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Case Comments

John G. Bambrick

J. Patrick McDavitt

Richard F. Battagline

Michael C. Crowe

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CONSTITUTIONAL LAW — FAIRNESS DOCTRINE — FCC'S FORMAL RULES CONCERNING PERSONAL ATTACKS AND POLITICAL EDITORIALS CONTRAVENE THE FIRST AMENDMENT.—On April 6, 1966 the Federal Communications Commission adopted a Notice of Proposed Rulemaking.[1] The purpose of the proposed rules was to codify in regulation form existing procedures used by the Commission under its Fairness Doctrine[2] when dealing with personal attacks and political editorials. The existing procedures required broadcast licensees to notify and offer reply time to any person or group attacked over their station, and to any legally qualified candidate for public office who is the subject of a station editorial.[3] The Commission received written comments on the proposed rules from twenty-six interested parties — eighteen were opposed to the proposed rules and eight were in favor of them.[4] Despite the opposition the Commission issued a Memorandum Opinion and Order on July 5, 1967 adopting the rules substantially as proposed.[5] The rules stated that if a licensee broadcast an attack upon an identified person or group during the presentation of views on a controversial issue of public importance, the licensee had to notify the attackee of the broadcast, send him a script of the attack and offer him a reasonable opportunity to reply over the licensee's station. This had to be done within one week of the attack. Attacks made on foreign groups or public figures, and attacks made by legally qualified candidates were exempted from the rules. The same notification requirements applied if a licensee endorsed or opposed a candidate in a station editorial.

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1 31 Fed. Reg. 5710 (1966).

2 *Id.* For an explanation of the Fairness Doctrine, see *Editorializing by Broadcast Licensees,* 13 F.C.C. 1246 (1949).

3 31 Fed. Reg. 5710-11 (1966).

4 32 Fed. Reg. 10303 (1967).

5 *Id.* The full text of the Commission's rules, adopted on July 5, 1967, reads:

> Personal attacks; political editorials.
>
> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.
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> (b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman, or persons associated with the candidates in the campaign.
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> NOTE: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, section 315(a) of the Act (47 U.S.C. 315(a)); public notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415.
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> (c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* that where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance

On July 27, 1967[6] an unincorporated association of radio and television journalists (Radio Television News Directors Association) and eight companies holding radio and television station licenses[7] petitioned the United States Court of Appeals for the Seventh Circuit to review and set aside this final order of the Commission. The petition was based on the grounds that the rules violated the first amendment guarantee of freedom of speech and that their promulgation exceeded the authority granted to the Commission by Congress under the Federal Communications Act of 1934.[8] On August 2, 1967 the Commission adopted a supplementary order amending part (b) of the rules to exempt "bona fide newscasts" and "on-the-spot coverage of bona fide news events" from the personal attack rule.[9] On March 8, 1968 (while the case was pending) the Commission obtained the permission of the court of appeals to amend the rules a second time. The final version of the rules was adopted on March 27, 1968. The only change made by the second amendment enlarged part (b) to cover "bona fide news interviews" and "commentary or analysis" if contained in one of the exempt programs.[10] In setting aside the Commission's order adopting

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of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

6 On the same day, CBS sought review in the United States Court of Appeals for the Second Circuit. On August 31, 1967, NBC sought review in that same court. Their petitions were transferred to the Seventh Circuit on September 25, 1967, and consolidated with that of RTNDA pursuant to 28 U.S.C. § 2112(a) (1964). Brief for Respondents at 22, RTNDA v. FCC, No. 16,369 (7th Cir., Sept. 10, 1968).

7 The companies were Bedford Broadcasting Corporation, Central Broadcasting Corporation, The Evening News Association, Marion Radio Corporation, RKO General, Inc., Royal Street Corporation, Roywood Corporation, and Time-Life Broadcast, Inc.

8 48 Stat. 1064 (1934), *as amended*, 47 U.S.C. §§ 151-609 (1964).

9 47 C.F.R. §§ 73.123(b), 73.300(b), 73.598(b), 73.679(b) (1968). The full text of the Commission's amendment to the rules, adopted August 2, 1967, reads:

> (b) The provisions of paragraph (a) of this section shall be inapplicable (i) to attacks on foreign groups or foreign public figures; (2) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).
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> NOTE: The fairness doctrine is applicable to situations coming within (3), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (2), above. See section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415.

10 12 F.C.C.2d 250 (1968). The full text of the Commission's second amendment, adopted March 27, 1968, reads:

> (b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).
>
> NOTE: The fairness doctrine is applicable to situations coming within (3), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (2), above. See section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 F.R. 10415. The categories listed in (3) are the same as those specified in section 315(a) of the act.

the personal attack and political editorial rules, as amended, the Seventh Circuit *held*: the personal attack and political editorial rules promulgated by the Commission contravene the first amendment in view of their vagueness, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship. *Radio Television News Directors Association v. FCC,* No. 16,369 (7th Cir., Sept. 10, 1968).

In its early days, broadcasting was a hectic and disorganized business. New stations used any frequencies regardless of interference to existing stations, and the existing stations switched frequencies and increased power at will.[11] In order to combat the resulting chaos and confusion and make radio a more effective means of communication, Congress enacted the Communications Act of 1934[12] which established the Federal Communications Commission. In order to broadcast, the Act required all stations to secure a license from the Commission. Licenses were issued for three-year periods and issuance was contingent on Commission satisfaction that "public convenience, interest, or necessity" would be served by granting the particular applicant a license.[13] The Act also included a requirement embodied in section 315,[14] that stations had to allot equal time to opposing political candidates. This was to prevent a licensee from expounding only one point of view over its station. In the following years, the Commission began to apply this policy to non-political areas by denying applications for licenses from any broadcaster who would, or did, stifle opinions contrary to his own.[15] This policy of balanced presentation of public issues was broadened into the Commission's "Fairness Doctrine" in 1949 when it issued its report on *Editorializing by Broadcast Licensees.*[16] This report recognized the right of the public to be informed of all the different attitudes and viewpoints held by members of the community concerning controversial issues of the day. It placed an affirmative duty on all licensees to provide a reasonable amount of time for balanced discussion of all sides of important public questions. In this first definitive exposition of the Fairness Doctrine, the genesis of the personal attack rules in question in *Radio Television News Directors Association* [hereinafter *RTNDA*] can be seen: "[E]lementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist."[17]

In 1959, section 315 of the Communications Act of 1934 was amended to exempt appearances by political candidates on news programs from the equal time requirements of the section.[18] The amendment also appears to have

11 National Broadcasting Co. v. United States, 319 U.S. 190, 212 (1943).
12 48 Stat. 1064 (1934), *as amended,* 47 U.S.C. §§ 151-609 (1964).
13 48 Stat. 1083 (1934), *as amended,* 47 U.S.C. § 307(a), (d) (1964).
14 48 Stat. 1088, *as amended,* 47 U.S.C. § 315 (1964).
15 *E.g.,* Young Peoples Ass'n for the Propagation of the Gospel, 6 F.C.C. 178 (1938). In *Mayflower Broadcasting Corporation,* 8 F.C.C. 333 (1941), the Commission said:

> It is equally clear that with the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of his [the broadcaster's] own partisan ends. . . . In brief, the broadcaster cannot be an advocate. *Id.* at 340.

16 13 F.C.C. 1246 (1949).
17 *Id.* at 1252.
18 73 Stat. 557 (1959), 47 U.S.C. § 315 (1964).

bestowed congressional approval on the Commission's Fairness Doctrine. In pertinent part it reads:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[19]

With this approval, the Commission continued to consider problems arising under the Fairness Doctrine on an ad hoc basis. In 1964 it issued a *Fairness Primer*[20] to all broadcast licensees. The purpose of this document was to inform licensees of their obligations under recent Commission decisions, which were set out in the *Fairness Primer*. Included among these selected materials were rulings involving the application of fairness principles in personal attack and political editorial situations.[21] Despite this notice from the Commission, the fairness procedures were not always followed by licensees in personal attack and political editorial situations. This non-compliance led to promulgation of the formal rules in 1967, which in fact had their basis in the fairness procedures set out by the Commission in its case rulings. The Commission's purpose in codification was to clarify the obligations of licensees in this area and to enable the Commission to impose more effective sanctions than it could under the Fairness Doctrine.[22]

In *RTNDA,* petitioners[23] based their attack on the Commission's rules on the broad first amendment protection of freedom of expression. In setting aside the rules, the Seventh Circuit pointed to their vagueness, the unreasonable burdens they place on licensees, and the possibilities they raise of Commission and licensee censorship.[24] These are the stated flaws. However, the case embodies an underlying conflict of theories regarding interpretation of the first amendment's application to broadcasting. Petitioners advocated a first amendment theory that interprets free speech as adversary speech. As the Supreme Court stated in *New York Times Company v. Sullivan:*[25] "[There is] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[26] This idea of uninhibited, adversary speech should apply to broadcasting in the same

19 *Id.*

20 *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10415 (1964).

21 *Id.* at 10420-21.

22 32 Fed. Reg. 10303 (1967). For a discussion of the sanctions, see text accompanying notes 31-36 *infra.*

23 "Petitioners" refers to RTNDA, NBC, CBS and the eight companies listed in note 7 *supra.*

24 RTNDA v. FCC, No. 16,369, at 27 (7th Cir., Sept. 10, 1968).

25 376 U.S. 254 (1964). For a thorough discussion of the conflict between the concept of free speech and governmental regulation in the broadcasting field, see Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation,* 52 MINN. L. REV. 67 (1967).

26 *Id.* at 270. *See also* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1 (1965).

way that it applies to the printed press. "Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas."[27]

The Commission contended that there is a basic distinction between the broadcast press and the printed press that justifies government regulation of broadcasting in the public interest. "The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest."[28] This contention stresses the concept that the public has a right to be informed of all the various viewpoints on controversial issues. This goal of an informed public can be accomplished only through a fair and balanced presentation of all important public questions by broadcast licensees.[29] The discussion and final determination of the specific issues in the case reveals the court's attempt to reconcile these conflicting theories.

The court noted that the import of *New York Times* and its progeny[30] was that freedom of the press to discuss public issues had to be protected from the imposition of unreasonable burdens by governmental action. Applying this principle to the broadcasting question at hand, the court decided that the Commission's rules would impose such burdens on broadcast licensees. It felt that the mandatory requirement of transmission to the aggrieved party of (1) notification of the attack or editorial, (2) a script or tape of the broadcast, and (3) an offer of a reasonable opportunity to respond, amounted to substantial economic and practical burdens on licensees.

Most of the specific requirements set out in the rules had been the subject of Commission rulings under the Fairness Doctrine.[31] However, the *RTNDA* court noted two crucial distinctions between the Fairness Doctrine and the formal rules in question as far as the burden on licensees was concerned. Under the Fairness Doctrine licensees are to use their own best judgment and good sense in determining whether they have presented all the viewpoints on issues of public importance broadcast over their stations.[32] However, the formal rules replaced this licensee discretion with mandatory requirements (notification, script, offer of reply) for each individual broadcast. The sanctions are also quite different. The Commission's principal sanction for non-compliance with the Fairness Doctrine is to refuse to renew the license of any offending broadcaster.[33] This decision as to renewal is based on the licensee's overall performance

27 Superior Films, Inc. v. Department of Educ., 346 U.S. 587, 589 (1954) (concurring opinion of Justice Douglas).

28 National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943).

29 *Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1249 (1949). *See also* Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine,* 37 U. COLO. L. REV. 31 (1964); Cahill, *"Fairness" and the FCC,* 21 FED COM. B.J. 17 (1967).

30 St. Amant v. Thompson, 390 U.S. 727 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); Mills v. Alabama, 384 U.S. 214 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964).

31 See notes 20-21 *supra* and accompanying text.

32 *Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1251 (1949); *Network Programming Inquiry,* 25 Fed. Reg. 7291, 7293 (1960).

33 There are alternative remedies for Fairness Doctrine violations. The Commission has the power to revoke a license pursuant to the Communications Act, 47 U.S.C. § 312 (1964), but feels that this sanction is too strict for a single fairness violation. The Commission can

during the three years the license was held. Thus one or two fairness violations during the three years might not be grounds for denial, depending on the entire performance.[34] On the other hand, the formal rules in *RTNDA* were codified pursuant to the Communications Act of 1934.[35] In this situation the Commission can employ the broad enforcement powers of the Act which apply to formal Commission regulations. The sanctions can be imposed on the basis of a single broadcast and include civil forfeitures and criminal fines,[36] in addition to the usual administrative sanctions. In holding that the stricter and more rigid standards of the new rules impose unreasonable burdens on licensees, the court said: "[W]hatever discretion is still reposed in a licensee under the new rules with respect to his handling of personal attacks and political editorials must be exercised in the face of the omnipresent threat of suffering severe and immediate penalties."[37]

Petitioners also attacked the rules on the grounds that they were vague and lacked the specificity necessary in view of the extreme sanctions that could be applied in the event of their violation. Such terms as "attack," "character," and "like personal qualities" could be subject to diverse interpretations since they were not explicitly defined by the Commission. In agreeing with petitioners, the court noted that the failure of the Commission to clearly articulate the rules was fatal since first amendment freedoms were involved.[38]

In addition to the vague terms in the rules, the court felt that there was some doubt as to their application. Part (a) provided: "When, during the presentation of views on a controversial issue of public importance, an attack is made . . . ."[39] In its memorandum accompanying the first version of the rules the Commission said that an attack "must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle [of part (a)]."[40] But in the memorandum accompanying the final version of the rules the Commission stated that "the [personal attack] rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in that discussion."[41] The

issue cease and desist orders, and can revoke a broadcaster's license for failure to comply. This remedy is rarely used because of the burdensome hearing requirement on the Commission under 47 U.S.C. § 312(c) (1964). *See* Leventhal, *Caution: Cigarette Commercials May be Hazardous to Your License — The New Aspect of Fairness,* 22 FED. COM. B.J. 55, 90-91 (1968).

