *St. Joseph Lead* the court noted that the legislature has not specifically given

7. F. Davis, *supra* note 6, at 170-71.

8. *E.g.*, 68 OKL. ST. ANN. § 2461 (1966).

9. *E.g.*, 4 S.D.C.L. tit. 10-11-42,-43,-44 (1967).

10. F. Davis, *supra* note 6, at 171-72. *See also* Annot., 5 A.L.R. 2d 576 (1949).

11. 352 S.W.2d 656 (Mo. 1962).

12. Section 536.100, RSMo 1969 (now Rule 100.03), provides in part:

Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case . . . shall be entitled to judicial review thereof, as provided in section 536.100 to 536.140, unless some other provision for judicial review is provided by statute; provided, however, that nothing contained in this chapter shall prevent any person from attacking any void order of an agency at any time or in any manner that would be proper in the absence of this section.

13. *In re St. Joseph Lead Co.*, 352 S.W.2d 656, 658 (Mo. 1962). A school district is a political subdivision of the state for taxation purposes. Mo. CONST. art. X, § 15.

14. *Id.* at 661. Curiously, as Professor Davis notes, the case makes no reference to numerous Missouri cases denying standing to public officials in this situation. F. Davis, *supra* note 6, at 174.

15. *In re St. Joseph Lead Co.*, 352 S.W.2d 656, 659 (Mo. 1962); *Birmingham Drainage Dist. v. Chicago, B. & Q. R. Co.*, 274 Mo. 140, 156, 202 S.W. 404, 408-09 (1918).

the right of review to counties, but "on the other hand, it has not specifically denied the right."<sup>16</sup> Recognizing that the question was essentially one of policy, the court said the general policy of the state was to be liberal in granting review to persons aggrieved by governmental decisions so long as such review was not prohibited by the constitution or limited by some particular statute.<sup>17</sup> Thus, whether a county was a "person aggrieved" depended on what its interest was in the proceeding and how much it would be hurt by a ruling adverse to that interest. The court found that the county had "indeed a vital interest in all questions relating to the levy and assessment of taxes."<sup>18</sup> Therefore, it fell within the language of section 536.100 granting the right of judicial review to "persons aggrieved" by a decision in a contested case, even though it was not expressly mentioned in the statute.

Under this reasoning the question whether a particular political subdivision has standing to challenge a decision, at least in a contested case, is based not on its being *specifically* mentioned in the statutory language, but on its being injured. Section 536.100 is applicable only to contested cases—<sup>19</sup> *i. e.*, proceedings "in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing."<sup>20</sup> There are many situations where a hearing is not required by law before an administrative decision can be made. Under section 536.150 these "non-contested" cases are reviewable "by suit for injunction, *certiorari*, mandamus, prohibition or other appropriate action."<sup>21</sup> Since both sections are based on the same constitutional provision,<sup>22</sup> one would have expected an extension of the standing rationale of *St. Joseph Lead* to non-contested cases.

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16. 352 S.W.2d at 659.

17. *Id.* at 659-60.

18. *Id.* at 661. *Kearney County v. Hapeman*, 102 Neb. 550, 167 N.W. 792 (1918).

19. The statute specifically so provides. A person must elect whether he wishes to proceed under section 536.100 or section 536.150. *Kopper Kettle Restaurants, Inc. v. City of St. Robert*, 439 S.W.2d 1, 4 (Spr. Mo. App. 1969). Selection of the wrong method may be grounds for dismissal. *Id.*; Weinstein, *Contested Case in Missouri Liquor Licensing*, 36 Mo. L. Rev. 444 (1971). *But see State ex rel. Walmar Investment Co. v. Mueller*, 512 S.W.2d 180 (Mo. App., D. St. L. 1974); *State ex rel. Bond v. Simmons*, 299 S.W.2d 540 (St. L. Mo. App. 1957).

20. § 536.010(2), RSMo 1969.

21. § 536.150, RSMo 1969. *See State ex rel. Wilson Chevrolet, Inc. v. Wilson*, 332 S.W.2d 867 (Mo. 1960); *State ex rel. Leggett v. Jensen*, 318 S.W.2d 353 (Mo. En Banc 1958); *State ex rel. State Tax Commission v. Walsh*, 315 S.W.2d 830 (Mo. En Banc 1958).

22. *State ex rel. Leggett v. Jensen*, 318 S.W.2d 353, 357 (Mo. En Banc 1958).

However, *Lalumondier* put an additional restriction on the parties who have standing to challenge administrative decisions in non-contested cases. Basing its argument on article V, section 22 of the Missouri constitution,<sup>23</sup> the court said that the statute is applicable only to decisions which affect "private rights," and therefore only persons with injured private rights may bring actions under it.<sup>24</sup> Because political subdivisions cannot have "private rights," as the court used the term, they are completely denied judicial review of non-contested cases. In short, the case stands for the proposition that no one, not even public bodies, can seek review of non-contested cases that affect so-called "public rights."

In *St. Joseph Lead* the court rejected a similar contention in respect to contested cases based on the private right-public right distinction. The court noted that section 536.100 "does not mention or distinguish between what the [company] calls public and private rights. . . ." <sup>25</sup> It said further:

[T]he use of the words "private rights" [in article V, section 22] in setting forth the minimum standard of review was not necessarily intended as a limitation or restriction on the legislative power to provide for judicial review of "public rights" upon the initiative of an appropriate "public body."<sup>26</sup>

Section 536.150 does not use the term "private rights," either. Nevertheless, the *Lalumondier* court cited in support of its holding the cases of *May Dept. Stores Co. v. State Tax Commission*<sup>27</sup> and *In re Roadway in Section 21, Township 60, Range 6, West*,<sup>28</sup> which said that the language in section 536.150 referring to "any person," the "revocation of a license," and "such person" indicated the section "clearly comprehends only decisions involving individual rights and interests."<sup>29</sup> The use of the word "person" does not seem signifi-

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23. The section provides:

All final decisions, findings, rules and orders of any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.

24. 518 S.W.2d at 643.

25. 352 S.W.2d at 660.

26. *Id.* at 661.

27. 308 S.W.2d 748 (Mo. 1958).

28. 357 S.W.2d 919 (Mo. 1962).

29. *May Dept. Stores Co. v. State Tax Commission*, 308 S.W.2d 748, 756 (Mo. 1958).

cant in view of the decision in *St. Joseph Lead*.<sup>30</sup>

These cases may be distinguished by noting that both plaintiffs were private individuals attempting to assert the public interest, or "public rights." It is well-established in Missouri that a private individual must show an injury different from that of the general public in order to have standing.<sup>31</sup> In *May Dept. Stores*, the plaintiff challenged an inter-county equalization order. The order raised May's valuation, but the effect was proportionately the same on all property owners.<sup>32</sup> The plaintiffs in *In re Roadway* sought review of a county court's decision closing a public road. The supreme court said:

[A]ppellants did not have sufficient individual rights and interests involved in order to entitle them to a judicial review of the order in question. Their only interest was as a user of the road. While they might have used the road more than certain other persons in the community their legal interest was, nevertheless, the same as that of the public generally. The cases heretofore cited hold that this is not an adversary proceeding and that it involves the public interest and not private rights.<sup>33</sup>

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30. See text accompanying notes 11-18, *supra*.

31. *In re Roadway* in Section 21, Township 60, Range 6, West, 357 S.W.2d 919 (Mo. 1962). Compare *Village of Grandview v. McElroy*, 222 Mo. App. 787, 9 S.W.2d 829 (K.C. Ct. App. 1928), with *In re City of Uniondale*, 285 Mo. 143, 225 S.W. 985 (1920). For more recent statements of the type of injury sufficient to give a person standing, see, e.g., *State ex rel. Pruitt-Igoe Dist. Community Corp. v. Burks*, 482 S.W.2d 75 (Mo. App., D. St. L. 1972); *Stickelber v. Bd. of Zoning Adjustment*, 442 S.W.2d 134 (K.C. Mo. App. 1969); *Hernreich v. Quinn*, 350 Mo. 770, 168 S.W.2d 1054 (En Banc 1943).

Similar requirements are found in the federal system. The United States Supreme Court has approved recent developments broadening the categories of injuries which may support standing in federal courts. *Ass'n of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). Nevertheless, the plaintiff must show some concrete injury in fact, *Sierra Club v. Morton*, 405 U.S. 727 (1972), and it must be of a nature that affects more than the general interest of all citizens. *United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974). This view has been subjected to strong criticism. See, e.g., the dissenting opinions of Mr. Justice Douglas in the last two cases and in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), where he said, in writing for the Court:

[S]tanding is not to be denied simply because many people suffer the same injury. . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.

*Id.* at 687-88.

32. 308 S.W.2d at 756.

33. 357 S.W.2d at 922. This has been the typical use of the private right-public right distinction in Missouri courts—*i.e.*, to deny standing to private individuals because their

Because *Lalumondier* involved a public body and not an individual, the logic of *May Dept. Stores* and *In re Roadway* did not compel the result in *Lalumondier*.

Although the "private rights" language is derived from the constitution, the limitation is clearly not constitutional. The *Lalumondier* court itself suggested that the problem could be resolved by appropriate legislation.<sup>34</sup> Further, if the defect were constitutional, the reasoning of *Lalumondier* would apply with equal force to the review of contested cases and require the overruling of *St. Joseph Lead*.

It is submitted that *St. Joseph Lead* was properly decided and that the test for determining whether a political subdivision has standing to seek review of non-contested cases should be the same as for contested cases. Both statutes are based on the same constitutional provision and neither makes a distinction between public or private rights. As long as the constitution or a specific statute does not prohibit such review, it should be available where an "appropriate" political subdivision can show a sufficiently direct adverse effect on its interests in fact.<sup>35</sup> Denial of such standing can result in a

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private rights are not affected. For example, in *Smith v. Hendricks*, 136 S.W.2d 449 (Spr. Mo. App. 1939), some individual taxpayers sued to recover money from a school board member who had been illegally hired as a school district employee. The court said that the taxpayers did not have standing to bring the action because the legal interest involved was in the nature of a public rather than a private right, which must be enforced by the school board or by public officers.

34. 518 S.W.2d at 643.

35. *In re St. Joseph Lead Co.*, 352 S.W.2d 656, 659-61. Missouri courts have allowed standing to political subdivisions even where there was no express statutory provision for it in similar situations where the entity could show actual injury. See, e.g., *Village of Grandview v. McElroy*, 222 Mo. App. 787, 9 S.W.2d 892 (K.C. Mo. App. 1928), where a village was allowed to seek a writ of certiorari to review the action of the county court in excluding land from its corporate limits. The village's "dismemberment" was enough to give it standing. In *In re Tarkio-Squaw Levee Dist. of Holt County*, 319 S.W.2d 660 (Mo. En Banc 1959), the court allowed standing to a levee district to seek a writ of certiorari reviewing a decision ordering it out of existence. The court said:

[I]t would seem that a party who has been condemned to be beheaded at the guillotine is the most interested party in the case. It is difficult to reason that the Levee District in question was not aggrieved by the judgment which ended its existence [even though there was no statute expressly authorizing review].

*Id.* at 664. This is essentially the position of K.C. Davis in 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.18 (1958).

Some courts have said that a governmental unit cannot be injured by a lessening of its tax base through underassessments either because it is not a taxpayer, *Central School Dist. No. 1 v. Parsons*, 61 Misc. 2d 838, 306 N.Y.S.2d 833 (1969), or because it did in fact raise the needed revenue, *Central School Dist. No. 1 v. Rochester Gas & Electric Corp.*, 61 Misc. 2d 846, 306 N.Y.S.2d 765 (1970). However, this type of injury is sufficient to confer standing in Missouri in a contested case. *In re St. Joseph Lead Co.*, 352 S.W.2d 656 (Mo. 1962).

situation, such as the one in *Lalumondier*, where there is *nobody* who can go to court to protect the public interest.<sup>36</sup>

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36. In discussing a similar problem involved in *State ex rel. Rouveyrol v. Donnelly*, 365 Mo. 686, 285 S.W.2d 669 (En Banc 1956), where both the state commissioner of finance and a competitor bank were denied standing to seek review of a decision of the state board of bank appeals granting an application for a new bank, one commentator said:

The difficulty with the court's approach is that it, in effect, places the administrative decision favorable to an applicant in a conclusive position. If neither the commissioner nor a competitor has standing, who *can* have such [a] decision reviewed in the courts?