34 The Commission has never denied a license renewal application solely on the grounds of failure to broadcast all sides of a controversial issue. Nor has it ever revoked a license for unfair political broadcasting or a single fairness violation. Leventhal, *supra* note 33; Branscomb, *Should Political Broadcasting be Fair or Equal? A Reappraisal of Section 315 of the Federal Communications Act,* 30 GEO. WASH. L. REV. 63, 74-76 (1961).

35 50 Stat. 191 (1937), 47 U.S.C. § 303(r) (1964).

36 74 Stat. 894 (1960), 47 U.S.C. § 503(b) (1964).

37 RTNDA v. FCC, No. 16,369, at 17 (7th Cir., Sept. 10, 1968).

38 *Id.* at 19. The court was impressed with the language of the Supreme Court in Ashton v. Kentucky, 384 U.S. 195, 200 (1966):

> Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by police power, freedom of speech or of the press suffer. (Footnotes omitted.)

39 Part (a) is quoted in full at note 5 *supra.*

40 32 Fed. Reg. 10303, 10304 (1967).

41 12 F.C.C. 2d 250 n.1 (1968).

first memorandum suggests that any personal attack occurring during a broadcast of a controversial issue is subject to the rules, while the final memorandum suggests that only personal attacks which are of themselves an issue in the broadcast are subject to the rules. With vague terms and changing standards such as these, the court thought that licensees might be uncertain as to exactly what their obligations would be under the rules.[42] The only courses of action open to licensees who were uncertain as to their obligations were courses that reflected great possibilities of inhibiting their freedom of expression.

The Commission stated that if licensees were unsure of their obligations they could consult with the Commission and obtain an interpretation of the rules as applied to their particular fact situation.[43] However, this procedure borders on Commission censorship since it gives the Commission the power to interpret the rules in light of whether it thinks the licensee's actions were "good" or "bad."[44] A second possibility is that licensees will hesitate to engage in programming controversial issues or political editorials due to uncertainty as to whether the rules apply. Any controversial broadcasts that are undertaken would run the risk of being rigorously censored by licensees to ensure that they do not fall within the application of the rules. The danger conceived by the court was that licensees "will steer far wider of the unlawful zone."[45] Both hesitation in programming and licensee self-censorship would cause definite restrictions on the dissemination of views on public issues. This would be in direct conflict with the Commission's first amendment policy behind the rules — to achieve the goal of an informed public by fair and balanced presentation of all viewpoints on controversial public issues.

The final alternative for uncertain licensees would be to program controversial issues and political editorials, and then comply meticulously with the Commission's rules. However, petitioners argued that this would lead to a blandness and neutrality in presentation, since all sides would have to be espoused. They also contended that this procedure amounts to the imposition of an official administrative determination of what is "fair" discussion in a manner contrary to the plan of the first amendment that speech be adverse and unrestricted.[46] In accepting petitioners' contention on this point, the court outwardly tended toward the theory that the first amendment stands for robust and uninhibited speech for broadcasters as well as for newspapers. It said:

42 RTNDA v. FCC, No. 16,369, at 21 (7th Cir., Sept. 10 1968). The court also pointed to another area of uncertainty: that in the area of personal attacks occuring during station editorials or commentary. At first such editorials and commentary were not included in the part (b) exemptions from the personal attack rule. But in its final version the Commission exempted "news commentary or analysis in a bona fide newscast" from the attack rule. See note 10 *supra*. This presents an anomalous situation: news commentary in a bona fide news cast is not subject to the rules while the same commentary broadcast in a non-exempt show would be subject to the rules.

43 32 Fed. Reg. 10303, 10304 n.6 (1967).

44 The court noted that this procedure would be in direct violation of 47 U.S.C. § 326 (1964), which prohibits Commission censorship. RTNDA v. FCC, No. 16,369, at 18 (7th Cir., Sept. 10, 1968).

45 *Id.* at 21, quoting from Speiser v. Randall, 357 U.S. 513, 526 (1958). See the separate views of Commissioner Jones in *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1264 (1949).

46 See text accompanying notes 25-27 *supra*. *See also* Brennan, *supra* note 26.

> [T]he thrust of the rules themselves reflect an apparent desire on the Commission's part to neutralize (or perhaps to eliminate altogether) the expression of points of view on controversial issues and political candidates. Such a result would be patently inconsistent with protecting the invaluable function served by the broadcast press in influencing public opinion and exposing public ills.[47]

The court relied on first amendment freedom of the press cases to support this view. As the Supreme Court said in *Mills v. Alabama:*[48]

> Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials . . . responsible to all the people whom they were elected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.[49]

This leaning by the court toward the adversary interpretation of the first amendment is also indicated by its treatment of the Commission's main contentions. The Commission had argued that the rules were justified by the public interest in requiring the limited number of broadcasters to present all sides of controversial issues of public importance. As the Commission said:

> Unlike other modes of expression radio inherently is not available to all. For that reason, and because the airways belong to the public, Congress has chosen to regulate the use of radio in the public interest. This regulatory scheme is fully consistent with the First Amendment to the Constitution, since the special nature of the medium requires a degree of community control which might not be permissible for other modes of expression.[50]

This argument that the broadcast press is subject to governmental regulation of program presentation because of limited access to the medium was not accepted by the Seventh Circuit. Instead, the court apparently was impressed by the empirical data introduced by the petitioners.[51] This data suggested that broadcasting opportunities were more prevalent than those in the newspaper field, and therefore the broadcast press should not receive a lower order of first amendment protection than newspapers on the basis of limited access to the medium. The statistics presented established that there are approximately three and one-half times as many commercial radio and television stations in this

47 RTNDA v. FCC, No. 16,369 at 17-18 (7th Cir., Sept. 10, 1968).
48 384 U.S. 214 (1966).
49 *Id.* at 219. In *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the Supreme Court stated:

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. *Id.* at 310.

50 Brief for Respondents at 23, RTNDA v. FCC, No. 16,369 (7th Cir., Sept. 10, 1968).
51 Brief for Petitioners at 39-43, RTNDA v. FCC, No. 16,369 (7th Cir., Sept. 10, 1968).

country as there are general circulation newspapers.[52] This clearly indicates that the "technical limitation of frequencies" distinction between broadcasting and the printed press is invalid. Economics is as much of a deterrent to entrance into the broadcasting field as is the supposed scarcity of available frequencies. In effect then, the court rejected the Commission's contention that governmental regulation of broadcasting in areas other than technical licensing, finances and ownership (*e.g.*, programming), can be justified on the grounds that "radio inherently is not available to all." The abundance of broadcasting facilities as opposed to newspapers suggests that the adversary interpretation of the first amendment should be fully extended to broadcasting as it is to newspapers.

The Commission also relied on the recent decision in *Red Lion Broadcasting Company v. FCC.*[53] In that case, a personal attack was broadcast in a program aired by Red Lion Broadcasting Company. The attack occurred late in 1964, prior to the promulgation of the formal rules in question in *RTNDA.* The person attacked complained to the Commission that the licensee, Red Lion, had not complied with the personal attack aspects of the Fairness Doctrine as set out in the *Fairness Primer.*[54] After discussing the matter with the Commission, Red Lion was willing to allow the attackee to use its broadcasting facilities to present his side of the issue but the station continued to object to the position that it should afford the reply time free to the attackee. The Court of Appeals for the District of Columbia upheld the Commission's informal ruling that the person attacked did not have to show financial inability to pay for the reply time in order to receive it free. The *Red Lion* court also discussed the Fairness Doctrine and held that it had been adopted by the 1959 amendment of section 315 of the Communications Act of 1934; that it (the Fairness Doctrine) was constitutional; and that its decision was merely an application of general fairness principles to the personal attack situation at hand.

The Commission had earlier stated that the formal rules in question were simply a codification of the personal attack principles of the Fairness Doctrine and did not alter or add to the substance of the doctrine.[55] Since these principles were upheld in *Red Lion,* it argued that the codification should be upheld in *RTNDA.*[56] The court rejected this argument on two grounds. It had already demonstrated that the codified rules imposed greater burdens than the Fairness Doctrine did on licensees, specifically in the area of sanctions and licensee discretion.[57] Thus the contention that codification did not affect or alter the Fairness Doctrine was weak. The court's second reason for rejecting the Commission's argument was its flat disagreement with the holding in *Red Lion:*

> First, we [the court] draw a distinction between the personal attack rules,

52 *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 515, 519 (Nos. 737 and 746) (88th ed. 1967).

53 Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), *cert. granted,* 389 U.S. 968 (1967). The oral argument of *Red Lion* before the Court was postponed pending the Seventh Circuit's decision in *RTNDA.* 390 U.S. 916 (1968).

54 See note 20 *supra* and accompanying text for a discussion of the *Fairness Primer.*

55 See 32 Fed. Reg. 10303 (1967).

56 Brief for Respondents at 43, RTNDA v. FCC, No. 16,369 (7th Cir., Sept. 10, 1968).

57 See notes 32-37 *supra* and accompanying text.

> *whether incorporated in an ad hoc ruling such as occurred in* Red Lion *or in formal rules such as have now been promulgated by the Commission,* and the Fairness Doctrine as referred to in section 315. . . . Second, we are in disagreement with the District of Columbia Circuit's holding in *Red Lion,* sustaining the Commission's order, inasmuch as we think that the order was essentially an anticipation of an aspect of the personal attack rules which are here being challenged.[58] (Emphasis added.)

In effect the court said that the personal attack principles can be distinguished from the Fairness Doctrine; that is, that the personal attack principles are bad whether codified or not. Therefore the fact that the codified rules impose extra sanctions and limited discretion on licensees is not the main point of the court's reasoning. Even under the Fairness Doctrine the personal attack principles impose the mandatory notification requirements, invite the possibility of Commission censorship, and present the problem of licensee unwillingness to program controversial issues or licensee tendency to censor them rigorously.[59] In other words, the principles unduly burden the licensee's freedom of expression.

In setting aside the formal rules and distinguishing the personal attack principles from the general Fairness Doctrine, the *RTNDA* court has shown a commitment to the idea of limiting governmental inhibition of freedom of expression in the broadcasting field. It has accepted a somewhat diluted version of the adversary theory of the first amendment as urged by petitioners. Full acceptance of that theory would mean that the entire Fairness Doctrine as well as the formal rules in question would have to be set aside, since the Fairness Doctrine embodies some restraints on licensee freedom of expression, although to a lesser degree than the rules. Overruling the Fairness Doctrine was a step the court was not prepared to take. The question it left undetermined is to what extent the "public interest" justifies any government regulation of broadcasting. As the court said:

> [T]he rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting to remedy this problem, and that it is unable to obtain such fairness by less restrictive and oppressive means.[60]

A public interest in attaining fairness as would sustain the heavy burdens imposed by the formal rules was not demonstrated by the Commission. Whether or not there is such a public interest in attaining fairness so as to sustain government regulation under the Fairness Doctrine is something the court has apparently left for the determination of the Supreme Court when it hears *Red Lion.*[61] The court declined to comment on the Fairness Doctrine's constitutionality in *RTNDA* except as it might pertain to the personal attack principle. Nevertheless, the case still represents a step forward for advocates of robust and uninhibited expression for broadcasters. By abolishing the "technical limitation" distinction between broadcasting and newspapers, and by flatly disagreeing with

58 RTNDA v. FCC, No. 16,369, at 23-24 (7th Cir., Sept. 10, 1968).
59 See notes 38-46 *supra* and accompanying text.
60 RTNDA v. FCC, No. 16,369, at 27 (7th Cir., Sept. 10, 1968).
61 See note 53 *supra.*

Red Lion, the court has set the stage for a final determination of the conflict between advocates of uninhibited expression for broadcasters and those favoring some standard of regulation in the public interest.

John G. Bambrick, Jr.

FEDERAL INCOME TAXATION—OIL AND GAS—CARRIED INTEREST TRANSACTIONS — INCIDENCE OF FEDERAL INCOME TAXATION AND ATTENDING DEDUCTIONS, ATTRIBUTABLE TO GROSS INCOME RETAINED BY CARRYING PARTY TO RECOUP ADVANCES MADE IN BEHALF OF CARRIED PARTY, IS WITH CARRYING PARTY.—William H. Cocke, Sr. and his wife, and William H. Cocke, Jr. and his wife were involved in two agreements[1] for the drilling and production of oil on mineral properties located in Louisiana. The agreements were made between the Cockes and the Humble Oil and Refining Company, each party at all times retaining legal title to certain percentage shares of production. The transactions were in the form of carried interest arrangements whereby Humble, as carrying party, was required to advance all monies necessary for conducting the drilling and development of wells on the properties. Humble could recoup the Cockes' proportionate share of the costs only from the Cockes' proportionate interest in the proceeds from oil produced. All income from production attributable to the Cockes' interest was to be paid to them after such recoupment of advances on their behalf by Humble. The agreements further specified that Humble could only look to certain percentages (one-half in the first agreement and one-fourth in the second agreement) of the Cockes' proportionate share of the proceeds for recoupment purposes, the rest of the proportionate share being paid out directly to the Cockes.

In filing their respective tax returns for 1958 and 1959, the Cockes reported as income their entire proportionate share of gross income from the proceeds of oil produced on the properties and computed deductions for depletion, intangible drilling and developing costs, and depreciation upon such proportionate share of gross income. The Commissioner of Internal Revenue disal-

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1 The first agreement dealt with what was known as the "Goodrich-K properties." Cocke, Sr. and wife, R. H. Goodrich, and Humble Oil and Refining Company owned working interests in the property. Under the agreement, dated October 12, 1955, Humble was given a 50 percent interest in production with control of exploration, drilling and production. Goodrich and Cocke were each given a 25 percent interest in production. Humble was obligated to advance all monies necessary for conducting the operation of "Goodrich-K properties" and could recoup the proportionate share of these outlays owned by Goodrich and Cocke only from one-half of their proportionate interest of 50 percent. This contract was in effect, in reference to these properties, during the year 1958. Cocke v. United States, 263 F. Supp. 762, 762-64 (S.D. Tex. 1966), *rev'd*, 399 F.2d 433 (5th Cir. 1968).

The second agreement dealt with what was known as the "Bayou Postillion properties." Working interests in the properties were owned by Cocke, Sr. and wife, Cocke, Jr. and wife, R. H. Goodrich, H. R. Goodrich, Humble and the California Company. Under the agreement, dated January 1, 1956, Humble and the California Company were given respective interests in production of 40.302 percent and 48.06 percent with control of exploration, drilling, and production of oil. The Goodriches and the Cockes were given the remaining 11.638 percent interest. Humble and the California Company were required to advance all the costs of drilling and development and could recoup the proportionate share of these outlays owned by the Goodriches and the Cockes only from one-fourth of their proportionate interest of 11.638 percent. This contract was in effect in reference to these properties during the year 1957. *Id.*

lowed all income, depletion, operating expenses, and depreciation claimed by the Cockes that was attributable to those proceeds from oil production used by Humble for recoupment of its advances made in behalf of the Cockes. The grounds given for the disallowance was that this income and the attending deductions were attributable to Humble, and that the only income and deductions attributable to the Cockes were from the percentage of their interest not used by Humble to recoup its costs and expenses (*i.e.*, the remaining one-half in the first agreement and three-fourths in the second agreement). Based upon his computations, the Commissioner assessed additional taxes and interest for the returns in question, and these assessments were subsequently paid by the Cockes. The United States District Court for the Southern District of Texas, relying on *Commissioner v. J. S. Abercrombie Company,*[2] gave judgment for the Cockes in their suit for refund.[3] The United States Court of Appeals for the Fifth Circuit sitting en banc, reversed and *held*: in a carried interest arrangement the incidence of federal income taxation and attending deductions, attributable to gross income retained by the carrying party to recoup advances made in behalf of the carried party, is with the carrying party rather than the carried party. *United States v. Cocke,* 399 F.2d 433 (5th Cir. 1968).

The oil and gas industry can be characterized as having a high degree of risk and expense, and a consequent high turnover among investors.[4] This situation has made it necessary for those desiring to invest in oil and gas developments to combine their economic wherewithal in order to share the financial burdens of such development. It is because of this necessity that "carried interest" transactions developed.

Attempts at formulating a suitable definition of a carried interest arrangement have been made by numerous authorities.[5] The difficulty in trying to provide a suitable definition comes from the fact that a great variety of complex arrangements have been devised over the years, each having its own somewhat unique form. The result has been that the carried interest concept has been classified into types[6] rather than defined. However, for the limited scope of the present discussion, the following explanation best illustrates the basic idea:

> A carried interest in an oil and gas lease is a fractional interest which is held under a special agreement that the owner of the interest is not obli-

2 162 F.2d 338 (5th Cir. 1947).

3 Cocke v. United States, 263 F. Supp. 762 (S.D. Tex. 1966).

4 Galvin, *G.C.M. 22,730 — Twenty-Five Years Later,* SW. LEGAL FOUNDATION 18TH INST. ON OIL & GAS LAW & TAXATION 511, 523 (1967).

5 C. BREEDING & A. BURTON, TAXATION OF OIL AND GAS INCOME § 2.08 (1954) [hereinafter cited as BREEDING & BURTON]; 4 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 24.25b (rev. ed. 1966) [hereinafter cited as MERTENS]; K. MILLER, OIL AND GAS FEDERAL INCOME TAXATION 173 (2d ed. 1951); Bean, *Taxation of Carried Interests in Oil and Gas Transactions — In Retrospect and Prospect,* 10 KAN. L. REV. 391, 392 (1962); Breeding, *The Trend in Carried Interest Cases,* 17 SW. L.J. 242, 243 (1963); Fielder, *The Option to Deduct Intangible Drilling and Development Costs,* 33 TEXAS L. REV. 825, 838 (1955); Ryan, *The Carried Interest in the Fifth Circuit, or, Is Abercrombie Dead?* 4 HOUSTON L. REV. 477 (1966).

6 The most common classifications as to type are: the "Manahan type" (which is characterized by the carried party being the original owner of the working interest and assigning the entire interest to the carrying party with a reversion after recoupment of a portion of the working interest), the "Herndon type" (the carried party is the original owner of the working interest and assigns half of the interest to the carrying party and a production payment cover-

> gated to contribute to current costs of developing and operating, but the owners of the [carrying] interest in the lease will develop the lease and advance their own funds; when production is had, the proceeds of the oil and gas sales are credited to each interest and the operators [carrying party] are reimbursed for advances made the carried interest. Finally, when all costs are recovered, the owner of the carried interest receives his share of the income.[7]

Income attributable to oil and gas production is afforded special tax treatment by the Internal Revenue Service. The treatment is special in the sense that:

> The distinctive tax provisions applying to income from oil and gas production pertain to the *definition* of current income for tax purposes; that is, they pertain to the amount and timing of deductions that the affected taxpayer may make from his gross receipts in determining his taxable income.[8]

Deductions pertaining to depletion allowance[9] are of primary concern.[10] Oil and gas resources are wasting assets in the sense that the removal of oil and gas from "its natural reservoir diminishes the quantity remaining in the reservoir until eventually the supply is exhausted."[11] The resulting depletion of oil and gas reserves is comparable to depreciation of machinery or exhaustion of raw materials in manufacturing; thus, a deduction is given to compensate for capital assets being consumed in the production of oil and gas income.[12] Indirectly related to depletion allowance is the tax treatment given to intangible drilling and development costs.[13] An option is granted whereby the taxpayer may either charge these costs to capital or to expense.[14] To the extent that this option is allowable, such costs may be capitalized and then charged to depletion insofar as they do not pertain to physical property.[15]

The problem is not one of justifying these deductions[16] but rather of de-

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ing the retained half; the assignment ends after recoupment), and the "Abercrombie type" (the carried party retains full title to a portion of the working interest). *See, e.g.*, BREEDING & BURTON, §§ 8.14-.17. One author has added a fourth type to this list: the "Burton-Sutton or Southwest Exploration type" (the carried party assigns his entire working interest to the carrying party and reserves a net profits interest for himself — this is a subsidiary of the Abercrombie type). Galvin, *Another Look at Sharing Arrangements — Some Drafting Suggestions*, SW. LEGAL FOUNDATION 16TH INST. ON OIL & GAS LAW & TAXATION 453, 471 (1965). Another classification by types is based on the period of time for which the carried interest arrangement is in effect. If the arrangement is for the full productive life of the lease it is a permanent (sometimes termed perpetual) carried interest, if for only a portion of the development of the lease it is a temporary carried interest. *See, e.g.*, MERTENS, § 24.25b at 119.

7 J. BEVERIDGE, FEDERAL TAXATION OF INCOME FROM OIL AND GAS LEASES § 114 (1948).

8 S. MCDONALD, FEDERAL TAX TREATMENT OF INCOME FROM OIL & GAS 8 (1963).

9 INT. REV. CODE OF 1954, §§ 611-13 and Treas. Reg. §§ 1.611-1 to 1.613-6 (1968).

10 Deductions for intangible drilling and development costs charged to expense as well as deductions for depreciation if the intangible drilling and development costs are capitalized, are treated as any other expense or depreciation deduction. *See* INT. REV. CODE of 1954, §§ 162, 212, 263(c) and Treas. Reg. 1.612-4 (1968) as to deductions for expenses; *see* INT. REV. CODE of 1954, §§ 167, 611 and Treas. Reg. 1.611-5 (1968) as to deductions for depreciation.

11 BREEDING & BURTON § 11.01.

12 Anderson v. Helvering, 310 U.S. 404, 408 (1940).

13 *See* INT. REV. CODE of 1954, § 263(c).

14 Treas. Reg. § 1.612-4 (1968).

15 *Id.* § 1.612-4(b). Costs that pertain to physical property may be capitalized and then charged to depreciation. *Id.*

16 BREEDING & BURTON §§ 10.01-.03, 11.01; MERTENS §§ 24.01-.16, 24.46-.51; Blaise,

termining who is entitled to them. In carried interest transactions this problem also presents itself with respect to income, resulting from the production of oil and gas, which is "credited" to the carried party's interest but is being used by the carrying party to reimburse itself for advances made in behalf of the carried party. Are the income and the attending deductions attributable to the carrying party or to the carried party?

As one commentator has noted: "No facet of oil and gas operations has generated more uncertainty and vacillation as to federal tax consequences than the carried interest arrangement."[17] The factors in part responsible for this confusion have been judicial inconsistency[18] and an absence of clear administrative guidelines.[19] Judicial analysis began in the early 1930's with two cases involving the same set of facts: *Reynolds v. McMurray*[20] and *Helvering v. Armstrong*.[21] The taxpayer in each case owned a certain percentage share of oil and gas leases; an oil company owned the remaining share. It was agreed that the oil company would "manage, control, develop, and operate such leases" and "pay all costs incident thereto." The oil company would be reimbursed for such advances to the taxpayer from the proceeds attributed to the taxpayer's proportionate share of the oil and gas production. The Commissioner felt that the taxpayer should have computed his income tax on all gross income credited to him by the oil company rather than income actually received by the taxpayer after the oil company's recoupment. Both courts agreed, basing their decisions on the fact that the taxpayer and oil company were co-owners in the operation of the lease and that the proceeds from production were "income to all."[22] The *McMurray* court stated that: "Profits which would constitute income if paid directly to a person are also income to him if paid, pursuant to his agreement, to a third person to discharge his obligation to such third person."[23] This is the first judicial indication of the justification for attributing income and deductions to a carried party prior to "payout" (the point in time at which recoupment has been accomplished and the carried party begins to receive his percentage of the proceeds). The decisions in *McMurray* and *Armstrong* seem to be based upon two theories: (1) legal title in oil and gas interests is determinative of the incidence of income taxation; and (2) the carrying party's advances of costs is in substance a loan made to the carried party and income applied to the repayment of this loan is income to the carried party.[24]

What Every Tax Man Should Know About Percentage Depletion, 36 TAXES 395 (1958); Fielder, *supra* note 5 at 825-30. *See generally* MCDONALD, *supra* note 8.

17 Ryan, *supra* note 5 at 477.

18 Appleman, *Oil and Gas Tax Law — 1964 Critique,* SW. LEGAL FOUNDATION 15TH INST. ON OIL & GAS LAW & TAXATION 457, 469 (1964).

19 Klayman, *The Final Intangibles Regulations: Where Do We Stand Now?,* SW. LEGAL FOUNDATION 17TH INST. ON OIL & GAS LAW & TAXATION 371, 383 (1966).

20 60 F.2d 843 (10th Cir. 1932).

21 69 F.2d 370 (9th Cir. 1934).