9 AD. LAW BULL. 138 (1959). Professor Jaffe is also "inclined to doubt the wisdom of a *general rule* that an officer or an authority cannot qualify as a relator under prerogative writ procedure or as "a person or party aggrieved" under statutes using that formula." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 538 (1965).



## CONSTITUTIONAL PROBLEMS IN ENHANCED SENTENCING FOR "DANGEROUS SPECIAL OFFENDERS"

*United States v. Duardi*<sup>1</sup>

James S. Duardi and five co-defendants were convicted of conspiring to establish through bribery<sup>2</sup> a gambling and prostitution business and of using interstate facilities to promote bribery.<sup>3</sup> The trial by jury was held before Judge John W. Oliver in the United States District Court for the Western District of Missouri, and the convictions were affirmed on appeal.<sup>4</sup> The Government had filed a pretrial, *in camera* notice of its intention to seek application of sections 3575-3578 of Title 18, regarding the imposition of enhanced sentences for "dangerous special offenders."<sup>5</sup> Judge Oliver granted defendants' motion to dismiss the notice and denied the Government's motion for leave to file an amended notice on the grounds that: (1) the Government failed to comply with the statutory procedural requirements, and (2) the enhanced sentencing statute was unconstitutional as sought to be applied.

"Habitual criminal laws" and "recidivist statutes" arose in England in the late 1800's.<sup>6</sup> Most states have some such legislation in effect today.<sup>7</sup> Historically, these statutes have been held constitutional, surviving attacks based on the due process,<sup>8</sup> equal protection,<sup>9</sup> fourteenth amendment privileges and immunities,<sup>10</sup> double jeopardy,<sup>11</sup> *ex post facto*,<sup>12</sup> and cruel and unusual punishment clauses<sup>13</sup> of the Constitution. There is a crucial difference, however,

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1. The court's disposition of the issues covered in this casenote appears in four separate entries (memoranda and orders) in the reporter. 384 F. Supp. 856 (W.D. Mo. 1973); 384 F. (Supp. 86 (W.D. Mo. 1973); 384 F. Supp. 871 (W.D. Mo. 1974); 384 F. Supp. 874 (W.D. Mo. 1974).

2. Violation of 18 U.S.C. § 371 (1970).

3. Violation of 18 U.S.C. § 1952 (1970).

4. 492 F.2d 1361 (8th Cir. 1974). The appeal did not concern the issues discussed in this note.

5. 384 F. Supp. at 860.

6. Following the Gladstone Committee report, House of Commons, REPORT OF THE COMMITTEE ON PRISONS (1895).

7. See, e.g., IOWA CODE ANN. § 747.5 (1950); KAN. STAT. ANN. § 21-4504 (1971); § 556.280, RSMo 1975 Supp.; NEB. REV. STAT. § 29-2221 (1965).

8. *Spencer v. Texas*, 385 U.S. 554 (1967); *Oyler v. Boles*, 368 U.S. 448 (1962).

9. *Oyler v. Boles*, 368 U.S. 448 (1962); *Graham v. West Virginia*, 224 U.S. 616 (1912).

10. *Graham v. West Virginia*, 224 U.S. 616 (1912); *McDonald v. Massachusetts*, 180 U.S. 311 (1901).

11. *Gryger v. Burke*, 334 U.S. 728 (1948); *Carlesi v. New York*, 233 U.S. 51 (1914).

12. *Carlesi v. New York*, 233 U.S. 51 (1914); *McDonald v. Massachusetts*, 180 U.S. 311 (1901).

13. *Graham v. West Virginia*, 224 U.S. 616 (1912); *McDonald v. Massachusetts*, 180

between a traditional habitual criminal-recidivist law and the "dangerous special offender" statute at issue in *Duardi*. The former deals with extended sentences based on the fact(s) of prior convictions, but the latter goes beyond that consideration<sup>14</sup> by allowing enhanced sentencing for undesirable behavior which may not have been the subject of either a criminal trial or conviction.<sup>15</sup> This larger scope, not considered in the constitutional challenges noted above, led the court in *Duardi* to find the newer statute unconstitutional on several grounds.

This enhanced sentencing statute was enacted as Title X of the Organized Crime Control Act of 1970.<sup>16</sup> Although the Act was specifically aimed at the eradication of organized crime,<sup>17</sup> the sentencing provisions are seemingly applicable to any felony offender tried in a federal court.<sup>18</sup> The statute directs that the court "shall sentence" a convicted felon to imprisonment for an appropriate term not to exceed twenty-five years if it finds by a "preponderance of the information" that the defendant is "dangerous" and is a "special offender."<sup>19</sup> A defendant is deemed dangerous if "a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant."<sup>20</sup> A defendant may be a special offender by meeting the statutory definitions of a recidivist,<sup>21</sup> professional criminal,<sup>22</sup> or organized crime offender.<sup>23</sup> The third type, relied upon by the Govern-

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U.S. 311 (1901).

14. 18 U.S.C. § 3575(e)(1) (1970).

15. 18 U.S.C. § 3575(e)(2)-(3), (f) (1970).

16. Act of Oct. 15, 1970, Pub. L. No. 91-452, 84 Stat. 922.

17. SENATE COMM. ON THE JUDICIARY, REPORT ON THE ORGANIZED CRIME CONTROL ACT OF 1970, S. REP. No. 617, 91st Cong., 1st Sess. 32 (1969).

18. See, e.g., *United States v. Gorden*, 495 F.2d 308 (7th Cir. 1974).

19. 18 U.S.C. § 3575(b) (1970). The requirement that both the "dangerousness" and "special offender" elements must be proven was one factor leading the *Duardi* court to hold that the Government had failed to comply with the statute's procedural requirements. 384 F. Supp. at 864-65.

20. 18 U.S.C. § 3575(f) (1970).

21. 18 U.S.C. § 3575(e)(1) (1970). This subsection is the traditional approach, being based on prior convictions. SENATE COMM. ON THE JUDICIARY, REPORT ON THE ORGANIZED CRIME CONTROL ACT OF 1970, S. REP. No. 617, 91st Cong., 1st Sess. 87-89 (1969).

22. 18 U.S.C. § 3575(e)(2) (1970) provides:

A defendant is a special offender for purposes of this subsection if . . . the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise . . .

23. 18 U.S.C. § 3575(e)(3) (1970).

ment in *Duardi*, requires the following criteria to be met:

[S]uch felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.<sup>24</sup>

The statute also sets out certain procedural rules: a hearing by the court sitting without a jury, notice of the hearing, the Government's and defendant's rights to inspect the presentence report, the parties' rights to assistance of counsel, process to compel the attendance of witnesses, and cross-examination of such witnesses as appear at the hearing. The "preponderance of the information" standard, transferred without definition from civil law, is to be used for determining whether the defendant is a "dangerous special offender."<sup>25</sup> Furthermore, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."<sup>26</sup> Both the Government and the defendant have a right to appellate review of the sentencing court's decision.<sup>27</sup> These rules seem to accord with, and even go somewhat beyond, current constitutional standards for the traditional sentencing function. The *Duardi* court's task was to pass upon the constitutional sufficiency of such rules for making the "dangerous" and "special offender" determinations in the enhanced sentence proceeding.

Since the constitutionality of these sentencing provisions was essentially a matter of first impression, much consideration was given to the extensive legislative history of the statute.<sup>28</sup> The two other reported decisions<sup>29</sup> on this enhanced sentencing statute have

24. *Id.*

25. The major procedural rules are contained in 18 U.S.C. § 3575(b) (1970).

26. 18 U.S.C. § 3577 (1970).

27. 18 U.S.C. § 3576 (1970).

28. Judge Oliver relied on SENATE COMM. ON THE JUDICIARY, REPORT ON THE ORGANIZED CRIME CONTROL ACT OF 1970, S. REP. NO. 617, 91st Cong., 1st Sess. (1969), and HOUSE COMM. ON THE JUDICIARY, REPORT ON THE ORGANIZED CRIME CONTROL ACT OF 1970, H.R. REP. NO. 1549, 91st Cong., 2d Sess. (1970). See also *Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969); *Hearings on Organized Crime Control Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

29. One reason for the small amount of judicial review of this enhanced special offender

found against its application, but solely on the ground of noncompliance with statutory procedure rather than constitutional inadequacies.<sup>30</sup> The other federal statutory experiment in the enhanced sentencing of dangerous special offenders, the Comprehensive Drug Abuse Prevention and Control Act of 1970,<sup>31</sup> has also not been subjected to constitutional review. The relevant provisions of that Act were taken almost verbatim from those at issue in *Duardi*, but so far have been refused application solely on the basis of failure to follow the statute's procedural prerequisites.<sup>32</sup>

The judiciary's reluctance to reach the constitutional issues is not surprising. Implementing basic procedural and evidentiary requirements at the sentencing stage might convert sentencing into another trial, a step that overburdened courts are most hesitant to take.<sup>33</sup> The sentencing segment of the criminal justice process has consequently not been the subject of such stringent constitutional restrictions as have been the areas of police work,<sup>34</sup> juvenile proceedings,<sup>35</sup> all trial activities,<sup>36</sup> correctional programs,<sup>37</sup> and probation<sup>38</sup>

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statute is that the statute's provisions were not invoked for more than two years after the statute was enacted and that the invocation of the statute was not pursued to conclusion in a case for more than four years. One possible reason is the Justice Department's own recognition of the sentencing provisions' questionable constitutionality. See Attorney General Mitchell's comments, *Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures*, *supra* note 28, at 365, 375-77. See also United States Department of Justice, Memo. No. 769 (1972), requiring clearance from the Department before any "dangerous special offender" proceeding can be initiated.

30. In *United States v. Edwards*, 379 F. Supp. 617 (M.D. Fla. 1974), the Government's motion to increase the sentence was dismissed as "untimely filed." *Id.* at 621. *United States v. Kelly*, 384 F. Supp. 1394 (W.D. Mo. 1974), was decided by another judge in the District Court for the Western District of Missouri on the day after the final decision in *Duardi*, the defendant there having specifically asked the court to find "that the notice does not give sufficient notice of the allegations . . . [and] that a number of the procedural steps outlined in Section 3575 for the hearing contemplated by that statute are violative of the Due Process clause of the fifth amendment." *Id.* at 1397. The court, however, made no such findings. *Id.* at 1400.

31. 21 U.S.C. § 849 (1970).

32. *United States v. Noland*, 495 F.2d 529 (5th Cir. 1974); *United States v. Tramunti*, 377 F. Supp. 6 (S.D.N.Y. 1974).

33. See *Williams v. New York*, 337 U.S. 241, 251 (1949); Bethune, *Criminal Procedure, Probable Cause and Due Process at Sentencing*, 50 N.C.L. REV. 925, 928 (1972).

34. See, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1970); *Miranda v. Arizona*, 384 U.S. 436 (1966).

35. See, e.g., *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541, 556 (1966).

36. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

37. See, e.g., *Wolff v. McDonnell*, \_\_\_ U.S. \_\_\_, 94 S. Ct. 2963; *Procunier v. Martinez*, \_\_\_ U.S. \_\_\_, 94 S. Ct. 1800 (1974).