22 Reynolds v. McMurray, 60 F.2d 843, 844 (10th Cir. 1932); *see* Helvering v. Armstrong, 69 F.2d 370 (9th Cir. 1934).

23 Reynolds v. McMurray, 60 F.2d 843, 845 (10th Cir. 1932).

24 This "loan theory" was seen later in the Sixth Circuit case of *T. K. Harris Company v. Commissioner,* 112 F.2d 76 (6th Cir. 1940). The taxpayer had contracted with a gas company whereby the gas company was to drill wells on the taxpayer's land. If gas was found, the gas company was to retain all proceeds until recoupment of drilling costs at which time the title to the well and equipment would go to the taxpayer and the gas company would continue to operate the well and purchase gas from the taxpayer. The taxpayer claimed that the

Shortly after *McMurray,* the Supreme Court in *Palmer v. Bender*[25] diverted from this "legal title theory."[26] The case did not involve a carried interest arrangement but dealt with two lessees of oil and gas leases who assigned or subleased their operating rights to an oil company in return for a royalty. Each lessee claimed he was entitled to depletion allowances. The Court held for the lessees on the theory that legal ownership was not determinative of a right to depletion allowance.[27] It stated that the taxpayer was entitled to depletion when he possessed an "economic interest," that is,

> for every case in which the taxpayer has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital.[28]

To the extent that *McMurray* relies on legal title as the test for determining the incidence of income for federal income tax purposes and *Palmer* relies on an "economic interest" test, there is obvious judicial inconsistency.

In 1941 the Bureau of Internal Revenue, attempting to clarify its position as to carried interest transactions,[29] issued General Counsel's Memorandum [G.C.M.] 22730[30] wherein it repudiated *McMurray.* The directive emphasized the economic realities of the situation (*i.e.,* the oil company had to assume all the burdens and risks associated with the development and operation of the wells) in its determination that the oil company held the economic interest and McMurray only held a net profits interest.[31] It admitted that if the arrangement in *McMurray* were a carried interest arrangement, wherein after payout the carried party would be liable for expenses and would share in gross income as a joint adventurer, the carried party would, after such recoupment period, also hold an economic interest.[32] The guidelines established in G.C.M. 22730 were modified a few years later by two Supreme Court decisions which stated that a

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income from proceeds during recoupment was not income to him. The court disagreed. "While the proceeds from the gas produced were not paid directly to the taxpayer, they were actually applied during the taxable year on the purchase of each completed well." *Id.* at 77.

25 287 U.S. 551 (1933).

26 *Id.; accord,* Thomas v. Perkins, 301 U.S. 655 (1937).
Two cases prior to *Palmer* had signaled this relaxation of strict adherence to title in oil and gas interests as determinative of the incidence of federal income taxation: *Lynch v. Alworth-Stephens Company,* 267 U.S. 364 (1925) and *Burnet v. Harmel,* 287 U.S. 103 (1932).

27 Palmer v. Bender, 287 U.S. 551, 557 (1933).

28 *Id.*

29 Bean, *supra* note 5, at 393; Hambrick, *A New Look at the Carried Interest,* 10TH ANNUAL TUL. TAX INST. 304 (1961).

30 1941-1 CUM. BULL. 214.

31 McMurray's interest was converted into a mere contractual right to share in any net income derived from the sale after recoupment of all capital invested by the oil company. The oil company was obligated to make all of the investment necessary to develop the property and to pay all the costs of operation, and it could look *only* to the proceeds from the sale of the lessee share of oil and gas produced for reimbursement of its capital expenditures and operating expenses. The oil company *assumed all the risks and burdens* attending development and operation, and it was entitled under the contract to the entire lessee share of production which was the only source from which its capital and expenses could be recouped. Accordingly, such investment was in an *economic interest* in oil and gas in place measured by the lessee share of production. (Emphasis added.) *Id.* at 223.

32 *Id.* at 224.

net profits interest was in fact an economic interest.[33] But the view that economic interest rather than title should be determinative of the benefit of depletion was reinforced.[34]

It was against this background[35] that the Fifth Circuit reached its inauspicious decision in *Commissioner v. J. S. Abercrombie Company.*[36] This case has been the law with regard to the incidence of federal income taxation in carried interest transactions for twenty years, and has been analyzed in every major discussion concerning the subject.[37] Its acclaim is one of dubious distinction, since the consensus of opinion is that it "is one of the finest examples, in the taxation of income from the exploitation of natural resources, of the confusion between the role of 'economic interest' and the concept of legal ownership."[38]

Abercrombie involved a carried party that had assigned all but one-sixteenth of operating profits (income from proceeds less costs) in a working interest to a carrying party. The carrying party was to control the development and operation of the property, was to advance all funds necessary for the operation of the property, and could recoup the advances only from production. No income was paid to the carried party during the tax year in question because expenses exceeded proceeds, but the carrying party did not include one-sixteenth of gross income in its tax return, claiming that it was income attributable to the carried party. The Commissioner argued that since the carried party had assigned all its interests in the leases to the carrying party and retained only a right to share in one-sixteenth of net profits, the incidence of federal income taxation in gross income was with the carrying party because the carried party had no economic interest in gross income. In holding for the carrying party, the majority opinion, without ever mentioning *McMurray,* relied on the title and loan theories found in *McMurray.* In applying the title theory, the *Abercrombie* court stated that its decision was "controlled by the fundamental principle that income is taxable to the owner of the property producing the same,"[39] *i.e.,* the fact that the carried party retained the one-sixteenth interest made him taxable on gross income attributed to that interest. In applying the loan theory, the court's rationale was that "[t]he economic reality of the transaction was that the assigning co-owners

33 Kirby Petroleum Co. v. Commissioner, 326 U.S. 599, 607 (1946); Burton-Sutton Oil Co. v. Commissioner, 328 U.S. 25, 35 (1946).

34 "By this [economic interest] is meant only that under his contract he must look to the oil in place as the source of the return of his capital investment. The technical title to the oil in place is not important." Kirby Petroleum Co. v. Commissioner, 326 U.S. 599, 603 (1946). "Economic interest does not mean title to the oil in place but the possibility of profit from that economic interest dependent solely upon the extraction and sale of the oil." *Id.* at 604.

35 Two decisions handed down by the Tax Court a few years after G.C.M. 22730, *Manahan Oil Company,* 8 T.C. 1159 (1947) and *Herndon Drilling Company,* 6 T.C. 628 (1946), reaffirmed the Internal Revenue's view that during the recoupment gross income is attributed to the carrying party rather than the carried party. The carrying party in both cases received legal title until payout, at which time title reverted or was assigned back to the carried party. See note 6 *supra* for a discussion of the types of interests which have evolved from these cases.

36 162 F.2d 338 (5th Cir. 1947).

37 See *United States v. Cocke,* 399 F.2d 433, 448 n.20 (5th Cir. 1968) for a complete list of materials treating the *Abercrombie* decision.

38 Hambrick, *supra* note 29, at 346.

39 Commissioner v. J. S. Abercrombie Co., 162 F.2d 338, 340 (5th Cir. 1947).

[carried party] mortgaged their interest to their operating co-owners [carrying party]"[40] as security for advances to development costs which would be reimbursed from proceeds attributed to the one-sixteenth interest, *i.e.*, the advances for the operation of the property made in behalf of the carried party's one-sixteenth interest constituted a loan from the carrying party to the carried party and gross income used to recoup such advances was "income" to the carried party. The result was a break from G.C.M. 22730, as well as from the economic interest theory enunciated by the Supreme Court.

With the exception of one federal district court case,[41] the carried interest problem did not again present itself in the courts for twelve years. One writer explains the absence of such cases as being the result of settlements before litigation or simply acceptance by the Commissioner of the treatment that taxpayers gave carried interest transactions.[42] This latter explanation is buttressed by the Bureau's attitude toward *Abercrombie*. The Bureau issued its non-acquiescence in the Tax Court decision in 1946,[43] withdrew its non-acquiescence in 1949,[44] after the Tax Court had been affirmed by the Fifth Circuit, and then reinstated its non-acquiescence in 1963[45] with the note that:

> The position of the Internal Revenue Service with respect to the tax treatment of carried interests of the type here involved is presently under study within the Service in connection with the preparation and development of regulations under section 612 of the Internal Revenue Code of 1954 and a study of the changes this will require to G.C.M. 22730, C.B. 1941-1, 214, primarily as the result of court decisions subsequent to the instant one.[46]

However, the economic interest question did present itself in the Supreme Court, in the case of *Commissioner v. Southwest Exploration Company*.[47] The Court's decision therein crystallized the economic interest idea by "[r]ecognizing that the law of depletion requires an economic rather than a legal interest in oil in place . . . ."[48]

The carried interest discussion resumed in 1959 with *Prater v. Commissioner*.[49] The taxpayer was the carried party in an arrangement whereby the carrying party was to advance all funds necessary for development and operation of certain oil and gas properties. The carried party retained a one-fourth interest in the properties but was not personally liable for any advances made by the carrying party in behalf of the carried party. Rather, the carrying party was to look only to proceeds attributable to the carried party's one-fourth interest

40 *Id.*
41 In *Foster v. United States*, 85 F. Supp. 447 (S.D. Tex. 1949), the plaintiffs (carried party) claimed depletion allowances on a reserved one-half working interest which was subject to adjustment for deductions in their share of operating costs; the court approved the allowances utilizing the *Abercrombie* rationale.
42 Bean, *supra* note 5, at 399-400. *See also* BREEDING & BURTON § 2.08, at 28.
43 1946-2 CUM. BULL. 6.
44 1949-1 CUM. BULL. 1.
45 1963-1 CUM. BULL. 5.
46 *Id.* at n.18.
47 350 U.S. 308 (1956).
48 *Id.* at 316.
49 273 F.2d 124 (5th Cir. 1959).

to recoup such advances. Any income attributable to this one-fourth interest after recoupment was then to go to the carried party. On his federal income tax return the carried party claimed deductions for costs of operation and development attributable to his one-fourth interest during the recoupment period. The court, in approving the claim for deductions, reasoned that to the extent that costs attributable to the one-fourth interest resulted in a diminution of the value of the interest held by the taxpayer, he had suffered a loss.[50] This rationale was based on the title and loan theories applied in *Abercrombie,* "where it was held that income from property, which was charged with the payment of a debt, was the income of, and taxable to, the owner of the property . . . ."[51] *Abercrombie* had specifically dealt with division of income for federal tax purposes. The Fifth Circuit in *Prater* completed the picture by approving a carried party's claim for deductions from gross income attributed to his retained carried interest.

After *Prater* a gradual erosion of the principles proclaimed in *Abercrombie* took place. The first sign of such erosion came in the case of *Estate of Weinert v. Commissioner.*[52] The taxpayer, the carried party, sold a one-half interest in oil and gas leases to an investor, the carrying party, in consideration for his promise to advance the development funds. The carried party's proportionate share of the costs was to be paid out from his retained one-half interest. The carried party assigned his interest to a trustee with directions to pay to the carrying party all income coming to the one-half interest, until recoupment had been achieved. The taxpayer claimed no income, for tax purposes, attributable to the one-half interest that was used to reimburse the carrying party. The court, finding for the taxpayer, relied on economic realities in its determination that the effect of the arrangement was to shift the economic interest from the carried to the carrying party, thereby shifting the taxable income in question to the carrying party.[53] The opinion emphasized the importance of considering substance over form, and the precedence of the tax concept of economic interest over the property concept of legal title in the area of federal income taxation of oil and gas interests.[54] Relying on the Supreme Court cases concerning economic interests,[55] the court stated that "[t]he stake in the minerals is what counts: the income from oil and gas is taxable to the man who risks his stake to produce oil and gas."[56] The idea of the carried interest transaction as a loan was dis-

50 *Id.* at 126.
51 *Id.*
52 294 F.2d 750 (5th Cir. 1961). *But see Sowell v. Commissioner,* 302 F.2d 177 (5th Cir. 1962), which gave at least some indication that *Abercrombie* still had vitality in the Fifth Circuit. The *Sowell* court made the following remark:

> Whatever else may be said about Abercrombie and Prater, there can be no question as to the soundness of this Court's position in those cases that oil and gas income is constructively received by a taxpayer when it is applied in payment of a debt for which his economic interest is liable. *Id.* at 181.