38. See, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

and parole hearings.<sup>39</sup> A primary reason for this situation may well be the judiciary's belief that sentencing, the one area completely subject to their discretion, is sufficiently protected from constitutional abuses simply by their own administration thereof. In the most often cited Supreme Court opinion on sentencing (and the one basically relied upon as justifying the enhanced sentencing procedures at issue in *Duardi*), *Williams v. New York*,<sup>40</sup> Justice Black denied the presence of such due process requirements as the right of confrontation at sentencing and affirmed the absence of restrictions upon the sources and kinds of evidence that may be considered at sentencing.<sup>41</sup> This previous insulation of the general sentencing process from the constitutional restrictions imposed on other criminal justice activities indicates the significance of the *Duardi* opinion.<sup>42</sup>

Judge Oliver did find noncompliance with statutory requirements as a basis for his decision against the enhanced sentencing provisions,<sup>43</sup> but he nevertheless proceeded to enumerate a series of "separate and independent [constitutional] reasons" for his holding.<sup>44</sup> His most serious concerns were the sort of information being offered as a basis for the dangerousness determination<sup>45</sup> and the statute's prescriptions for handling such information. The Government's declared intention was to have the court base a finding of dangerousness on "the testimony of F.B.I. and Bureau of Narcotics Agents as to what faceless informants told them about alleged contacts with particular defendants" and "certain alleged criminal conduct of the defendants" concerning which "none of the defendants in this case have been tried or convicted."<sup>46</sup> The court's decision was unequivocal and in non-dictum terminology:

[W]e find and conclude, as a separate and independent alter-

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39. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471 (1972).

40. 330 U.S. 241 (1949).

41. *Id.* at 250-51. The major case extending constitutional rights to the sentencing process, *Mempa v. Rhay*, 389 U.S. 128 (1967), was limited to the right to counsel.

42. See Frankel, *Lawlessness in Sentencing*, 41 U. Cn. L. Rev. 1, 54 (1972).

43. Failure to file a proper notice, setting out with particularity the reasons defendant is believed to be a dangerous special offender, in accordance with 18 U.S.C. § 3575(a) (1970), and the unallowable attempt to amend the notice pursuant to § 3575(a) after trial and conviction. 384 F. Supp. at 865, 879.

44. *Id.* at 880.

45. The decision specifically addresses the dangerousness determination, but is equally applicable to the use of the same type of information in the same sort of procedural setting for the "special offender" determination under 18 U.S.C. § 3575(e)(2)-(3) (1970).

46. 384 F. Supp. at 881.

nate ground, that it would be constitutionally impermissible for this Court, sitting without a jury, to make a finding of 'dangerousness' under [section] 3575(f) based upon 'information' that defendants may, if charged and tried, be found guilty of the crimes alleged in the government's amended notice.<sup>47</sup>

The constitutional impermissibility was asserted to be the possibility of imposing punishment, through a finding of dangerousness, for allegedly criminal activities (1) in violation of the sixth amendment right to a speedy, public trial by an impartial jury,<sup>48</sup> (2) without the fundamental due process protection of the reasonable doubt standard,<sup>49</sup> (3) in derogation of a due process right not to be tried on the basis of information unrestricted by the rules of evidence,<sup>50</sup> and (4) pursuant to a standard established by section 3575(f) which is so unduly vague and uncertain that it violates due process.<sup>51</sup>

These four findings involve rights which have long been accorded the criminal defendant at trial, but not at sentencing. They are the four important trial rights which were not included in the enhanced sentencing statute's procedural provisions.<sup>52</sup> Inclusion of these rights would effectively make the enhanced sentence proceeding a "second trial." Despite the absence of cited authority for *Duardi's* expansive interpretation of the Constitution, it was not entirely without precedent. The Supreme Court, in *Williams v. New York*,<sup>53</sup> although refusing to extend certain traditional due process safeguards to sentencing, did indicate by footnote that the decision was to be read narrowly: "What we have said is not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due process clause."<sup>54</sup> The Supreme Court in *Burgett v. Texas*<sup>55</sup> stated that "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright*<sup>56</sup> [the constitutional right to counsel] to be used against a person . . . to . . . enhance punishment for another offense . . . is to erode the principle of that case."<sup>57</sup> *Duardi* stands for a judicial refusal to permit the use of "information" about

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47. *Id.* at 883.

48. *Id.*

49. *Id.* at 882.

50. *Id.* at 883.

51. *Id.* at 885.

52. See text accompanying notes 25-27 *supra*.

53. 337 U.S. 241 (1949).

54. *Id.* at 252 n.18.

55. 389 U.S. 109 (1967).

56. 372 U.S. 335 (1963).

57. 389 U.S. at 115 (1967).

behavior which has never been the subject of a trial or conviction to enhance punishment for another offense through a process devoid of certain constitutional rights.

In requiring the four additional constitutional safeguards, it was necessary for the court to assume that a finding of dangerousness based upon "new and separate criminal charges" authorizes enhanced punishment under the statute.<sup>58</sup> In view of the "information" tendered by the Government<sup>59</sup> and the statute's plain meaning in regard to "special offender" determinations,<sup>60</sup> it is relatively certain that new and separate charges were involved in *Duardi*. With respect to sentencing upon such charges, the Supreme Court declared in *Specht v. Patterson*<sup>61</sup> that:

It is a separate criminal proceeding . . . [at which] the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees . . . He must be afforded all those safeguards which are fundamental rights and essential to a fair trial. . . .<sup>62</sup>

The safeguards actually provided by the statute here in question<sup>63</sup> fall well short of a full panoply of the due process rights essential to a fair trial. The sponsor of the Organized Crime Control Act of 1970, Senator John L. McClellan, admitted as much in testimony before a House subcommittee, when he declared that "special offender sentencing is a 'half-way-house' between trial and sentencing, and . . . [that] title X [the provisions at issue in *Duardi*] provides half-way procedures. . . ."<sup>64</sup> *Specht*, and now *Duardi*, prohibit any half-way application of constitutional rights when new and separate criminal charges are considered at sentencing. They demand that the full panoply of due process rights in a criminal trial be given a criminal defendant in such a sentencing procedure. These rights have consistently been held to include: (1) trial by jury,<sup>65</sup> as

58. 384 F. Supp. at 883.

59. See text accompanying note 46 *supra*.

60. Specifically, the "professional criminal" and "organized crime offender" determinations. 18 U.S.C. § 3575(e)(2)-(3) (1970).

61. 386 U.S. 605 (1967). The case concerned the Sex Offenders Act of Colorado. COLO. REV. STAT. ANN. §§ 39-19-1 to 10 (1963).

62. 306 U.S. at 609-10, quoting with approval from *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 312 (3d Cir. 1966), and quoted in *Duardi*, 384 F. Supp. at 882.

63. See text accompanying notes 25-27 *supra*.

64. *Hearings on Organized Crime Before Subcomm. No. 5, supra* note 28, at 86.

65. See *Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Baldwin v. New York*, 399 U.S. 66 (1970).

opposed to the enhanced sentencing statute's "hearing . . . by the court sitting without a jury,"<sup>66</sup> (2) the reasonable doubt standard,<sup>67</sup> as opposed to the statute's "preponderance of the information,"<sup>68</sup> (3) a due process right to be tried in a proceeding which is restricted by the rules of evidence,<sup>69</sup> as opposed to the statute's unlimited use of information on the defendant's "background, character, and conduct;"<sup>70</sup> and (4) a reasonably certain statutory prohibition,<sup>71</sup> as opposed to the statute's broad, inexplicit definition of "dangerousness."<sup>72</sup>

Consideration of "new and separate charges" under the statute will often result in a defendant spending additional time in prison or under supervision. Whatever the common practice may actually be, legal scholars generally agree that presentence investigation reports may include such charges if the defendant has admitted to them.<sup>73</sup> In the absence of such admission, however, the charges should be subject to the sixth amendment right to jury trial and other constitutional rights of the criminal defendant at trial. The sixth amendment grants its rights "[i]n all criminal prosecutions,"<sup>74</sup> and such would logically include situations where previous behavior is considered as a basis for additional punitive sanctions. The Supreme Court has recently commented on the constitutional unacceptability of transferring the consideration of such behavior

66. 18 U.S.C. § 3575(b) (1970).

67. See *In re Winship*, 397 U.S. 358 (1970); *Coffin v. United States*, 156 U.S. 432 (1895).

68. 18 U.S.C. § 3575(b) (1970).

69. See *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 310 (3d Cir. 1966); *United States v. Duardi*, 384 F. Supp. 874, 883 (W.D. Mo. 1974).

70. 18 U.S.C. § 3577 (1970). See text accompanying note 26 *supra*. This section on the absence of evidentiary limitations is being applied in all types of federal sentencing proceedings, not just those under the dangerous special offender statute. The section itself may thus be the subject of further constitutional review. See *United States v. Gorden*, 495 F.2d 308 (7th Cir. 1974), where 18 U.S.C. § 3577 (1970) was cited to support the use of defendant's "marital infidelity" as a "permissible consideration" in sentencing him for a trust fund tax fraud conviction. 495 F.2d at 310. See also *United States v. Allen*, 494 F.2d 1216 (3d Cir. 1974); *United States v. Dreer*, 457 F.2d 31 (3d Cir. 1972).

71. See *Papachristou v. Jacksonville*, 405 U.S. 156 (1972); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

72. 18 U.S.C. § 3575(f) (1970).

73. See, e.g., R. DAWSON, SENTENCING 20-21 (1969). Several cases have held that information used in sentencing must be accurate almost to the level of certainty. See, e.g., *Townsend v. Burke*, 334 U.S. 736 (1948). More recently, the National Advisory Commission of Criminal Justice Standards and Goals declared that a presentence report should include three types of information about the offender—"his background [education, employment, etc.], his prospects for reform, and details of the crime for which he has been convicted." NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 184 (1973).

74. U.S. CONST. amend. VI.



from the trial to the sentencing hearing. The Court stated in *Mullaney v. Wilbur*<sup>75</sup> that it would be undermining fundamental constitutional rights "to redefine the elements that comprise different crimes, characterizing them as factors that bear solely on the extent of punishment."<sup>76</sup> *Duardi* addresses the analogous undermining of constitutional rights involved in designating as sentencing factors some elements which should comprise a separate crime and therefore be subject to jury trial and corresponding rights. The refusal to apply such basic constitutional principles in the past is what has made sentencing "a wasteland in the law."<sup>77</sup>

It is important to note that *Duardi* did not consider all the possible constitutional attacks that can be made upon the dangerous special offender enhanced sentencing statute as now written. For instance, the sentence imposed under a special offender statute may be so disproportionate to the underlying offense that it constitutes a violation of the eighth amendment ban on cruel and unusual punishment.<sup>78</sup> Consideration by a sentencing judge of other allegedly criminal activities may be objectionable on the ground that the defendant is entitled to a presumption of innocence and that any consideration of those activities could prejudice his defense to later prosecution.<sup>79</sup> The double jeopardy objection may be raised because such activities may result in additional punishment at a later trial.<sup>80</sup> It is further possible that the statutory presumptions involved, such as dangerousness, cannot be sustained due to the lack of a rational connection existing between the information submitted and those presumptions.<sup>81</sup> Indeed, there is considerable debate over whether dangerousness can ever be detected or predicted.<sup>82</sup> The unconstitutionality of punishing "status" rather than criminal conduct may be another possible objection.<sup>83</sup>

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75. 95 S. Ct. 1881 (1975).

76. *Id.* at 1889.

77. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 54 (1972).

78. See *Hart v. Coiner*, 483 F.2d 136, 138 (4th Cir. 1973), *cert. denied*, 94 S. Ct. 1454 (1974). Although *Hart* involved sentencing under a recidivist statute, the reasoning would apply with equal force to a special offender statute.

79. See *United States v. Haygood*, 502 F.2d 166, 171 n.15 (7th Cir. 1974).

80. See *Benton v. Maryland*, 395 U.S. 784 (1969); *North Carolina v. Pearce*, 395 U.S. 711 (1969).

81. See *Tot v. United States*, 319 U.S. 463 (1943). Judge Oliver specifically noted that this question was not reached in *Duardi*. 384 F. Supp. at 881 n.3.