53 Estate of Weinert v. Commissioner, 294 F.2d 750, 753 (5th Cir. 1961).
54 *Id.* at 755.
55 Commissioner v. Southwest Exploration Co., 350 U.S. 308 (1956); Burton-Sutton Oil Co. v. Commissioner, 328 U.S. 25 (1946); Kirby Petroleum Co. v. Commissioner, 326 U.S. 599 (1946); Thomas v. Perkins, 301 U.S. 655 (1937); Palmer v. Bender, 287 U.S. 551 (1933).
56 Estate of Weinert v. Commissioner, 294 F.2d 750, 756 (5th Cir. 1961).

counted on the basis that, although the transaction may take the form of a loan, it is in fact an agreement to share the costs of development and operation. Also, the essential characteristics of the typical loan are absent.[57]

> Such a sharing arrangement reallocates, temporarily, the benefits and burdens of developing and operating an oil lease which otherwise would be borne equally by two lessees each having an undivided half interest; for the term of the carry the carrying party has all of the burdens and the economic interest in the minerals.[58]

Ironically enough, the *Weinert* court distinguished *Abercrombie* on the fact that in *Abercrombie* the carried party retained title whereas, here title was assigned to a trustee with a right to reassignment.[59]

The *Abercrombie* rationale was expressly rejected in *United States v. Thomas*,[60] a Ninth Circuit case which overruled *Armstrong*. The taxpayer in *Thomas* assigned to one Richfield seventy percent of an oil and gas sublease and retained a thirty percent interest. Richfield was to develop and operate the property and advance all funds to finance the project. Richfield was to look solely to production for reimbursement of the taxpayer's share of costs and, upon recoupment of expenses, all profits attributed to the thirty percent interest were to go to the taxpayer. The taxpayer claimed depletion allowance on thirty percent of gross income from production. The court, referring to the economic interest cases, reaffirmed the principle that "economic realities determine tax consequences."[61] It held that during the recoupment period Richfield, rather than the taxpayer, held economic interest and that the taxpayer had only a net profits interest rather than an interest in gross income.[62] The factors leading to this conclusion were: Richfield had exclusive control of the property and obligation to advance all capital for the venture; Richfield bore all risks and burdens in the venture if proceeds failed to meet expenditures; and Richfield alone was benefited by the income attributed to recoupment.[63] Precedents cited by the taxpayer — *McMurray, Armstrong, Harris, Prater* and *Abercrombie* — were criticized for relying on strict property concepts,[64] but the court was "in no po-

57 The characteristics noted by the court as usually accompanying a loan but absent in the instant case were: lack of physical evidence of indebtedness or notes, no personal liability on the "debtor," property only liable if net profits result, two percent interest charged indicative of something other than a loan, and economic interest not retained in the "borrower." *Id.* at 757-58. "Its characteristics are so unlike a conventional loan that for modern tax purposes it should not be treated as loans are traditionally treated. . . . Such a transaction is in fact a sharing arrangement, not a loan." *Id.* at 757.

58 *Id.* at 757.

59 *Id.* at 759.

60 329 F.2d 119 (9th Cir. 1964).

61 *Id.* at 129.

62 *Id.* at 130.

63 *Id.*

64 The holdings in McMurray, Armstrong and Harris are based primarily, if not wholly, upon property law concepts, and the opinions in those cases give no consideration to the "economic interest" concept as developed in many of the Supreme Court cases above cited. Likewise Abercrombie and Prater rely upon property law concepts and resort to legal fictions which were severely criticized by a recent decision of the same Circuit [*Weinert*], and their precedential value was largely undermined. *Id.* at 131.

sition to overrule any of the cases relied upon by appellees except the Armstrong case."[65]

Abercrombie has long dominated the area of federal income taxation in the carried interest field. It has been bitterly attacked by those participating in the field,[66] has met with resistance from the Bureau of Internal Revenue,[67] and has been distinguished or criticized by recent opinions.[68] As with any case of import, one would anticipate its demise to be accompanied by a complete review of the field that it dominated. In overruling *Abercrombie, Cocke* does exactly this.

The two cases share the same basic fact pattern. Both involve a carrying party who is to advance all costs of development and operation of oil and gas properties; in both, such carrying party is to be reimbursed for such advances only from production. Both involve a carried party who retains legal title to a share of a working interest, who is not personally liable for advances made in his behalf, and who is to receive income from production after recoupment is achieved.

The majority opinion[69] in *Cocke* views the rationale of *Abercrombie* as based on the theory of a loan from the carrying to the carried party and upon the theory that income produced from oil and gas property is attributable to the legal owner of that property.[70] In its refutation of the loan theory, *Cocke* refers back to two cases decided prior to *Abercrombie*.[71] The essence of those decisions is that without personal liability to reimburse another for advances, *i.e.*, where the so-called "creditor" must rely only upon income from production to recoup the "debt" owed, no loan has in fact been made.[72] The *Cocke* court then noted

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65 *Id.*

66 See note 37 *supra.*

67 See text accompanying notes 43-46 *supra. See also* BREEDING & BURTON § 2.08, at 28. One commentator has observed that:

> Indeed, the opposition of the Service to the *Abercrombie* case continues unabated. Down to the present date the administrative practice considers that during the payout period the carried interest does not have an economic interest in that portion of the production attributable to the carried interest. Hambrick, *supra* note 29, at 309.

In 1960 Treasury Regulation section 1.611-1 was issued to indicate that the economic interest concept set forth in the *Palmer* case, and discussed in the text accompanying note 28 *supra,* was formally adopted by the Internal Revenue Service:

> (b) *Economic interest.* (1) Annual depletion deductions are allowed only to the owner of an economic interest in mineral deposits or standing timber. An economic interest is possessed in every case in which the taxpayer has acquired by investment any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the extraction of the mineral or severance of the timber, to which he must look for a return of his capital.

68 See the discussion in *United States v. Thomas,* 329 F.2d 119 (9th Cir. 1964), at 131, quoted at note 64 *supra. See also* Estate of Weinert v. Commissioner, 294 F.2d 750 (5th Cir. 1961).

69 Four of the thirteen judges sitting en banc concurred in the majority's result but dissented as to the decision not to overrule *Abercrombie* prospectively.

70 United States v. Cocke, 399 F.2d 433, 437-38 (5th Cir. 1968).

71 *Id.* at 442-43. The cases are *Ortiz Oil Company v. Commissioner,* 102 F.2d 508 '(5th Cir. 1939) and *Commissioner v. Caldwell Oil Corporation,* 141 F.2d 559 (5th Cir. 1944).

72 Both *Ortiz* and *Caldwell* involved a leaseholder (carried party) who was unable to finance the development of oil and gas property and who called upon another (carrying party) to advance funds for such development. The carried party treated the transaction as a loan and claimed as income proceeds retained by the carrying party as recoupment of advances made in the carried party's behalf. The Fifth Circuit rejected this argument in both cases. "The money furnished by Westbrook and Thompson [carrying party] was not a loan. . . . [T]he petitioner [carried party] was only obligated to pay over and account to them when

the decision of *Wood v. Commissioner,*[73] which although not involving a carried interest, was pertinent to the loan theory because of its rationale that proceeds from production assigned for payment of debts associated with property cannot be said to be income to the property owner when he has no personal liability to pay such debts.[74] Finally, *Thomas* and *Estate of Weinert* were cited as authority supporting the concept that, in the absence of personal liability, where recoupment can be made only from proceeds and where the arrangement lacks the usual essentials of a loan transaction, it will not be looked upon as a loan.[75]

In refuting the title theory, the court relied on the doctrine that economic interest has precedence over legal title as the factor which determines the incidence of federal income taxation and attending deductions.[76] The court cited the economic interest cases as support for this conclusion.[77] Special attention was given to the two elements noted in *Palmer* as being essential to the existence of an economic interest: (1) an interest in minerals in place, and (2) a return of capital coming solely from income derived from the extraction of oil.[78] Applying this double-pronged test to the instant case (and by implication to *Abercrombie*), the *Cocke* court concluded that the carrying party holds the economic interest in gross income from production prior to payout.[79] The requirement that there be an investment of minerals in place was fulfilled by the existence of the following two conditions: a) the carrying party advanced all the funds to be invested in the property, and b) the carried party risked no investment in the property and was not personally liable for the advances made on his behalf.[80] The requirement that there be a return of capital coming solely from income derived from the extraction of oil was likewise fulfilled because: a) all proceeds from production prior to payout were to go to the carrying party, and b) the carrying party could look only to the proceeds from production for a return of his investment and advances made in behalf of the carried party.[81] The court's analysis led to a rejection of the title theory:

> "Title" is a collocation of rights. It is a legal conclusion. The several rights which make up title vary from state to state, and are not always

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and if the oil was produced." Ortiz Oil Co. v. Commissioner, 102 F. 2d 508, 509 (5th Cir. 1939). "The Tax Court found that there was no personal obligation in the taxpayer [carried party] to repay Caldwell [carrying party] . . . . We agree with the Tax Court in this respect." Commissioner v. Caldwell Oil Corp., 141 F.2d 559, 561-62 (5th Cir. 1944).

73 274 F.2d 268 (5th Cir. 1960).

74 A divorce decree gave the taxpayer (here analogous to a carried party) a one-half interest in oil and gas production and title was to vest after the payment of certain community debts. The Commissioner claimed that the taxpayer held a present interest in production and that proceeds from production used to pay the community debts were income to the taxpayer, since such payments were to the benefit of the taxpayer's interest in the property. The court agreed with the taxpayer that

> since, after the divorce, the community debts were not chargeable to her [taxpayer] (even though collectible out of her "share" of the community property) discharge of the debts was not for her benefit and thus did not thereby become income to her. *Id.* at 270.

75 United States v. Cocke, 399 F.2d 433, 443-44 (5th Cir. 1968). See note 57 *supra.*

76 United States v. Cocke, 399 F.2d 433, 441-42 (5th Cir. 1968).

77 *Id.* at 445.

78 *Id.* at 445-46. See text accompanying note 28 *supra.*

79 United States v. Cocke, 399 F.2d 433, 445-46 (5th Cir. 1968).

80 *Id.* at 446.

81 *Id.*

> relevant to tax litigation. The owner of title may divest himself of title without losing any rights, such as by placing title in a trustee as was done in *Weinert*. Title is relevant in tax litigation only insofar as significant benefits or burdens accompany it. It is easier, less dangerous, and more nearly accurate to speak of these relevant benefits and burdens individually than it is to lump them uncertainly together and deal with them as "title."[82]

The key to *Cocke* is stated in the phrase "benefits and burdens."[83] The case seems to establish this as the ultimate test of economic interest. Since the incidence of federal income taxation and attending deductions is with the party who holds the economic interest, the important question, then, is which party receives the benefits of production during the recoupment period and which party bears the burdens during this period. The carrying party rather than the carried party meets the test. The carrying party is the party benefited by the proceeds from production prior to payout, since all such proceeds are used to recoup the expenses that he incurred. Likewise, all the burdens or risks fall on the carrying party, since he has the responsibility of advancing all needed funds and stands to lose them all if production fails.

The court devoted scant attention to the question of depreciation and intangible drilling and development costs, but chose to rely on its benefits and burdens theory for these deductions as well.[84] Thus it concluded that "depreciation and intangible drilling and development costs are subservient satellites of depletion in situations involving carried interests, and that, as the spoils go to the victor, so these deductions go to the rightful depleter."[85]

The concepts involved in carried interest transactions are many and complex. The task of synthesizing the law in this area is indeed a difficult one. However, the opinion in *Cocke* is a rather successful attempt to place everything in its proper place.[86] The doctrine of economic interest has been discussed in the courts for thirty years but the broad test outlined in *Palmer* has not, until now, been articulated in the field of carried interests. *Estate of Weinert* produced the test of "benefits and burdens" but it was *Cocke* that, in the process of refuting the title and loan theories followed in *Abercrombie,* applied this test specifically to the *Abercrombie* carried interest situation.

The *Cocke* decision provides the Internal Revenue Service with a sound

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82 *Id.* at 445.

83 The court draws from *Estate of Weinert* the term "benefits and burdens." See text accompanying note 58 *supra.* However, the term seems to appear first in Branscomb, *Recent Developments in Oil and Gas Taxation,* SW. LEGAL FOUNDATION 11TH INST. ON OIL & GAS LAW & TAXATION 615 (1960). "Basically, it has been the office of the economic interest to identify the party to whom benefits and burdens attendant to mineral production are to be attributed for tax purposes." *Id.* at 617.

84 United States v. Cocke, 399 F.2d 433, 446-47 (5th Cir. 1968).

85 *Id.* at 446.

86 It may be argued by some that the court should have regarded the Abercrombie type situation present in *Cocke* as one in which the carried party in effect held only a "net profits" interest and that it did not involve a true carried interest. *See* Hambrick, *Another Look at Some Old Problems — Percentage Depletion and the ABC Transaction,* 34 GEO. WASH. L. REV. 1, 31 (1965). The problem seems to be merely one of semantics, since the end result is the same in either case, *i.e.,* no economic interest in gross income is recognized in the "carried party."

There may also be disappointment in that *Cocke* did not deal more specifically with the problem of intangible drilling and development costs. *See generally* Fielder, *supra* note 5; Klayman, *supra* note 19; Ryan, *supra* note 5.

judicial basis for the establishment of administrative guidelines that have been sorely needed in the carried interest area since the inception of the *Abercrombie* nightmare. The Fifth Circuit has finally responded to pleas such as "May Wisdom prevail and may *Abercrombie* rest in peace."[87] The sound of the death knell should be welcomed in the oil and gas field by practitioners and investors alike.