82. See von Hirsh, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717 (1972); Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968).

83. See *Robinson v. California*, 370 U.S. 660 (1962).

The *Duardi* decision may also raise questions about the constitutionality of the normal sentencing function itself. The statute in *Duardi* is specifically attacked for allowing judges to consider "new and separate charges" in sentencing the defendant to a term which is longer than the legislatively authorized maximum for the crime committed. Even in the absence of such a statute, however, decisions to impose lengthy sentences are often influenced by the judge's opinion of the defendant's general character,<sup>84</sup> since judges usually have the discretion to select a term from within a broad sentencing range.<sup>85</sup> That opinion has been shown to be influenced by various prior activities of the defendant.<sup>86</sup> To whatever extent those activities may include "new and separate charges," *Duardi* may be the basis for future constitutional attacks upon the entire sentencing process—regardless of any enhanced punishment features. Sentencing has been deemed to be a "critical" part of the criminal proceeding as regards the sixth amendment right to counsel.<sup>87</sup> *Duardi's* explication of how other substantial rights of a defendant are affected at sentencing could be persuasive in future considerations of whether to provide such rights in the sentencing proceeding.

*Duardi's* implications for the future of enhanced sentencing provisions are clear. Any consideration of "new and separate charges" in the sentencing proceeding will demand all of the procedural safeguards already present in the enhanced sentencing statute at issue,<sup>88</sup> plus the constitutional rights to trial by jury, a reasonable doubt standard, traditional rules of evidence for the finding of guilt, and a reasonably certain statutory definition of the prohibition-sanction. *Duardi* would presumably permit the consideration of prior convictions at sentencing with something less than this "full panoply" of due process rights. Despite a general lack of precedent, the idea of a trial-like sentencing proceeding with heavy Government burdens and corresponding defendant's rights has not been totally ignored by previous cases,<sup>89</sup> prior statutes,<sup>90</sup> and the com-

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84. W. GAYLIN, *PARTIAL JUSTICE* 28-43 (1974).

85. R. DAWSON, *SENTENCING* 173-75 (1969).

86. FEDERAL JUDICIAL CENTER, *THE SECOND CIRCUIT SENTENCING STUDY* 52-53 (1974).

87. See *Mempa v. Rhay*, 389 U.S. 128 (1967).

88. See text accompanying notes 25-27 *supra*.

89. One interpretation of *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972), is that an increased sentence should not be imposed on the basis of criminal activity which was neither alleged nor proven at the trial of the crime for which the defendant was convicted. See Beals, *Criminal Law—Presentence Reports—Allegations of Prior Criminal Activity*, 33 OHIO Sr. L.J. 960, 962 (1972).

90. The procedure for enhancement of narcotics and marijuana convictions prior to the

mentators.<sup>91</sup>

*Duardi's* extension of procedural and evidentiary safeguards to the enhanced sentencing situation assures the convicted defendant that his constitutional rights will be protected there as they have been in all prior phases of the criminal justice process. In specifying the constitutional parameters of enhanced sentencing statutes, the opinion joins many recent cases<sup>92</sup> which have recognized the rights of criminal defendants. The *Duardi* decision may also be significant in reversing a recent trend in penological thinking and in rendering guidance to legislators drafting revised criminal laws and comprehensive codes. Since 1963, five prestigious studies have recommended precisely the type of enhanced sentencing provisions and procedures at issue in *Duardi*.<sup>93</sup> The Congress,<sup>94</sup> as well as state

Comprehensive Drug Abuse Prevention and Control Act of 1970 was contained in 26 U.S.C. § 7237(c)(2) (1964). It required a prior conviction, gave the offender the opportunity to affirm or deny his identity as the prior offender, and (if he denied it) postponed sentence until a trial by jury could be had on the issue of identity. See *United States v. Noland*, 495 F.2d 529, 530 (5th Cir. 1974), *cert. denied*, 419 U.S. 966 (1974).

91. Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORN. L. REV. 51 (1972).

92. See cases cited notes 34-39 *supra*.

93. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT §§ 5, 10 (1972 Revision); NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, FINAL REPORT § 3202 (1971); A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, §§ 3.3, 5.1-5.8 (1967) (requiring a finding of two prior felony convictions plus dangerousness); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 203 (1967); AMERICAN LAW INSTITUTE, MODEL PENAL CODE, §§ 6.07, 6.09, 7.03, 7.04 (1963).

94. Senator McClellan and ten of his colleagues introduced the "Criminal Justice Reform Act of 1975" on January 15, 1975, at which time it was referred to the Committee on the Judiciary. S. 1, 94th Cong., 1st Sess. (1975). This is an amended version of S.1, 93d Cong., 1st Sess. (1973), which was studied by the Senate Committee on the Judiciary but never reported out. The Act would codify, revise, and reform existing federal criminal laws into the first criminal code in the history of the federal government. The committee print for the bill states the following: "Of particular note is the retention and codification of provisions that permit an extended term of imprisonment for 'dangerous special offenders.'" Staff of Subcomm. on Criminal Laws and Procedures, Senate Judiciary Comm., 94th Cong., 1st Sess., Comm. Print on a Federal Criminal Code 14 (Comm. Print 1975). Those provisions contained in the Act also provide for a court hearing rather than a jury trial, S. 1, 94th Cong., 1st Sess. § 2302(b) (1975), and establish no evidentiary limitations. *Id.* at § 3715. The "preponderance of the information" standard has been deleted, but was not replaced by the "reasonable doubt standard." Indeed, the sentence may be enhanced if the court merely "finds" that the defendant is a dangerous special offender. *Id.* at § 2302(b). The vague definition of dangerousness has been eliminated, with the "dangerous special offender" determination now solely dependent upon meeting one of three sets of criteria. *Id.* at § 2302(b)(1)-(3). These are essentially identical to the three sets used for the "special offender" determination under the current statute. See notes 21 and 22 and accompanying text *supra*. Two of these sets once again allow

legislative bodies,<sup>95</sup> should now take careful note of the constitutional mandates contained in *Duardi* before they enact any such enhanced sentencing statutes.

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the sentencing court's consideration of undesirable alleged behavior which may have never been the subject of a criminal trial or conviction. *See* note 22 *supra*.

95. The Proposed Criminal Code for the State of Missouri contains a section on "Extended Term for Dangerous Offenders" (§ 3.020), but it avoids the fatal flaw of dealing with "new and separate (criminal) charges." Rather, it is keyed to the violence of the felony for which convicted, prior felony convictions, and a finding that the defendant is suffering from a severe mental or emotional disorder indicating a propensity toward continuing criminal activity of a dangerous nature. MISSOURI COMM. TO DRAFT A MODERN CRIMINAL CODE, THE PROPOSED CRIMINAL CODE FOR THE STATE OF MISSOURI, (PROPOSED FINAL DRAFT, 1973), §§ 3.020, .030 (the latter section covers "Extended Term Procedures" and requires substantial due process safeguards, but not the four protections demanded by *Duardi*). Thus, whatever constitutional challenges might be made to the Missouri provisions, they would not seem to be subject to constitutional attack based on *Duardi*. *But see* Anderson, *Sentencing Under the Proposed Missouri Criminal Code—The Need for Reform*, 38 MO. L. REV. 549 (1973), where it is suggested that the legislature should ask whether extended terms are needed at all in view of the Code's high upper limits for felony sentences. *Id.* at 557.

## LABOR LAW—NO DUTY TO RECOGNIZE UNION ON THE BASIS OF AUTHORIZATION CARDS

*Linden Lumber Division, Summer & Co. v. NLRB*<sup>1</sup>

Truck Drivers Union Local No. 413 obtained authorization cards<sup>2</sup> from a majority of the employees in an appropriate bargaining unit of Linden Lumber Division, Summer & Co. The union presented these cards to the employer, demanding recognition as the exclusive bargaining representative of this unit. Claiming that it doubted the union's majority status, the employer refused to recognize the union and suggested that the union petition the National Labor Relations Board (the Board) for an election. The union filed a petition which was withdrawn when Linden declined to enter a consent election agreement, stating that it would not consider itself bound by an election because the organizational campaign had been improperly assisted by company supervisors. The union then struck for recognition and filed an unfair labor practice charge, claiming that Linden's refusal to bargain with the union violated section 8(a)(5) of the National Labor Relations Act<sup>3</sup> (the Act). The Board held that the employer had not violated section 8(a)(5).<sup>4</sup> The court of appeals reversed, holding that Linden had violated section 8(a)(5).<sup>5</sup> In a 5-4 decision, the United States Supreme Court reversed the court of appeals and reinstated the Board's decision.

In reaching this decision, the Court was required to interpret two sections of the Act. Section 8(a)(5) provides that it is an unfair labor practice for an employer to refuse to bargain with the repre-

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1. 419 U.S. 301, 95 S. Ct. 429 (1974).

2. Authorization cards are statements signed by the employees authorizing a union to act as their bargaining agent. Unless the representative soliciting the card misleads the employee as to the purpose of the card, the Board will recognize as valid a card which clearly authorizes the union to represent an employee. This principle was enunciated in *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268 (1963), and was cited with approval by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 606-07 (1969). The *Gissel* Court warned, however, that the test should not be applied without a careful scrutiny of the events surrounding the solicitation of the cards, paying heed to both the wording of the card and the solicitor's representations, 395 U.S. at 607-08. See Platt, *The Supreme Court Looks At Bargaining Orders Based On Authorization Cards*, 4 GA. L. REV. 779 (1970); Scheinkman, *Recognition of Unions Through Authorization Cards*, 3 GA. L. REV. 319, 324-27 (1969). Authorization cards are not the usual device by which unions gain recognition. In the period between June 1962 and December 1967 there were only 365 bargaining orders issued on the basis of cards. In that same period, there were over 40,000 NLRB-supervised elections. See Gordon, *Union Authorization Cards and the Duty to Bargain*, 19 LAB. L.J. 201, 203 (1968).

3. 29 U.S.C. § 158(a)(5) (1970).

4. 190 N.L.R.B. 718, 721 (1971).

5. *Truck Driver's Union Local No. 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973).

sentatives chosen by his employees in accordance with section 9(a) of the Act.<sup>6</sup> Section 9(a) merely provides that the representatives are those parties designated or selected by a majority of the employees.<sup>7</sup> The problem is that neither of these two provisions indicates which majority selection methods must be recognized by an employer. The primary issue confronting the Court in *Linden* was whether an employer violates section 8(a)(5) by refusing to bargain with a union which has obtained authorization cards from a majority of his employees (hereinafter referred to as a card holding union). In addition, the Court faced the question whether an employer who has refused to bargain with a card holding union has the burden of petitioning the Board for an election to determine if the union has attained majority status. In resolving these issues, the Court held that an employer does not violate section 8(a)(5) by refusing to bargain with a card holding union, and that such an employer does not have the burden of petitioning the Board for an election.

In several decisions prior to *Linden*, the Board wrestled with section 8(a)(5) in an attempt to determine under what circumstances an employer was obliged to bargain with a union claiming to hold a card majority.<sup>8</sup> In *Joy Silk Mills, Inc.*<sup>9</sup> the Board held that an employer could in good faith decline to bargain with a card holding union. The test proposed by the Board in *Joy Silk* required a subjective examination of the employer's state of mind.<sup>10</sup> Subse-

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6. 29 U.S.C. § 158(a)(5) (1970) makes it an unfair labor practice for an employer "[T]o refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

7. 29 U.S.C. § 159(a) (1970) provides:

[R]epresentatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees. . . .

The Supreme Court has held that the Board may issue a bargaining order as provided for in 29 U.S.C. § 160(c) (1970) as a remedy for a refusal to bargain violation. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969).

8. *Arthur Derse Sr.*, 173 N.L.R.B. 214 (1968), *rev'd*, 185 N.L.R.B. 175 (1970), *rev'd*, 198 N.L.R.B. No. 123 (1972); *Louisburg Sportswear Co.*, 180 N.L.R.B. 739 (1970); *Converters Gravure Service Inc.*, 164 N.L.R.B. 397 (1967); *Sinclair Co.*, 164 N.L.R.B. 261 (1967); *General Steel Products Inc.*, 157 N.L.R.B. 636 (1966); *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263 (1949); *Frank Bros. Co.*, 44 N.L.R.B. 898 (1942). Prior to the 1947 Taft-Hartley amendments, the Board had issued bargaining orders on the basis of cards and also had issued certifications without more than a presentation of a majority of authorization cards. See *Beeson, Recognition Without Elections*, 70 *LAB. L. REV.* 89, 90 (1970). Since the passage of the Taft-Hartley amendments, certification could be obtained only through a Board-supervised election.

9. 85 N.L.R.B. 1263 (1949).

10. See *Beeson*, *supra* note 8, at 99-100; *Gordon, Union Authorization Cards and the*

quently, in *Aaron Brothers of California Co.*<sup>11</sup> the Board modified its position, holding that an employer could refuse to bargain with a card holding union so long as its refusal was not in bad faith. This modification removed the burden of proving good faith from the employer, and required the Board's General Counsel to prove the employer's bad faith. In determining whether an employer made a bad faith refusal, the Board no longer attempted to divine the employer's state of mind. Rather, the Board looked at the employer's behavior during the organizational process. Bad faith was deemed to be present when the employer committed unfair labor practices.<sup>12</sup>

When arguing *NLRB v. Gissel Packing Co.*<sup>13</sup> before the Supreme Court, the Board abandoned the rhetoric of the "bad faith test" and stated that it would find a section 8(a)(5) violation when the employer has committed independent unfair labor practices.<sup>14</sup> In *Gissel* the union had obtained authorization cards from a majority of the employees in an appropriate bargaining unit and demanded recognition on the basis of those cards. Additional unfair labor practices were committed during the organizational campaign when the employer threatened the workers with a loss of their jobs as well as reduced benefits and hours. Some employees were discharged on account of their union activities, while others were offered bonuses if they would use their influence to break up the union. The Court wholeheartedly accepted the Board's new standard, holding that an employer who refuses to recognize a card holding union violates section 8(a)(5) if he also commits unfair labor practices likely to destroy the union's majority and seriously impede the holding of a fair election.<sup>15</sup> Although espousing the superiority

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*Duty To Bargain*, 19 LAB. L.J. 201, 203 (1968) (where it is stated that of the 365 bargaining orders issued between 1962 and 1967, in only 8 had the employer refrained from committing unfair labor practices, giving rise to the inference that the Board considered an employer's commission of unfair labor practices as constituting what it labeled an employer's lack of "good faith").

11. 158 N.L.R.B. 1077 (1966).

12. Platt, *supra* note 2, at 792-93.

13. 395 U.S. 575 (1969).

14. *Id.* at 594.

15. *Id.* at 614. The Court distinguished between employer conduct which was "outrageous" and "pervasive" and employer conduct that was less serious but nonetheless undermined union strength and impeded the election process. *Id.* In the latter instance, a bargaining order may be issued if there is a showing that the union at one point had a majority. At least one court has held that, in the case of "outrageous" and "pervasive" employer conduct, a bargaining order may issue even absent a showing that the union ever had a majority. J.P. Stevens & Co., Gulistan Division v. NLRB, 441 F.2d 514, 519-21 (5th Cir. 1971), enforcing 183 N.L.R.B. No. 5 (1970). *But see* Platt, *The Supreme Court Looks at Bargaining Orders Based on Authorization Cards*, 4 GA. L. REV. 779, 795-97 (1970).

of elections as a method for determining majority status,<sup>16</sup> the Court reasoned that the preferences of employees as expressed on authorization cards are more likely to be representative of the employees' true sentiments in this situation, because the employer's unfair labor practices inhibit the employees from expressing their true preferences in an election.<sup>17</sup> The Court preferred the new objective test, stating that it could be administered more uniformly than the *Joy Silk* subjective motivation test.<sup>18</sup> The *Gissel* Court, however, expressly reserved determination of the question presented in *Linden*—i.e., whether an employer who does not commit unfair labor practices violates section 8(a)(5) by refusing to bargain with a card holding union.<sup>19</sup>

The *Linden* Court held that, absent the commission of unfair labor practices, an employer does not violate section 8(a)(5) by refusing to bargain with a card holding union.<sup>20</sup> The Court expressly rejected the approach of the court of appeals, which had concluded

16. 395 U.S. at 603. See Affeldt, *Bargaining Orders Without an Election: The National Labor Relations Board's "Final Solution"*, 57 KY. L.J. 151 (1969); Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851 (1967); Comment, *Refusal-To-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387 (1966); Comment, *Union Authorization Cards: A Reliable Basis for an N.L.R.B. Order to Bargain?*, 47 TEX. L. REV. 87 (1968); Comment, *Union Authorization Cards*, 75 YALE L.J. 805 (1966) (an attack on the use of authorization cards).

17. The Court stated:

If the Board finds that the possibility of erasing the effects of past practices and ensuring a fair election . . . is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. . . .

395 U.S. at 614-15. See Christensen & Christensen, *Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recognition of Unions Under the NLRA*, 37 U. CHI. L. REV. 411, 423-24 (1970).

18. 395 U.S. at 594.

19. The Court in *Gissel* stated:

[W]e are not here faced with a situation where an employer, with "good" or "bad" subjective motivation, has rejected a card-based bargaining request without good reason and has insisted that the Union go to an election while at the same time refraining from committing unfair labor practices that would tend to disturb the "laboratory conditions" of that election.

*Id.* at 601 n.18.

20. 95 S. Ct. at 434 n.9. The Court reserved the question of whether an employer commits an unfair labor practice when he reneges on an agreement to determine majority in a specified manner. In *Snow & Sons*, 134 N.L.R.B. 709 (1961), the Board held that the employer committed a section 8(a)(5) violation when it refused to recognize a union on the basis of cards after it had agreed to a card check by a third party, and the third party had determined that the union had attained majority status. The Board has narrowly construed *Snow & Sons*, limiting it to its facts. See Welles, *The Obligation To Bargain On The Basis of a Card Majority*, 3 GA. L. REV. 349, 350 (1969).



that if an employer doubted the union's majority status as evidenced by authorization cards, it must petition the Board for an election in order to avoid committing a section 8(a)(5) violation.<sup>21</sup> Under that approach, the employer would be faced with the choice of either recognizing the union on the basis of the cards, or filing a petition for a Board-supervised election. Under the approach taken by the Supreme Court, the employer has no duty to bargain with a card holding union. Rather, the employer has a duty to bargain under section 8(a)(5) only when the union has won a Board-supervised election.

The result reached in *Linden* seems unwarranted in view of the legislative history of the National Labor Relations Act, which indicates that elections were rejected as the sole device for determining a union's majority status.<sup>22</sup> Also, *Gissel* and other Supreme Court decisions have suggested that an employer may have a duty to bargain when presented with convincing evidence of majority support.<sup>23</sup> Furthermore, the Act itself does not compel the interpretation given it in *Linden*. Where a union presents convincing evidence of majority status it has fulfilled the requirement of section 9(a), because that section merely requires that the representatives be those chosen by a majority of the employees.<sup>24</sup> No section of the Act requires a union to seek an election in all instances.

The requirement of a Board-supervised election is particularly unnecessary in the *Linden* situation. There, the union held authorization cards from over fifty percent of the employees and the em-

21. *Truck Drivers Union Local No. 413 v. NLRB*, 487 F.2d 1099, 1111 (D.C. Cir. 1973).

22. S. REP. NO. 105, 80th Cong., 1st Sess. 10-11 (1947). See Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285 (1960).

23. The Court in *Gissel* stated:

Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practices provision of § 8(a)(5)—by showing convincing support, for instance, by a union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.

395 U.S. at 596-97. In *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956), where the union had obtained authorization cards from a majority of the employees, the Court stated:

[I]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated § 8(a)(5) of the Act.

*Id.* at 69. See also *Brooks v. NLRB*, 348 U.S. 96, 101 (1954); *Frank Bros. Co. v. NLRB*, 321 U.S. 702 (1944).

24. See statute quoted note 7 *supra*.

ployees struck for recognition for more than three months. That should have been sufficient indication of majority support to force an employer to bargain or, at the very least, to force the employer to seek a Board-supervised election.

One of the grounds for rejecting the use of cards in *Linden* is that they require the Board to administer a subjective test—*i.e.*, whether the employer refused to bargain in “good faith.”<sup>25</sup> The Court deemed an objective test much more desirable. This line of reasoning ignores the fact that the Act proposes no such distinction. Furthermore, cards may be used to determine majority status without using a subjective test. The cards themselves may be objective evidence of majority status, as the dissent in *Linden* pointed out.<sup>26</sup> Additional factors, such as strikes or extensive picketing, may be further indicia of majority support. The Board need not determine whether the employer in “good faith” doubted the union’s majority status, but rather should look at the evidence to see if the employer has refused to bargain with a majority status union. The issue in these cases is whether the union has demonstrated to the employer that it has the support of a majority of the workers;<sup>27</sup> authorization cards, as well as elections, can resolve this issue without requiring the Board to make subjective inquiries into the employer’s state of mind.

Having decided that cards do not create a bargaining obligation, the Court faced the question whether the employer has the burden of petitioning the Board for an election.<sup>28</sup> Under section 9(c)(1)(B) of the Act, either an employer or a union may petition the Board for an election.<sup>29</sup> However, no provision of the Act puts

25. 95 S. Ct. at 432.

26. *Id.* at 436 (dissenting opinion).

27. See statute quoted note 7 *supra*.

28. Requiring an employer to petition for an election is thought to give the union a strategic advantage, namely, a speedier election. It has been suggested that an employer-filed petition would normally result in a shorter waiting period between the filing and the holding of an election than would a union-filed petition. This belief is based on the premise that a union would not file objections to an employer petition in order to achieve a speedy election, while an employer would file numerous objections to a union petition in order to delay the holding of an election. An objection can substantially delay the holding of an election. A prompt election is considered to be to the union’s advantage because a union’s support may dissipate with the passage of time. See Comment, *Employer Recognition of Unions on the Basis of Authorization Cards: The “Independent Knowledge” Standard*, 39 U. CHI. L. REV. 314, 325 nn. 48, 326 (1972). An employer’s petition, of course, may not be acceptable to the union, in which case the union will be obliged to object. For a good discussion of this topic, see Christensen & Christensen, *supra* note 17, at 421-25.

29. 29 U.S.C. § 159(c)(1) (1970).

the employer under an absolute obligation to seek an election. Prior to *Gissel*, an employer violated section 8(a)(5) by refusing to bargain collectively if his refusal was in bad faith. Such an employer could demonstrate absence of bad faith by petitioning for an election. After *Gissel*, an employer, when presented with a card majority, could avoid a possible refusal to bargain charge by petitioning for an election. By doing this, the employer indicates that he has not rejected the collective bargaining principle but rather prefers to see majority support certified under the laboratory conditions of an election. Employers will no longer be inclined to pursue this course of behavior because there is no obligation on the part of the employer to seek an election according to the *Linden* decision.<sup>30</sup> Thus, under *Linden*, an employer may refuse to bargain with a union even if the union presents convincing evidence of majority support, and the employer also has no obligation to seek an election to determine majority status.

The *Linden* decision clarifies an ambiguity in the Act by making it clear that an employer is required to recognize only those representatives who have prevailed in a Board-supervised election. This clarification is helpful, but neither the terms of the Act nor its legislative history dictated the result. In fact, many considerations favor the opposite result. Authorization cards should be able to create a bargaining obligation in situations where, either by themselves or in conjunction with other factors, they constitute convincing evidence of a union's majority status. Although authorization cards may not always be reliable indicators of majority support, they may constitute strong evidence of such support in a plethora of situations other than those in which the employer has committed unfair labor practices which would impair the holding of a fair election.