J. Patrick McDavitt

SELECTIVE SERVICE ACT OF 1967 — CIVIL JUDICIAL REVIEW OF LOCAL BOARD DECISIONS — SECTION 460(b)(3) VIOLATES FIFTH AMENDMENT DUE PROCESS RIGHTS AND IS UNCONSTITUTIONAL.—Norman Lloyd Petersen filed an action seeking to enjoin an order to report on January 25, 1968 for induction into the Army, alleging that numerous procedural errors[1] had been committed by his local board in his selective service classification process. On January 29, 1968, the trial court ruled that plaintiff's complaint raised the substantial federal question of whether section 460(b)(3) of the Selective Service Act of 1967 was constitutional.[2] On March 14, 1968, after a pretrial order had been entered, the court approved a stipulation of the parties staying further proceedings of the case. It was believed at that time that *Oestereich v. Selective Service System Local Board No. 11*,[3] for which a petition for certiorari had been filed, had already raised the issue of the constitutionality of section 460(b)(3). However, after reading of the memorandum filed by the Solicitor General in *Oestereich*,[4] both sides discovered that the Supreme Court might not decide the precise question which was presented in *Petersen*. Therefore, on April 3, 1968, the government asked to be relieved of the stipulation and also filed a motion asking the court to dismiss plaintiff's action on the ground that section 460(b)(3) deprived the court of subject matter jurisdiction.

Since plaintiff had failed to report for induction on January 25, 1968, the government commenced criminal proceedings against him. On April 23, 1968, plaintiff filed a motion seeking injunctive relief to prevent criminal prosecution for his non-compliance with the induction order, and declaratory relief that the order itself was invalid. The District Court for the Northern District of California refused to grant the government's motion to dismiss, but, instead, *held:*

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87 Ryan, *supra* note 5, at 490. The reference to Judge Wisdom of the Fifth Circuit is occasioned by his dissenting opinion in *Prater* and by his majority opinion in *Estate of Weinert*, both of which led to the eventual demise of *Abercrombie*.

1 The specific procedural errors alleged are set out in the decision of plaintiff's trial on the merits. Petersen v. Clark, No. 47888 (N.D. Cal. Sept. 16, 1968).

2 The relevant portion of that section is:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title . . . after the registrant has responded either affirmatively or negatively to an order to report for induction. . . .

50 U.S.C.A. § 460(b)(3) (1968).

3 280 F.Supp 78, *aff'd*, 390 F.2d 100, *cert. granted* 36 U.S.L.W. 3443 (May 21, 1968) (No. 1246).

4 The pertinent part of this memorandum is quoted and discussed in text accompanying note 59 *infra*.

section 460(b)(3) of the Selective Service Act of 1967 is a violation of the fifth amendment right of due process and thus unconstitutional because it places unreasonable conditions upon the registrant's right to obtain judicial review of his classification. *Petersen v. Clark,* 285 F.Supp. 700 (N.D. Cal. 1968).

In 1940, immediately prior to the entrance of the United States into World War II, Congress passed the Selective Training and Service Act.[5] The Act established an efficient procedure for classification and appeal[6] so that national manpower could be mobilized "in the shortest practicable period."[7] To effectuate the purpose of the Act and prevent "litigious interruptions of the process of selection,"[8] the Act provided that the decisions of the "local boards shall be final."[9]

The precise issue of whether a right to judicial review of a local board's classification existed under the Act first came before the Supreme Court in the case of *Falbo v. United States.*[10] The Court there held that a defendant who had failed to exhaust his administrative remedies by refusing to report for induction was not entitled under the Act to a review of the local board's classification as a defense in his criminal trial.[11]

Two years later, the same question was again before the Court in *Estep v. United States.*[12] The defendants in this case had reported for induction, but refused to submit to induction by taking the required step forward. In allowing the defendants to raise the impropriety of their classification as a defense to a prosecution for refusal to be inducted, the Court interpreted the word "final" of the 1940 Act to apply only to the "scope of review."[13] *Falbo* was distinguished by the fact that the defendants in *Estep* had exhausted their administrative remedies: "Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them."[14]

For over twenty years, the federal courts almost unanimously followed *Estep* in holding that registrants could only obtain judicial review of their selective service classifications by: (1) submitting to induction and petitioning for a writ of habeas corpus, or (2) reporting, but refusing to submit to induction and raising the issue as a defense to criminal prosecution.[15]

The first break from this position came in 1965, in *Wolff v. Selective Service*

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5 Act of Sept. 16, 1940, ch. 720, 54 Stat. 885.
6 *Id.* at § 10(a)(2).
7 Falbo v. United States, 320 U.S. 549, 554 (1944).
8 *Id.*
9 Act of Sept. 16, 1940, ch. 720, § 10(a)(2), 54 Stat. 893.
10 320 U.S. 549 (1944).
11 *Id.* at 554.
12 327 U.S. 114 (1946).
13 The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.
Id. at 122-23.
14 *Id.* at 123.
15 Layton & Fine, *The Draft and Exhaustion of Administrative Remedies,* 56 GEO. L.J. 315, 328 (1967).

Local Board No. 16.[16] In *Wolff*, two University of Michigan students had been reclassified from II-S to I-A for participation in an anti-Viet Nam War demonstration before a local selective service board. Without exhausting their administrative remedies, the students petitioned a federal court to enjoin their induction and to declare their reclassifications invalid. The Court of Appeals for the Second Circuit, in granting the injunctions, noted that a registrant did not have to exhaust his administrative remedies before seeking judicial review if the local board's action had a chilling effect on his first amendment rights.[17]

In an immediate reaction to *Wolff*,[18] Congress amended section 10(b)(3) of the Universal Selective Service Act to permit judicial review of a registrant's classification only "as a defense to a criminal prosecution"[19] after he has "responded either affirmatively or negatively to an order to report for induction."[20]

The issue presented in *Petersen* was whether this limitation on judicial review of an induction order is constitutional. The court stated the issue in these terms:

> Is it unconstitutional and a denial of due process for Congress to deny a person the opportunity to have civil judicial review [in a constitutional court] of his selective service classification and order to report for induction . . . prior to a criminal prosecution pursuant to 50 U.S.C.App. § 462?[21]

The government's motion to dismiss was based on the grounds that the court, pursuant to section 460(b)(3), lacked subject matter jurisdiction.[22] Thus, the court was squarely faced with the preliminary issue of whether article III of the Constitution gives Congress the power to eliminate federal court jurisdiction. This question has been the subject of considerable debate since the Judiciary Act[23] was passed in 1789. As a result of this controversy, at least four possible resolutions have been suggested:

> (1) the constitutional grant is self-executing, and if there is some part of the judicial power not vested by Congress, the courts can hear such cases on the basis of the Constitution alone; (2) the constitutional language is mandatory, and Congress should vest the whole of the judicial power, but the duty is not enforceable if Congress should fail to act; (3) Congress has discretion in deciding whether or not to give to the federal courts any part of the constitutional judicial power, save that the grant of the original

16 372 F.2d 817 (2d Cir. 1967).
17 *Id.* at 824-25; *see* Comment, *Judicial Review of Selective Service Action: A Need For Reform*, 56 CALIF. L. REV. 448, 456 (1968).
18 See the House Armed Services Committee report:

> The Committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle.

H.R. REP. No. 267, 90th Cong., 1st Sess. 30-31 (1967).
19 Selective Service Act of 1967, 50 U.S.C.A. § 460(b)(3).
20 *Id.*
21 Petersen v. Clark, 285 F. Supp. 700, 702 (N.D. Cal. 1968).
22 *Id.*
23 Judiciary Act of 1789, ch. 20, 1 Stat. 73.

> jurisdiction to the Supreme Court is self-executing; (4) though Congress has a wide discretion in granting or refusing to grant jurisdiction, there are due process limitations on this discretion.[24]

Attempting to circumvent the actual issue and to simultaneously adopt the fourth position, the court in *Petersen* concluded:

> The precise question, however, of whether Article III *itself prohibits* Congress from abolishing the lower federal courts is not raised in this case. The reason, *of course,* is that Article III is not the only guide to congressional power, for there is precedent construing the due process clauses of the fifth and fourteenth amendments and their implications concerning a right of judicial review.[25] (Emphasis added.)

Although "scholarly support" can be found for the court's position,[26] the only "judicial support" directly on point is the Second Circuit Court of Appeals case of *Battaglia v. General Motors Corporation.*[27] In that case, plaintiff filed an action to recover overtime pay in accordance with the provisions of the Fair Labor Standards Act of 1938. While this suit was pending, Congress enacted the Portal-to-Portal Act of 1947 which attempted to revoke the jurisdiction of the federal court over plaintiff's claim. Plaintiff's complaint did not meet the requirements of section 2(a) of the more recent act, and the defendant filed a motion to dismiss. This motion alleged that section 2(d) withdrew from the courts jurisdiction to entertain such an action unless it was compensable under section 2(a). In taking jurisdiction to determine the validity of section 2(a), the court stated:

> We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. [Congress cannot] so exercise that power as to deprive any person of life, liberty, or property without due process of law . . . ."[28]

On the other hand, there is "judicial support" for the third position, (Congress has complete discretion in granting or withholding jurisdiction on any question from the inferior federal courts), which was argued by the government.[29] In the case of *Kline v. Burke Construction Company,*[30] the Supreme Court stated that:

> [o]nly the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. . . . The Consti-

24 C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 10 at 22 (1963).
25 Petersen v. Clark, 285 F. Supp. 700, 703 (N.D. Cal. 1968).
26 1 J. MOORE, FEDERAL PRACTICE ¶ 0.60[2] (2d ed. 1964); C. WRIGHT, *supra* note 24, § 10 at 24 nn. 29, 30.
27 169 F.2d 254 (2d Cir. 1948).
28 *Id.* at 257.
29 *See, e.g.,* 74 U.S. (7 Wall.) 506 (1868); *Ex parte* McCardle, Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850).
30 260 U.S. 226 (1922).

> tution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part . . . . A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress . . . cannot well be described as a constitutional right.[31]

Lockerty v. Phillips,[32] a 1943 Supreme Court decision, held that "[t]here is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court."[33] Thus, in spite of judicial positions holding that Congress has unrestricted power to confer or to withdraw jurisdiction from the federal courts, the court in *Petersen* held that such congressional power was limited by the due process clause of the fifth amendment.[34]

Following this initial determination of jurisdiction, the court then turned to the merits of the constitutional issue. After balancing the conflicting interests of the government and the individual, it concluded that the individual's stake weighed more heavily, and thus "[d]ue process is offended by an administrative order which demands compliance or a term of imprisonment."[35] Several commentators have also reached this conclusion, arguing that the Selective Service System lacks the necessary procedural safeguards to protect against arbitrary or prejudicial classification.[36] To both the commentators and the court it seemed only just that the individual be afforded some *adequate* judicial relief.

The government had argued that effective review was provided by habeas corpus and criminal prosecution. However, one commentator has argued that to say that habeas corpus is an adequate remedy to preserve the constitutionality of section 460(b)(3) would be to turn "an ultimate safeguard of the law into an excuse for its violation."[37] Furthermore, the affectiveness of the habeas corpus remedy has been seriously questioned.[38] Referring to habeas corpus remedy in the selective service, Mr. Justice Murphy, in his concurring opinion in *Estep*, stated: "No more drastic condition precedent to judicial review has ever been framed."[39]

With deference to the above observation, it can be argued that the consequences of the second alternative available to the registrant — refusal to submit to induction — brand it as an equally drastic condition precedent to judicial review. Not only is the registrant subjected to criminal prosecution with a possible penalty of up to five years imprisonment, or a fine of up to $10,000, or both,[40] but the "scope of review" applied is limited to the issue of whether there

31 *Id.* at 234.
32 319 U.S. 182 (1943).
33 *Id.* at 187.
34 Petersen v. Clark, 285 F. Supp 700, 713 (N.D. Cal. 1968).
35 *Id.* at 708.
36 White, *Processing Conscientious Objector Claims: A Constitutional Inquiry*, 56 CALIF. L. REV. 652, 676-79 (1968); Note, *New Draft Law: Its Failures and Future*, 19 CASE W. RES. L. REV., 292, 315-24 (1968). *See also* Ginger, *Minimum Due Process Standards In Selective Service Cases—Part I*, 19 HASTINGS L.J. 1313 (1968); Comment, *supra* note 17.
37 Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1382 (1953).
38 Comment, *supra* note 17, at 460.
39 327 U.S. at 130.
40 Selective Service Act of 1967, 50 U.S.C.A. § 462(a).

was any "basis in fact" for the board's decision.[41] Thus, even though the local board's decision was erroneous, it will not be overturned unless there is clearly no factual basis for the classification given.[42] The registrant is in effect guilty until proven innocent. Furthermore, "common sense would indicate that the number of those willing to undergo the risk of criminal punishment in order to test the validity of their induction orders, with the attendant difficulties of proof, would be extremely small."[43] It therefore would appear that the individual's stake does indeed weigh quite heavily in the balancing process.