GERARD JUDE FAUST

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30. 95 S. Ct. at 434.

## MISSOURI SERVICE LETTER STATUTE— THE BURDEN OF ESTABLISHING SUBSTANTIAL ACTUAL DAMAGES

*Schmidt v. Central Hardware Co.*<sup>1</sup>

Plaintiff Jo Anne Schmidt worked for defendant Central Hardware Company for five years. Then, following the filing of a workmen's compensation claim, she fell into disfavor and was discharged. Plaintiff wrote defendant requesting a service letter but defendant failed to respond. Plaintiff filed suit for actual and punitive damages arising out of defendant's failure to furnish a service letter pursuant to section 290.140, RSMo 1969.<sup>2</sup> The trial court entered judgment on a jury verdict for \$5,900 actual damages and \$20,000 punitive damages, voluntarily reduced to \$15,000 by plaintiff. The St. Louis District of the Missouri Court of Appeals upheld the punitive damages award, but held that plaintiff was entitled to recover only nominal actual damages because she could not establish actual damages to a reasonable certainty.

In 1905,<sup>3</sup> the Missouri General Assembly enacted a statute requiring corporate employers to furnish employees a service letter upon written request by the employee.<sup>4</sup> The statute was enacted to

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1. 516 S.W.2d 556 (Mo. App., D. St. L. 1974).

2. For a general discussion of the Missouri service letter statute, see Soebbing, *The Missouri Service Letter Statute*, 31 Mo. L. Rev. 505 (1966).

3. Mo. Laws 1905, at 178. This statute becomes by implication a part of every employment contract entered into by a corporate employer with its employees. *Cheek v. Prudential Ins. Co.*, 192 S.W. 387 (Mo. 1917), *aff'd*, 259 U.S. 530 (1922).

4. At common law an employer had no obligation to issue a service letter to an employee on termination of the employment. *Brink's, Inc. v. Hoyt*, 179 F.2d 355 (8th Cir. 1950). However, section 290.140, RSMo 1969, provides:

Whenever any employee of any corporation doing business in this state shall be discharged or voluntarily quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the written request of such employee to him, if such employee shall have been in the service of said corporation for a period of at least ninety days, to issue to such employee a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such employee has quit such service; and if any such superintendent or manager shall fail or refuse to issue such letter to such employee when so requested by such employee, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment.

The duty imposed by the statute is mandatory, *Soule v. St. Joseph Ry., Light, Heat, & Power Co.*, 220 Mo. App. 497, 274 S.W. 517 (K.C. Ct. App. 1925), and applies only when the

remedy the evil of "blacklisting" employees.<sup>5</sup> Although penal in nature,<sup>6</sup> the Missouri Supreme Court held that the statute gives employees a private cause of action<sup>7</sup> for damages against the corporation for failure to comply with the statutory provisions.

In order to assert a cause of action against a corporate employer, the employee must bring himself within the terms of the statute.<sup>8</sup> Only employees that have "been in the service of said corporation for a period of at least ninety days" are entitled to a service letter. The service must have been continuous employment for at least ninety days, but not necessarily on a daily basis.<sup>9</sup> The termination of the employment must be final; termination followed by arbitration proceedings which result in reinstatement does not result in a discharge giving rise to a cause of action under the service letter statute.<sup>10</sup>

The employee must submit a written<sup>11</sup> request for a service letter to the "superintendent or manager" of the corporation, or to the person who serves that function in relation to the employee.<sup>12</sup>

employment relationship occurs in Missouri. *Horstman v. General Electric Co.*, 438 S.W.2d 18 (K.C. Mo. App. 1969).

5. Railroads and other corporations effectively used the practice of "blacklisting" to control their employees by greatly hindering an employee from procuring employment elsewhere. The service letter statute was enacted to prevent this practice. *Cheek v. Prudential Ins. Co.*, 192 S.W. 387 (Mo. 1917), *aff'd*, 259 U.S. 530 (1922).

6. Criminal prosecutions under section 290.140, RSMo 1969, have never reached the appellate courts. One writer suggests the reasons are that an aggrieved employee has more interest in a civil remedy and that prosecutors generally disfavor such a proceeding. Soebbing, *The Missouri Service Letter Statute*, 31 Mo. L. Rev. 505 (1966).

7. *Cheek v. Prudential Ins. Co.*, 192 S.W. 387 (Mo. 1917). The court in *Cheek* also upheld the constitutionality of the statute despite claims that it was discriminatory class legislation. The court held that the statute did not prevent an employer from discharging any employee and thus was a valid exercise of the police power of the state. The United States Supreme Court affirmed. *Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922).

8. *Lyons v. St. Joseph Belt Ry. Co.*, 232 Mo. App. 575, 84 S.W.2d 933 (K.C. Ct. App. 1935). Absent a contract to the contrary, if the employee does not qualify under the statute, the corporate employer may discharge the employee at any time without giving a service letter or other reason for the discharge. *Bell v. Faulkner*, 75 S.W.2d 612 (Spr. Mo. App. 1934).

9. *Ackerman v. Thompson*, 356 Mo. 558, 202 S.W.2d 795 (1947). *See also Barrows v. Riss & Co., Inc.*, 238 Mo. App. 334, 179 S.W.2d 473 (K.C. Ct. App. 1944), where an employee who had worked for the same employer on two separate occasions and was discharged within ninety days on each occasion was not allowed to use the aggregate employment time to qualify under the statute.

10. An employee who was reinstated after arbitration proceedings continued in the service of the corporate employer from the time of his purported discharge ("conditional discharge") to the time he returned to work. *Arbuckle v. Fruehauf Trailer Co.*, 372 S.W.2d 470 (K.C. Mo. App. 1963).

11. The requirement that the request be made in writing was added to the statute by amendment in 1941. Mo. Laws 1941, at 330.

12. The title of the officer charged with issuing the service letter under the statute is

Although the statute requires an individual to issue the service letter, it has been held that the corporation, not the individual, is liable for failure to issue a proper service letter.<sup>13</sup> It is essential that the request express a desire for a service letter, because it has been held that a request for a "recommendation" will not give rise to a cause of action under the service letter statute.<sup>14</sup>

Upon receipt of a request for a service letter, the corporate employer must issue a service letter which contains a statement of (1) the nature and character of the service rendered by the employee, (2) the duration of such service, and (3) the true cause, if any, for the termination of the employment.<sup>15</sup> If the employer fails

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not controlling. See *Chrisman v. Terminal Ry. Ass'n*, 237 Mo. App. 181, 191, 157 S.W.2d 230, 234 (St. L. Ct. App. 1942) ("[T]he request shall be made to the person who performs the duties of a superintendent or manager as to the work or department in which such employee is engaged."). See also *Ackerman v. Thompson*, 356 Mo. 558, 202 S.W.2d 795 (1947) (service letter statute held applicable to a trustee in bankruptcy serving the function as manager of a railroad). Although the statute literally places the responsibility to issue the service letter on the person requested, there are cases which have indicated that delegation of the task to a specific officer or department is permissible. See *Turner v. Emerson Elect. Mfg. Co.*, 280 S.W.2d 474 (St. L. Mo. App. 1955); *Van Sickle v. Katz Drug Co.*, 235 Mo. App. 952, 151 S.W.2d 489 (K.C. Ct. App. 1941); *Lyons v. St. Joseph Belt Ry. Co.*, 232 Mo. App. 575, 84 S.W.2d 933 (K.C. Ct. App. 1935).

13. Although the officer designated by the statute retains possible criminal liability, it is the corporation that must answer in damages in a civil action for failure to issue a proper service letter. *Brink's, Inc. v. Hoyt*, 179 F.2d 355 (8th Cir. 1950); *Cheek v. Prudential Ins. Co.*, 192 S.W. 387 (Mo. 1917), *aff'd*, 259 U.S. 530 (1922). Thus, the corporation's liability is not based on the doctrine of *respondeat superior*, and exoneration of the officer designated by the statute will not prevent a judgment against the corporate employer. *State ex rel. Terminal R.R. Ass'n v. Hughes*, 350 Mo. 869, 169 S.W.2d 328 (1943); *Burens v. Wolfe Wear-U-Well Corp.*, 236 Mo. App. 892, 158 S.W.2d 175 (K.C. Ct. App. 1942). The good faith belief of the designated officer that the service letter complied with the statutory requirements will not affect the liability of the corporate employer. But such belief may be allowed to negate the proof of malice required for an award of punitive damages. *Woods v. Kansas City Club*, 386 S.W.2d 62 (Mo. En Banc 1964); *Booth v. Quality Drug Co.*, 393 S.W.2d 845 (St. L. Mo. App. 1965).

14. *Carr v. Montgomery Ward & Co.*, 363 S.W.2d 571 (Mo. 1963). See also *Seiller v. Kiel*, 149 S.W.2d 463 (St. L. Mo. App. 1941) (employee's request for a copy of a report made by the corporate employer to the Unemployment Compensation Commission was not sufficient to support a cause of action under the service letter statute). *But see Brink's, Inc. v. Hoyt*, 179 F.2d 355 (8th Cir. 1950) (although the employee requested a recommendation, his written request for the "time worked," "kind of work," and "why fired" was sufficient to qualify as a proper request under the statute).

15. The service letter must state the true reason for termination of the employment to comply with the statute. See *Van Sickle v. Katz Drug Co.*, 235 Mo. App. 952, 151 S.W.2d 489 (K.C. Ct. App. 1941) (true reason not put in service letter in order to aid the employee in securing future employment elsewhere; held, improper service letter). The burden is on the corporate employer to prove the truth of the reason "because such true reason is peculiarly within the knowledge of the employer." *Potter v. Milbank Mfg. Co.*, 489 S.W.2d 197, 203, (Mo. 1972). Letters written in general terms may not sufficiently state the true reason for

either to issue a service letter within a reasonable time<sup>16</sup> after receipt of the request or to state correctly any of the three requirements prescribed by the statute, the corporate employer is subject to civil liability.<sup>17</sup>

Upon a mere showing of failure to comply with the requirements of the service letter statute, the employee is entitled to recover nominal actual damages (usually \$1.00).<sup>18</sup> Such a recovery will support a substantial award of punitive damages<sup>19</sup> if the employee establishes that the failure to issue a proper service letter was the result of either "legal malice" or "actual malice."<sup>20</sup>

discharge and thus give rise to a cause of action under the statute. *Cumby v. Farmland Indus., Inc.*, 524 S.W.2d 132 (Mo. App., D.K.C. 1975). See also *Bourne v. Pratt & Whitney Aircraft Corp.*, 207 S.W.2d 533, 540 (K.C. Mo. App. 1948) (letter stated the employee was "not suited to work"); *Gerharter v. Mitchellhill Seed Co.*, 157 S.W.2d 577, 579 (K.C. Mo. App. 1941) ("[employee's] services were satisfactory, but no longer required"). It has been held that a service letter containing defamatory communications is qualifiedly privileged. *Williams v. Kansas City Transit, Inc.*, 339 S.W.2d 792 (Mo. 1960).

16. See *Heuer v. John R. Thompson Co.*, 251 S.W.2d 980 (St. L. Mo. App. 1952):

When a reasonable length of time expires a cause of action arises in favor of the employee entitling the employee to judgment against the employer for failure to issue a letter . . . whether a letter is subsequently issued or not. . . .

*Id.* at 987. Furnishing a proper service letter after a suit has been filed will not destroy the cause of action, but can be proven by the employer to mitigate damages. *Van Sickle v. Katz Drug Co.*, 235 Mo. App. 952, 151 S.W.2d 489 (K.C. Ct. App. 1941). There is no requirement that a request by an employee be made within a reasonable time after termination of the employment relationship. *Booth v. Quality Dairy Co.*, 393 S.W.2d 845 (St. L. Mo. App. 1965). One writer suggests that allowing an employee an indefinite time to request a service letter might result in injustice to a corporate employer who no longer has records available when the request is finally made. *Soebbing, The Missouri Service Letter Statute*, 31 Mo. L. Rev. 505 (1966).

17. *Heuer v. John R. Thompson Co.*, 251 S.W.2d 980 (St. L. Mo. App. 1952).

18. No proof of damages is necessary to sustain an award of nominal damages under the service letter statute. *Heuer v. John R. Thompson Co.*, 251 S.W.2d 980 (St. L. Mo. App. 1952); *Lyons v. St. Joseph Belt Ry. Co.*, 232 Mo. App. 575, 84 S.W.2d 933 (K.C. Ct. App. 1935). Thus, the cause of action granted under the service letter statute is treated like those arising from some intentional torts—*e.g.*, assault, battery, false imprisonment, and trespass to land, where proof of injury creates a right to an award of nominal damages. *W. PROSSER, LAW OF TORTS* § 8, at 130 (4th ed. 1971). The corporate employer is not entitled to reduce his liability by the amount of income that plaintiff derived from collateral sources while unemployed due to an improper service letter. See *Burens v. Wolfe Wear-U-Well Corp.*, 236 Mo. App. 892, 158 S.W.2d 175 (K.C. Ct. App. 1942) (the amount of unemployment compensation received by plaintiff not admissible).

19. Although an award of punitive damages must not be entirely disproportionate to the amount of actual damages, substantial awards of punitive damages may be allowed in cases where plaintiff is awarded only nominal actual damages because of failure to prove substantial actual loss. *Walker v. St. Joseph Belt Ry. Co.*, 102 S.W.2d 718 (K.C. Mo. App. 1937); *Lyons v. St. Joseph Belt Ry. Co.*, 232 Mo. App. 575, 84 S.W.2d 933 (K.C. Ct. App. 1935).

20. *Roberts v. Emerson Elec. Mfg. Co.*, 338 S.W.2d 62 (Mo. 1960). Actual malice is

In order to sustain an award of substantial actual damages, the plaintiff must establish that a loss was suffered as a direct consequence of the corporation's failure to issue a proper service letter.<sup>21</sup> This is established by proving that plaintiff was denied or hindered in obtaining employment<sup>22</sup> because of a lack of a service letter complying with the statutory requirements. Cases prior to *Schmidt* had held that such a showing may be demonstrated by circumstantial evidence,<sup>23</sup> but the court in *Schmidt* declared that substantial actual damages must be proved with "reasonable certainty."<sup>24</sup>

In requiring proof of harm to a reasonable certainty, the court in *Schmidt* increased the burden on a plaintiff seeking substantial actual damages under the Missouri service letter statute. The court held that in addition to proving that the lack of a proper service letter caused the loss, the plaintiff must establish (1) the approximate date he was refused or hindered in securing employment and (2) the salary of the job which he was denied.<sup>25</sup> Plaintiff must make such a showing in order to meet the burden of establishing a reasonable basis from which the actual loss may be calculated.<sup>26</sup>

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present if defendant acts with actual spite or ill-will; legal malice is defined as the "doing of a wrongful act without just cause or excuse." *Davenport v. Midland Bldg. Co.*, 245 S.W.2d 460, 464 (K.C. Mo. App. 1951). The corporate employer is presumed to know the law, and the question of legal malice is for the jury to determine. *Bubke v. Allied Bldg. Credits, Inc.*, 380 S.W.2d 516 (St. L. Mo. App. 1964). A finding of malice will also permit plaintiff to recover damages for mental suffering. *Roberts v. Emerson Elec. Mfg. Co.*, 338 S.W.2d 62 (Mo. 1960); *Ackerman v. Thompson*, 356 Mo. 558, 202 S.W.2d 795 (1947).

21. *Roberts v. Emerson Elec. Mfg. Co.*, 338 S.W.2d 62 (Mo. 1960); *Cook v. Mid-Continent Petroleum Corp.*, 193 S.W.2d 66 (K.C. Mo. App. 1946). The *Schmidt* court said: "Stated another way, defendant's failure to furnish plaintiff the statutory service letter must be the proximate cause of her damages." 516 S.W.2d at 559.

22. *Booth v. Quality Dairy Co.*, 393 S.W.2d 845 (St. L. Mo. App. 1965); *Bubke v. Allied Bldg. Credits, Inc.*, 380 S.W.2d 516 (St. L. Mo. App. 1964); *Cook v. Mid-Continent Petroleum Corp.*, 193 S.W.2d 66 (K.C. Mo. App. 1946); *Burens v. Wolfe Wear-U-Well Corp.*, 236 Mo. App. 892, 158 S.W.2d 175 (K.C. Ct. App. 1942).

23. See *Burens v. Wolfe Wear-U-Well Corp.*, 236 Mo. App. 892, 158 S.W.2d 175 (K.C. Ct. App. 1942).

[Plaintiff] was not required to prove his case by direct and positive testimony. The facts and circumstances shown in evidence are a sufficient basis for the jury to infer and find that plaintiff was hindered and delayed in obtaining employment by the act of defendant in refusing to furnish him the service letter.

*Id.* at 899, 158 S.W.2d at 179. See also *Booth v. Quality Dairy Co.*, 393 S.W.2d 845 (St. L. Mo. App. 1965).

24. 516 S.W.2d at 559.

25. *Id.*

26. It was apparent to the court in *Schmidt* that the jury had calculated plaintiff's substantial actual damages by taking the hourly rate paid by the defendant at the time of plaintiff's employment and multiplying that figure by the entire period plaintiff was unemployed. The court rejected that method as being "a formula . . . inconsistent with the



Even with the increased burden of proving substantial actual damages with reasonable certainty, the Missouri service letter statute remains an effective civil remedy for aggrieved employees.<sup>27</sup> An employee who presents a prima facie case is entitled to nominal actual damages, capable of sustaining a substantial punitive damages award.<sup>28</sup> Corporate employers should be aware of the requirements imposed upon them by the Missouri service letter statute to avoid potential exposure to civil liability.

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rationale underlying actual damages . . . in service letter cases." *Id.*

27. It has been suggested that the penal portion of the statute "is obsolete, unused, and might well be deleted." Soebbing, *The Missouri Service Letter Statute*, 31 Mo. L. Rev. 505, 515 n.46 (1966).

28. See *Potter v. Milbank Mfg. Co.*, 489 S.W.2d 197 (Mo. 1972) (\$1.00 actual; \$20,000 punitive); *Walker v. St. Joseph Belt Ry. Co.*, 102 S.W.2d 718 (K.C. Mo. App. 1937) (\$1.00 actual; \$5,000 punitive); *Lyons v. St. Joseph Belt Ry. Co.*, 232 Mo. App. 575, 84 S.W.2d 933 (K.C. Ct. App. 1935) (\$1.00 actual; \$10,000 punitive).

**TAXATION—RESEARCH AND EXPERIMENTAL  
EXPENDITURES—SECTION 174 DISTINGUISHED  
FROM SECTION 162**

*Snow v. Commissioner*<sup>1</sup>

Petitioner Snow, employed full time as an executive of a large corporation, was a partner in Burns Investment Company, a limited partnership formed to develop a trash burning device for commercial and industrial use. In 1966, the first year of the company's existence, the general partner and inventor worked on but did not perfect a marketable device, and the partnership received no income. Burns reported a net operating loss for the year, claiming expenses of over \$36,000 for research and development by reason of section 174(a)(1) of the Internal Revenue Code of 1954.<sup>2</sup> Snow sought to claim his pro rata share of this deduction on his personal income tax return. The Commissioner determined that the deduction was not allowable and asserted a deficiency of over \$6,000. The Tax Court<sup>3</sup> held for the Commissioner, and the Court of Appeals for the Sixth Circuit<sup>4</sup> affirmed. The Supreme Court reversed, holding that the deduction was proper.

Section 174 first appeared in the Internal Revenue Code of 1954. The 1939 Code contained no comparable provision;<sup>5</sup> to be deductible, research and development expenses had to come under section 23(a)(1) of the 1939 Code, which was substantially the same as section 162(a) of the present Code.<sup>6</sup> The expenses had to be characterized as "ordinary and necessary" and had to be incurred "in carrying on any trade or business." Under section 174, a taxpayer has a choice.<sup>7</sup> He may deduct research expenditures as an expense,<sup>8</sup>

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1. 94 S. Ct. 1876 (1974).

2. INT. REV. CODE OF 1954, § 174(a)(1), provides:

A taxpayer may treat research or experimental expenditures which are paid or incurred by him during the taxable year in connection with his trade or business as expenses which are not chargeable to capital account. The expenditures so treated shall be allowed as a deduction.

3. 58 T.C. 585 (1972).

4. 482 F.2d 1029 (6th Cir. 1973).

5. For an analysis of the uncertainties which existed with respect to research expenditures under 1939 Code, see Halperin, *Research Expenditures; Amortizable Bond Premiums; Corporate Contributions*, in FEDERAL TAX FORUM, HOW TO WORK WITH THE INTERNAL REVENUE CODE OF 1954, at 403-14 (1954).

6. INT. REV. CODE OF 1954, § 162(a), provides in part:

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . .

7. Treas. Reg. § 1.174-1 (1968).

8. INT. REV. CODE OF 1954, § 174(a)(1); Treas. Reg. § 1.174-3 (1968).

or he may capitalize them.<sup>9</sup>

The exact nature of these research and experimentation expenditures was not explained by Congress in the committee reports, nor was it defined in the Code itself.<sup>10</sup> Such expenses are described in the Regulations as those costs incurred in the laboratory sense.<sup>11</sup> The category may include expenses incidental to the development of a pilot model and can relate to either a general research program or one aimed at a particular product.<sup>12</sup> The actual research can be performed by a laboratory on behalf of the taxpayer.<sup>13</sup>

The opposing results reached by the Tax Court and the court of appeals, holding for the Commissioner, and the Supreme Court, for the taxpayer, reflect a basic ideological conflict on how to interpret section 174. The Code does not define the term "trade or business." A precise definition, adequate for all situations, may be impossible.<sup>14</sup> The traditional elements considered in determining the existence of a trade or business have been a profit motive<sup>15</sup> and an enterprise characterized by regularity of activities and the production of income.<sup>16</sup> The presence or absence of income, in itself, is not decisive.<sup>17</sup>

Older cases failed to distinguish between use of the term "trade

9. INT. REV. CODE OF 1954, § 174(b). When no other method of amortization is practicable, the expenditures may be written off over a period of not less than sixty months, beginning with the month in which benefits are first realized. Treas. Reg. § 1.174-4 (1968).

10. This accounts for part of the difficulty in determining the extent of the coverage that section 174 is to have. See Swanson, *Tax Treatment of Research and Experimental Expenditures*, 34 TAXES 541, 543 (1956).

11. Treas. Reg. § 1.174-2(a)(1) (1968).

12. *Id.*

13. *Id.*; Treas. Reg. § 1.174-2(a)(2). But the taxpayer is only covered by section 174 if the expenditures are of the type that would have been deductible if undertaken directly by himself. Swanson, *supra* note 10, at 544.

14. "There is . . . no ultimate definition [of trade or business] because the deductibility is dependent on the examination of all the facts and activities of the taxpayer in each case." 4A J. MERTENS, *LAW OF FEDERAL INCOME TAXATION*, ch. 25, at 33 (1972).

15. *I.e.*, as opposed to self-satisfaction. Joe H. Cunningham 27 CCH Tax Ct. Mem. 1219 (1968) (electrical engineer unable to deduct expenses incurred in researching mathematical formulas because seeking professional recognition, not profit).