On the other hand, the government does have a substantial interest in the enforcement of section 460(b)(3). To maintain national security, it is imperative that the government possess the ability to rapidly mobilize manpower in times of national emergency. This need was met by the establishment of an administrative agency, the Selective Service System, whose sole purpose is the procurement of sufficient manpower to meet the needs of the Armed Forces.[44] It is the duty of the Selective Service System to:

> provide a variable number of qualified men to be inducted into the armed forces each time a call is received from the Department of Defense . . . . No part of the System can appeal from a call for any reason. Calls are announced some months in advance; all levels of the System gear themselves accordingly. Each local board is given a monthly quota to induct, based on its pool of men classified I-A. The board must follow a complicated and inexact system for selecting the I-A's to be inducted, and must also place a certain number in class I-A each month to meet later calls. Meeting these quotas is part of the job of the draft board members.[45]

General Hershey, Director of the Selective Service, expressed his feelings on the issue of the relationship of fairness and efficiency in the draft by saying that "[i]t doesn't make any difference how fair it is or how rational it is or how anything else it is if you don't get the men . . . and this method we use has gotten men."[46] Foreseeing a possible threat posed by *Wolff,* Congress amended section 460(b)(3), with the purported purpose of preventing "litigious interruptions of procedures to provide the necessary military manpower."[47] Congress felt

41 *Id.* § 460(b)(3).

42 The *Estep* Courts' treatment of this issue is presented and discussed in note 13 and accompanying text, *supra.*

43 Estep v. United States, 327 U.S. 114, 129 (1946) (concurring opinion).

44 Baldwin, *The Draft Is Here to Stay But it Should be Changed,* N.Y. Times, Nov. 20, 1966, § 6 (Magazine), at 48.

45 Ginger, *supra* note 36, at 1316-17.

46 *Hearings on S. 1432 Before the Senate Comm. on Armed Services,* 90th Cong., 1st Sess. 618 (1967).

47 113 CONG. REC. 8052 (daily ed. June 12, 1967) (remarks of Senator Russell). It seems that the intent of Congress in restricting judicial review to criminal proceedings was not merely to postpone review, but to frustrate it. As the Solicitor General points out in his memorandum in *Oestereich,* "Indeed, if pre-induction review were generally available, many men could be expected to bring suit in the hope of avoiding, or at least postponing. military service." This portion of the memorandum is quoted in *Petersen v. Clark,* 285 F. Supp. 700, at 711 (N.D. Cal. 1968). However, if the intent of Congress were merely to eliminate frivolous claims used as delaying tactics, the "scope of review," it seems, would not have been limited to requiring no "basis in fact" for the board's decision. This limited scope of review has been termed as "the narrowest known to the law." Blalock v. United States, 247 F.2d 615, 619 (4th Cir. 1957).

such interruptions would "seriously effect the administration of the selective service."[48]

In substituting its judgment for that of Congress, the court in *Petersen* stated that "allowing civil review in advance of criminal prosecution would not disrupt the selective service system."[49] Voluntary compliance with an induction order once judicially declared valid will lessen the number of criminal trials.[50] If the registrant still willfully refuses to submit, time will be saved at criminal trial.[51] Furthermore, the court pointed out that:

> [S]ince only the timing and not the scope of review will be effected, the number of men who will ultimately be found to have been validly classified will not be changed. Hence, no interference with the governmental function of raising of armies will result from civil jurisdiction.[52]

Two fallacies seem apparent in the court's reasoning. First, the governmental function of raising armies not only entails the mobilization of "great numbers" of men, but also mobilization of them "in the shortest practicable period."[53] Civil review will allow men to institute insincere claims for the sole purpose of delaying their own induction.[54] Furthermore, if a sufficient number of men are dissatisfied with their classifications, it would seem that immediate judicial review for all of them would be impracticable. Thus, the delay would seem to impede the system's efficiency in meeting its quotas. Second, the court and several commentators have argued that section 460(b)(3) is unfair because many individuals who are in fact invalidly classified will not risk criminal prosecution to test the board order.[55] If this is true, and the review is made easier by the removal of the threat of criminal prosecution, then it is implicit in their theory that individuals who are invalidly classified would seek civil judicial review and these classifications would be changed. Thus, the number of men ultimately found to have been invalidly classified *will* be increased. This, of course, is in itself a desirable result, but the point is that the court is clearly wrong when it states that the number of men found to have been validly classified "will not be changed."

Petersen was the first case to declare section 460(b)(3) unconstitutional, and the government has decided not to appeal.[56] What effect this district court decision may have in extending due process rights into the selective service area

48 H.R. REP. 267, *supra* note 18, at 31.
49 285 F. Supp. at 711.
50 One commentator has noted that criminal prosecutions in 1967 were three times that of 1965 as a result of young men refusing "to accept the classification they were given and the resulting order of induction . . . ." Ginger, *supra* note 36, at 1313.
51 At such a trial, the court may avoid the now necessary procedure of having to excuse the jury whenever a witness gives testimony relating to the validity of the induction order, which issue is solely for the court to decide. . . . Petersen v. Clark, 285 F. Supp. 700, 712 (N.D. Cal. 1968).
52 *Id.*
53 Falbo v. United States, 320 U.S. 549, 554 (1944).
54 This point is discussed in that portion of the Solicitor General's memorandum in *Oestereich* quoted in note 47 *supra*.
55 Petersen v. Clark, 285 F. Supp. 700 (N.D. Cal. 1968); *see, e.g.*, Comment, *supra* note 17, at 455.
56 1 SELECTIVE SERVICE LAW RPTR. 3132 (July 1968).

is certainly debatable. A review of recent decisions dealing with section 460(b)(3) may serve as an indication.

Oestereich v. Selective Service Local Board No. 11[57] was one of the first cases questioning the constitutionality of that section. A ministerial student was reclassified I-A for returning his draft card to his local board. Later, after being ordered to report for induction, he sought an injunction and a declaration from the court that the order was invalid. Both the Wyoming District Court and the Court of Appeals for the Tenth Circuit held that they lacked jurisdiction pursuant to section 460(b)(3) to hear the case.[58] Plaintiff petitioned for certiorari, raising claims of free speech, due process and violation of statute and regulations. The Solicitor General responded in a memorandum, contending

> This issue does not necessarily involve the constitutional validity of the provision of Public Law 90-40 [460(b)(3)] relied on by the courts below. That statute forbids 'judicial review . . . of classification or processing of any registrant by local boards,' except in defense to a criminal prosecution. It is possible to construe this language as applicable to the generality of situations where the local board has applied its judgment, but to exclude purported action of a board which is in fact contrary to an exemption which has been expressly granted by statute.[59]

The Supreme Court granted certiorari in *Oestereich* on May 20, 1968, but no decision has as yet been handed down.[60] In *Turley v. Selective Service System,*[61] a full time student was reclassified for sending his draft card in to the Attorney General of the United States. The District Court for the Central District of California, disregarding the rationale of the Tenth Circuit courts in *Oestereich,* granted a preliminary injunction pending a further hearing on the merits. It claimed jurisdiction due to a controversy arising under the Constitution and laws of the United States including section 460(b)(3) and the first, fifth and sixth amendments.

Although proceedings in *Petersen* were resumed after the filing of the Solicitor General's memorandum, on the belief that the Supreme Court might not pass on the constitutionality of section 460(b)(3), other courts[62] gave less weight to the Solicitor General's contentions. One such case, *Kimball v. Selective Service Local Board No. 15,*[63] involved the punitive reclassification of a full time student. The District Court for the Southern District of New York granted a preliminary injunction pending the decision in *Oestereich,* stating: "[T]he distinction attempted to be drawn by the Government [in the Solicitor General's Memorandum] between an 'exemption' under § 456(g) and a 'deferment' under § 456(h) is one without legal significance. . . ."[64] Later, *Gabriel*

57 280 F. Supp. 78 (D. Wyo.), *aff'd per curiam,* 390 F.2d 100 (10th Cir.); *cert. granted,* 36 U.S.L.W. 3443 (May 21, 1968) (No. 1246).
58 *Id.* at 80, *aff'd per curiam,* 390 F.2d at 100.
59 This portion of the memorandum is reprinted in 1 SELECTIVE SERVICE LAW RPTR. 3028 (April 1968).
60 36 U.S.L.W. 3443 (May 21, 1968) (No. 1246).
61 No. 68-290-F (C.D. Cal. April 23, 1968).
62 *E.g.,* United States v. Imus, No. 9971 (10th Cir. Aug. 5, 1968); Linzer v. Selective Service Local Board No. 64, No. 68-c-110 (E.D.N.Y. April 29, 1968).
63 283 F. Supp. 606 (S.D.N.Y. 1968).
64 *Id.* at 608.

v. Clark,[65] decided in the same district as *Petersen* but by a different judge, followed *Petersen* in holding 460(b)(3) unconstitutional. Finally, in *Woods v. Selective Service Local Board No. 3*,[66] the District Court for the Eastern District of New York, in granting the plaintiff a preliminary injunction pending a full hearing on the merits, assumed jurisdiction, stating, "[n]umerous cases . . . in this Circuit and elsewhere have held that the Court may enjoin an induction which is contrary to law."[67] *Petersen* was one of the authorities cited.

A completely opposite view from the above cases has been taken by several other district courts in refusing civil review of a registrant's classification and induction order.[68] In these cases, civil review was refused primarily upon the ground that section 460(b)(3) denied the court jurisdiction. The constitutionality of that section in the light of the due process clause of the fifth amendment was never reached. *Breen v. Selective Service Board No. 16*[69] is typical of the rationale of these decisions. In this case, the Connecticut District Court refused review to a registrant who was reclassified from II-S to I-A for delivering his draft card to a clergyman for return to the government. The court said that it was convinced that section 10(b)(3) of the Act, as amended in 1967, specifically deprived it of whatever jurisdiction it might otherwise have had over the action.[70] Going one step further, *Hodges v. Clark*,[71] decided in the same district as *Petersen* and *Gabriel*, held section 460(b)(3) constitutional without even considering the due process issue.

Despite the Solicitor General's suggestion in his *Oestereich* memorandum, the Supreme Court may decide that case on the constitutionality of the 1967 amendment.[72] The issue could certainly be found to exist, and, as one commentator (prior to the *Petersen* decision) stated:

> Court opinions have not yet considered the System in the light of the broadened concepts of due process of law enunciated by the Supreme Court in related fields during the past decade, and the 1967 Act changed the statutory language considerably.[73]

However, if the constitutional issue is avoided, it seems apparent that a regis-

65 No. 49419 (N.D. Cal. June 28, 1968).
66 No. 68-C-350 (E.D. N.Y. Aug. 12, 1968).
67 *Id.*
68 Andersen v. Hershey, No. 30729 (E.D. Mich. June 25, 1968); National Student Ass'n v. Hershey, No. 3078-67 (D.D.C. Mar. 8, 1968); Johnson v. Clark, 281 F. Supp. 112 (D. Ariz. 1968); Moskowitz v. Kindt, 273 F. Supp. 646 (E.D.Pa. 1967), *aff'd per curiam*, 394 F.2d 648 (3d Cir. 1968).
69 284 F. Supp. 749 (D. Conn. 1968).
70 *Id.* at 753.
71 No. 49760 (N.D. Cal. Aug. 14, 1968).
72 Mr. Justice Douglas, dissenting from an opinion which denied a stay pending action on a petition for certiorari, stated:

> Although the Solicitor General supported that petition [*Oestereich*] on the ground that § 10(b)(3) should not be construed to preclude judicial review of a local board action terminating an express statutory exemption granted by Congress, the writ we issued was unrestricted. The question of the validity of § 10(b)(3) . . . is now pending before this court . . . . Shiffman v. Selective Service Board No. 5, No. 32307 (2d Cir. April 30, 1968), *application for stay denied*, May 27, 1968. (Mr. Justice Douglas' dissenting opinion to the denial of the stay application is reprinted in 1 SELECTIVE SERVICE LAW RPTR. 3083-84. The above quote is from footnote 2 of that dissent).

73 Ginger, *supra* note 36 at 1315.

trant's right to civil judicial review will depend upon the jurisdiction in which he resides, and as has been noted, even courts within the same jurisdiction may differ upon that issue. This drastic split of authorities in itself may force the Supreme Court to face the constitutional issue squarely in *Oestereich*.

Although *Petersen* has acquired the support of some members of Congress,[74] in view of the present world situation, it is unlikely that Congress will amend the present law to allow civil review of a local board order. A full scale war in Viet Nam, the possibility of outbreak in Korea, the Russian occupation of Czechoslovakia and the threats to West Germany dictate the need for an efficient process for raising armies in the "shortest practicable period."

In an attempt to predict which way the Supreme Court may decide this constitutional issue, what one writer has said concerning the first amendment rights of conscientious objectors might also apply to due process rights in the selective service context:

> The real obstacle to the establishment of this right by the Supreme Court is neither history nor logic, but politics. It is simply unlikely that the Supreme Court will attempt to define new areas of individual rights against the military in times of emergency or crisis, and it is particularly unlikely that such a right would be articulated in any but its narrowest possible form. The court has with reason proceeded slowly in creating constitutional rights . . . .[75]

Thus, the extension of due process rights into the selective service area may be avoided by the Court for the present because of the necessities demanded by the existing world crises.