16. *Richmond Television Corp. v. United States*, 345 F.2d 901, 907 (4th Cir. 1965) (" . . . not engaged in carrying on any trade or business within the intendment of section 162(a) until such time as the business has begun to function as a going concern and performed those activities for which it was organized"); *Lamont v. Commissioner*, 339 F.2d 377, 380 (2d Cir. 1965); *Hirsch v. Commissioner*, 315 F.2d 731, 736 (9th Cir. 1963); *Miller v. Commissioner*, 102 F.2d 476, 479 (9th Cir. 1939); *Smith v. United States*, 85 F. Supp. 838, 840 (W.D. Tenn. 1948); *Wooten v. United States*, 41 F. Supp. 496, 497 (N.D. Tex. 1941); *Atkins v. United States*, 14 F. Supp. 288, 290 (Ct. Cl. 1936).

17. *Johan A. Louw*, 30 CCH Tax Ct. Mem. 1421 (1971).

or business," in section 174 and in section 162. Some courts denied section 174 deductions when unable to find the existence of a trade or business as the term has been defined in cases arising under section 162.<sup>18</sup> Once the courts following that narrow interpretation determined that there was no trade or business, the logical result was to rule that expenses incurred for research could not have been "in connection with" a trade or business. In *John F. Koons*,<sup>19</sup> the taxpayer bought an invention and paid a laboratory to make it marketable. The Tax Court denied a section 174 deduction of the amount paid the laboratory, holding that the expenses incurred for research were in anticipation of organizing a business and not in connection with an existing business.<sup>20</sup> A number of cases have followed the reasoning of the *Koons* case in first finding the absence of a going business, so that research expenditures were only preliminary to a potential business, and, therefore, nondeductible.<sup>21</sup>

The Tax Court in *Snow* cited *Koons* and its progeny and found that the expenses incurred were merely in preparation of entering a trade or business.<sup>22</sup> The Court of Appeals for the Sixth Circuit upheld the denial of a deduction, saying that a partnership without a marketable product was not engaged in a trade or business,<sup>23</sup> and that *Snow* himself was not engaged in the business of inventing merely because he had advanced funds to Burns and two other research enterprises.<sup>24</sup>

In the past, once a court found an existing trade or business under the test for section 162, it was typically more liberal in allowing the deductions under section 174(a)(1). For example, in *Best*

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18. *Stanton v. Commissioner*, 399 F.2d 326 (5th Cir. 1968); *Mayrath v. Commissioner*, 357 F.2d 209 (5th Cir. 1966); *John F. Koons*, 35 T.C. 1092 (1961); *Industrial Research Products, Inc.*, 40 T.C. 578 (1963) ("[M]ere working on inventions during the year in question with no activity of offering them for sale or license" held "insufficient to show engagement in an inventing business"); *Myron E. Cherry*, 26 CCH Tax Ct. Mem. 557 (1967); *Charles H. Shafer*, 23 CCH Tax Ct. Mem. 921 (1964); *William S. Scull II*, 23 CCH Tax Ct. Mem. 1353 (1964).

19. 35 T.C. 1092 (1961).

20. "Expenditures made in investigating a potential new trade or business, or preparatory to entering into such business, do not . . . qualify for the application of section 174(a)(1)." *Id.* at 1101.

21. Cases cited note 18 *supra*.

22. 58 T.C. at 597.

23. 482 F.2d at 1032. The court of appeals cited Justice Frankfurter's concurring opinion in *Deputy v. DuPont*, 308 U.S. 488, 499 (1940), for the accepted definition of a trade or business: "[C]arrying on any trade or business . . . involves holding one's self out to others as engaged in the selling of goods or services." 482 F.2d at 1031.

24. *Id.* at 1033.

*Universal Lock Co.*,<sup>25</sup> a corporation whose regular line of business was the development of locks sought a section 174 deduction for expenditures made in research for the design of a new air compressor. The court allowed the deduction, saying that section 174 extended to expenses incurred in developing a new product unrelated to the past line of goods. In this respect one might observe the absence of any substantive difference between the kind of expenditures made by a business in its initial stage and those made by an ongoing business which undertakes the development of a new item unrelated to its regular line of goods.

*Cleveland v. Commissioner*,<sup>26</sup> cited by the Supreme Court<sup>27</sup> as being in conflict with the court of appeals' determination in *Snow*, may have been a judicial recognition of the lack of any such substantive difference. Cleveland was an attorney who advanced sums to an inventor, Kerla, under a trust agreement. According to this agreement, Kerla did not have to refund the money, but had to devote his time solely to the experimentation; the two men were to share equally in the anticipated proceeds. The Court of Appeals for the Fourth Circuit found that this agreement, though not using such terms, made the two men *partners* or equal participants in a joint venture.<sup>28</sup> Therefore, Cleveland had entered the inventing business and could claim the section 174 deduction. The court did not change the previous interpretation of the section, since it first looked for an existing business, and then to whether the expenses were incurred in connection with that business. But the practical result was that a partner's advances for research were deductible under section 174, even though no product was marketed that year.

In a surprisingly brief opinion, the Supreme Court held that *Snow's* advances to Burns qualified for expense treatment under section 174(a)(1). It rejected the Commissioner's argument that the use of the term "trade or business" in section 174 should carry with it the restrictive interpretation arising under section 162.<sup>29</sup> The Court stated that this decision was required if it were to carry out

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25. 45 T.C. 1 (1965). See Rev. Rul. 71-162, 1971-1 CUM. BULL. 97; cf. Kenneth Reiner, 24 CCH Tax Ct. Mem. 1005 (1965). Courts have sometimes found the regularity of a taxpayer's research activities and revenue therefrom to be sufficient to justify a claim of being engaged in the business of inventing so that expenses are deductible under section 174. See, e.g., Johan A. Louw, 30 CCH Tax Ct. Mem. 1421 (1971).

26. 297 F.2d 169 (4th Cir. 1961).

27. 94 S. Ct. at 1877.

28. 297 F.2d at 173 (emphasis added).

29. 94 S. Ct. at 1878.

the intent of the legislature.<sup>30</sup> In support of this view, the Court emphasized the distinction between the prefatory phrases "in connection with" in section 174 and "in carrying on" from section 162, and quoted a statement made in 1954 by the Chairman of the House Ways and Means Committee, which concluded with: "[Section 174] will be particularly valuable to small and growing businesses."<sup>31</sup> The Court stated that this section was enacted to allow small businesses the same tax advantage as that previously enjoyed only by larger businesses with established research departments.<sup>32</sup>

Persuasive arguments can be made that Congress did not intend such a result. The Treasury Regulations for section 162 use the phrases "connected with or pertaining to" and "in connection with" as the apparent equivalent of the statutory language, "in carrying on."<sup>33</sup> In other sections of the Code where the term "trade or business" has appeared, legislators, courts, and the Commissioner have relied on the interpretations of the term as developed under section 162.<sup>34</sup> Under section 166, which distinguishes between business and non-business bad debts, defining the latter as "a debt other than . . . a debt created . . . *in connection with* a taxpayer's trade or business . . .,"<sup>35</sup> the Supreme Court held that the meaning of trade or business as there used is identical to its established meaning under section 162.<sup>36</sup> The language in section 212, which allows a deduction to investors for certain income-producing expenditures,

30. *Id.*

31. *Id.*, quoting from 100 CONG. REC. 3425 (1954) (remarks of Congressman Reid).

32. *Id.*

33. Treas. Reg. §§ 1.162-1(a) (1960) ("connected with or pertaining to") and 1.162-17(a) (1960) ("in connection with"). See H.R. REP. NO. 2333, 77th Cong., 2d Sess. 75 (1942) (terms used as equivalent by House Ways and Means Committee).

34. See *e.g.*, Morton Frank, 20 T.C. 511, 513-14 (1953), where the Tax Court held traveling expenses incurred in searching for a business to buy were not deductible under section 23(a)(1) of the 1939 Code, the predecessor of section 162(a)(2), because not "in the pursuit of a trade or business." The court spoke of expenses incurred "in connection with" a trade as equivalent to those incurred "in carrying on" a trade or business.

See Treas. Reg. §§ 1.355-1, 1.355-4 (1960), which deal with the active business requirement of section 355, the provision for allowing tax free separation of two or more existing businesses formerly operated by a single corporation; Treas. Reg. § 1.355-1(d), ex. 5 (1960) (activities of research department of a wood products manufacturing corporation do not constitute a trade or business).

35. INT. REV. CODE OF 1954, § 166(d)(2) (emphasis added).

36. *Whipple v. Commissioner*, 373 U.S. 193, 201-03 (1963); see *Generes v. Commissioner*, 405 U.S. 93, 103-04 (1972); *Mark S. Campbell*, 31 CCH Tax Ct. Mem. 371 (1972); *Wallace L. Hirsch*, 30 CCH Tax Ct. Mem. 1008 (1971); *Leonard S. Krause*, 26 CCH Tax Ct. Mem. 358 (1967).

was also held not to broaden the traditional meaning of trade or business<sup>37</sup> under section 162.<sup>38</sup> It would seem that if Congress, which is presumed to be aware of such decisions, had intended section 174 to be broader than section 162, it would have used words such as "any profit-seeking activity" rather than "trade or business."

As alluded to by the court of appeals, a decision in favor of *Snow* makes possible a tax shelter for persons in high income tax brackets.<sup>39</sup> Such a taxpayer will be able to take a current deduction for sums advanced to an inventor-partnership. The tax benefits do not end there. Once a marketable product is developed, the partnership, rather than proceeding with its manufacture whereby the proceeds would be ordinary income, may sell the invention to an established manufacturer; the amount received from the sale would then be taxed at the more favorable capital gains rate. In this way a taxpayer who advances funds to a limited partnership which is developing only one product will be in a more advantageous tax position than either a large business with an established research department or a taxpayer who invests in a corporation that is totally devoted to research.<sup>40</sup> One probable consequence of *Snow* will be to enhance the use of the limited partnership as a one-shot investment medium for new product development.

In *Snow v. Commissioner*, the Supreme Court held that the wording in section 174 makes more expenses deductible from present income than those considered "ordinary and necessary" under section 162,<sup>41</sup> and thereby initiated a new approach toward section

37. See *Higgins v. Commissioner*, 312 U.S. 212 (1941) (investing held not a trade or business).

38. *Trust of Bingham v. Commissioner*, 325 U.S. 365, 373-74 (1945); *McDonald v. Commissioner*, 323 U.S. 57, 62 (1944); cf. *United States v. Gilmore*, 372 U.S. 39 (1963).

39. 482 F.2d at 1031. The court of appeals found two competing interests: the desire to encourage research versus the desire to discourage tax shelters by strictly interpreting tax laws. See J. CHOMMIE, *FEDERAL INCOME TAXATION* 80 (1973) (normal approach toward deductions is one of strict construction against the taxpayer).

40. A large business with a research department may take the current deduction authorized by section 174, but the proceeds it gets from the developed product are taxed as ordinary income. A stockholder who invests in a corporation with substantial research activities gets no current deduction under section 174, although any return ultimately realized on his investment is a capital gain, not ordinary income.

41. The Supreme Court did not narrowly define the bounds of these other expenses. *Snow*, however, had attempted to analyze them in his brief. He contended that a normal business has three stages: (1) the investigatory stage, which consists of an evaluation of the prospective business; (2) the pre-operating stage, which includes all basic elements of the business, except that no product has yet been offered for sale; and (3) the carrying-on stage, which covers the accepted concept of an active "trade or business." *Snow's* position, perhaps tacitly accepted by the Court, was that section 174 applies to the second as well as the third stage. Reply Brief for Petitioners at 18-19, *Snow v. Commissioner*, 94 S. Ct. 1876 (1974).

174 claims. So long as *Snow* is followed courts should no longer look first to whether a "trade or business," as interpreted under section 162, exists before deciding whether there are any deductible research expenses incurred "in connection with" a trade or business. The application of section 174 should depend upon the *substance* of the expenditures or the *purpose* for them, rather than upon the stage of advancement of the business when the expenditures are made. Therefore, if an expense is of the same type that a large business would attribute to its research department, then it will probably be eligible for a deduction under section 174, even though the taxpayer might not be engaged in a "trade or business" as defined in cases arising solely under section 162.

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