Richard F. Battagline

LABOR RELATIONS — PLANT REMOVAL — SENIORITY RIGHTS HELD NOT TO BE VESTED — ZDANOK V. GLIDDEN OVERRULED — Lux Manufacturing Company and Robertshaw Controls Company, purchaser of Lux's assets [hereinafter Company], engaged in a program of removing certain manufacturing operations from a plant in Waterbury, Connecticut, to another plant in Lebanon, Tennessee. Subsequent to this removal, the union and certain individual employees brought an action for damages in the district court, alleging that the 1960 collective bargaining agreement had been breached when the Company refused to allow laid off Waterbury employees to transfer to the Lebanon facility with full seniority earned at Waterbury. A summary judgment for the Company was granted on the ground that the language of the agreement, which did not expressly mention transfer with seniority to Lebanon, gave Waterbury employees

74 See, *e.g.*, the remarks of Senator Hart of Michigan:

> Mr. President, I have always felt that the 1967 draft act's section 460(b)(3), which denies judicial review unless the draft registrant is a defendant in a criminal action, raises serious constitutional due process questions. Thus, I was particularly interested to learn of the California district court's decision in Petersen against Clark. In this decision, the court specifically held that section 460(b)(3) was in fact unconstitutional. 114 CONG. REC. 7906 (daily ed. June 28, 1968).

Petersen was then printed in full in the Congressional Record. *Id.*

75 White, *supra* note 36, at 663.

no rights whatsoever at the Lebanon plant.[1] On appeal to the Second Circuit, the appellate court affirmed the lower court's decision, expressly overruled *Zdanok v. Glidden,* upon which petitioners had rested their cause, and *held:* unless expressly provided in the contract seniority rights earned under a collective bargaining agreement are not vested and do not extend beyond the term of the agreement creating them or beyond the location referred to in the agreement. *Local 1251 UAW v. Robertshaw Controls Co.,* No. 31955 (2d Cir. June 24, 1968).

Seniority refers to the length of service rendered by an employee for a particular employer in a given seniority unit. As an easily ascertained and definite measurement of an employee's service for the company, it has been taken as a standard by which certain aspects of the employment relation, particularly the order of layoff and recall, can be governed. The typical use of seniority in this manner produces a system of layoff under which the employee with the greatest amount of seniority is the last to be laid off and the first to be recalled. Such use of seniority creates a qualified type of job security. It is "qualified" in the sense that it protects the worker's job in relation to his fellow workers and not against the economic forces that completely eliminate the jobs to which the seniority pertains. When jobs are lost due to cutbacks in production, a seniority system of layoff causes the junior men to be released while the employment of the senior men continues.[2]

The existence of seniority as an element of the employment relation depends on the agreement of the employer and his employees to choose seniority as the rule to govern certain of their activities.[3] Such agreements are standard in union collective bargaining agreements, but are not limited to employee groups represented by unions.[4] The present state of the law considers the seniority rights thus created as property rights for the purposes of protection by the fifth amendment.[5] However, because of the historical development of seniority rights in the context of employment contracts, the rights have generally been treated by the courts as private rights arising solely from the terms of the contract. Accordingly, courts have held that seniority rights can be created only by agreement or statute, are not inherent in the employment relation, may be altered or abolished by subsequent agreement of the parties, and do not extend beyond the term of the agreement which created them.[6]

This traditional concept of seniority was abandoned by the second circuit in the case of *Zdanok v. Glidden Company.*[7] The facts in *Glidden* were essentially those of the instant case with three exceptions: (1) In *Glidden* the lay-

1 Local 1251, UAW v. Robertshaw Controls Co., 271 F. Supp. 373 (D. C. Conn. 1967), *aff'd,* No. 31955 (2d Cir. June 24, 1968).

2 *See, e.g.,* Meachem, *Seniority Clauses in Collective Bargaining Agreements, Part I,* 21 ROCKY MT. L. REV. 156 (1949).

3 *See* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Elder v. New York Cent. R.R., 152 F.2d 361 (6th Cir. 1945).

4 *See* J. SPEED & J. BAMBRICK, SENIORITY SYSTEMS IN NON-UNIONIZED COMPANIES 4 (National Industrial Conference Board, Conference Board Reports — Studies in Personnel Policy, No. 110) (1950).

5 *E.g.,* Nord v. Griffin, 86 F.2d 481, 484 (7th Cir. 1936).

6 Elder v. New York Cent. R.R., 152 F.2d 361, 364 (6th Cir. 1945); System Fed'n No. 59 v. Louisiana Ark. Ry., 119 F.2d 509, 515 (5th Cir.), *cert. denied,* 314 U.S. 656 (1941).

7 288 F.2d 99 (2d Cir. 1961).

offs were associated with removal of the entire plant to a second location; (2) the collective bargaining agreement was allowed to terminate without renegotiation; and (3) the plant to which the operations were moved was a completely new operation, except for certain equipment which was obtained from the old plant.[8] The court of appeals concluded that (1) the seniority provisions of the expired collective bargaining agreement were earned and "vested" rights which extended beyond the expiration date of the agreement, and (2) these vested rights, pursuant to the agreement as construed according to the "reasonable expectation of the parties," extended to the original employees the right to recall at the new plant with the seniority earned at the old plant.[9] As Chief Justice Lumbard implied in his dissent, the majority's decision in effect meant that the collective bargaining agreement gave the employees the right to "follow the work" to the new site.[10]

Unions received the *Glidden* decision with understandable satisfaction,[11] since job security obtained through seniority is one of organized labor's most vital objectives.[12] However, the legal and business communities were not so enthusiastic in their acceptance. Their reaction, almost consistently adverse,[13] has culminated in the *Robertshaw* decision which overruled *Glidden*. The Second Circuit apparently felt that the concept of seniority which emerged from *Glidden* departed so far from established precedent that it merited the official label of error. Since the plaintiff labor union had relied solely on *Glidden*, its case met its demise upon *Glidden's* destruction.

Judge Hays, writing for the en banc court (Judge Waterman concurred separately), first noted the large volume of law review comment stimulated by *Glidden*, most of which was adverse.[14] He then cited the reluctance of labor arbitrators to follow the job security developments enunciated in *Glidden*.[15] Finally, he noted that the other courts in similar situations have chosen to follow the "contract theory" expressed by the Sixth Circuit in *Oddie v. Ross Gear and Tool Company*,[16] rather than the "vested rights" concept of *Glidden*.[17] In fact, even the Second Circuit, in a later appeal of the *Glidden* case, had depreciated its own decision shortly after making it,[18] and has since refused to extend it.[19] After marshalling this array of contrary sentiment, Judge Hays went on to attack the reasoning in *Glidden* itself. He asserted that the assumption that seniority rights were "vested" was without any support of authority and that the author of *Glidden* had evidenced a basic misconception of the employment relationship

8 *Id.* at 100-01.
9 *Id.* at 103-04.
10 *Id.* at 105.
11 Turner, *Plant Removals and Related Problems*, 13 LAB. L.J. 907, 911 (1962).
12 J. SPEED & J. BAMBRICK, *supra* note 4 at 3 (foreword by S. Raube).
13 This reaction is expressed in the many articles prompted by the decision in *Glidden*, which are listed in *Local 1251, UAW v. Robertshaw Controls Company*, No. 31955 at 2800-01 (2d Cir. June 24, 1968).
14 *Id.*
15 *Id.* at 2801.
16 305 F.2d 143 (6th Cir.), *cert. denied*, 371 U.S. 941 (1962).
17 Local 1251, UAW v. Robertshaw Control Co., No. 31955, 2801-02 '(2d. Cir. June 24, 1968).
18 Zdanok v. Glidden Co., 327 F.2d 944, 952-53 (2d Cir. 1964).
19 Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181, 186 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963).

when he spoke of seniority as having a status independent of the contractual relationship. Judge Hays also scored the *Glidden* opinion for its construction of the agreement as not being in accord with what was written, but rather, as replacing the writing of the parties with the court's idea of the parties' rational and humanitarian expectations. The proponents of *Glidden* were lightly dismissed as not having justified the decision by contract analysis, but only on "equitable considerations" and "national labor policy," the sources of which were termed "obscure."[20]

The court's criticism of the *Glidden* opinion is no doubt sound insofar as its observation that the position on "vested" seniority rights was without authority.[21] Moreover, the construction of the recognition clause in the *Glidden* agreement as *descriptio personae* rather than as an express limitation of the effective geographical scope of the agreement appears to be a strain of the literal meaning.[22] Moreover, if the failure of judicial citation of a decision as precedent is a measure of its erroneousness, the *Robertshaw* court finds further support for its opinion in the fact that *Glidden* has not been accepted by any of the other circuits.[23] The court, then, can hardly be faulted in its position even if only narrow legal precedent is considered.

The *Robertshaw* case, however, can be justly criticized for its slight treatment of the policy positions that supported the *Glidden* holding. The court stated:

> Those few who have applauded the decision have not attempted to justify it in terms of contract analysis. Rather they have sought to defend the result upon the basis of equitable considerations or of national labor policy. The sources of these policies and equities are obscure and there is the gravest doubt of the power of the federal courts to apply them in derogation of the contract of the parties.[24]

This statement by the court, made after it had taken a strictly contractual approach to the problem, intimates that a contract analysis approach is the only proper way to address the problem of plant removal and seniority rights. Such a position, however, indicates a misconception of the present legal status of a collective bargaining agreement, and, indeed, the employment relation itself.

The employment relation is no longer based on strict contract law.[25] It has become a relation primarily of status in which public law rather than private agreement is the dominant factor.[26] Precisely because of this realization that the employment relation is one of public status, the judiciary has been able to carry out the mandates of national labor policy in derogation of what the *Robertshaw* court would call contract rights. The substance of federal labor statutes indicates that Congress does not consider the employment relation

20 No. 31955 at 2804.
21 See, in general, the articles listed in No. 31955 at 2800-01.
22 For a contrary construction of a similar clause, see *Pluss Poultry*, 100 N.L.R.B. 64, 66 (1952).
23 *See, e.g.*, Oddie v. Ross Gear & Tool, 305 F.2d 143 (6th Cir. 1962).
24 No. 31955 at 2804.
25 *See, e.g.*, John Wiley & Sons v. Livingston, 376 U.S. 543, 550 (1964).
26 *See generally* Malick, *Toward a New Constitutional Status for Labor Unions: A Proposal*, 21 ROCKY MT. L. REV. 260 (1949).

solely one of contract. Federal statutes have created certain rights and duties that inhere in the employment relation and do not depend on the collective bargaining agreements for their existence. For example, the duty to bargain collectively,[27] the right of the employees to self-organization,[28] and the binding effect of the collective agreement on those workers within the bargaining unit who are absolutely opposed to it[29] are not reconcilable with any concept of a contract as a voluntary relationship. This view was expressly adopted by the Supreme Court in the case of *John Wiley & Sons v. Livingston.*[30] There, a question arose as to the duty of a successor employer to arbitrate a grievance when the collective bargaining agreement with the prior employer was silent on the agreement's extension to the new employer. The Court held that the disappearance by merger of a corporate employer which had entered into a collective bargaining agreement with a union did not automatically terminate all employee rights conferred by the agreement, and therefore "the successor employer may be required to arbitrate with the union under the agreement."[31] In its opinion the Supreme Court noted:

> Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.[32]

An essential requirement for its holding to apply, according to the Court, is a "relevant similarity and continuity of operation across the change in ownership."[33]

The analogy to the plant removal situation in question is clear. The agreements in both cases were silent as to whether the rights contained therein extended beyond their terms. In each instance, there was a sudden change in the employment relation from which the employees needed protection and a relevant similarity and continuity of operation across a change in the employment relation.[34] Can it be said that the analogy fails because the change in *Wiley* was one of ownership while in *Robertshaw* it was one of location? The Supreme Court answered this question in the negative in the case of *Local 2549, Piano Workers v. W. W. Kimball Company,*[35] which involved the survival of the duty to arbitrate beyond the term of the contract in a situation where the employer had relocated his factory. There the Court, citing *Wiley,* reversed a lower court decision and, in effect, held that the relevant similarity and continuity of opera-

27 Labor-Management Relations Act (Taft-Hartley Act) § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).
28 *Id.*
29 *Id.* § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964).
30 376 U.S. 543 (1964).
31 *Id.* at 548.
32 *Id.* at 550.
33 *Id.* at 551.
34 *Id.* at 549.
35 379 U.S. 357 (1964), *rev'g per curiam,* 333 F.2d 761 (7th Cir.).

tion required by *Wiley* is found when one employer moves his plant to a new location some distance away, even though there is no wholesale transfer of employees from the old plant to the new.[36]

It may be argued that in *Wiley* the right that extended beyond the term of the agreement was the right to have agreements arbitrated as provided in the expired agreement, and that this right is more germane to the implementation of the national labor policy than the right to vested seniority. This contention can be met with the observation that employers are required to discuss with the employee representative the effects of plant removal upon the employees.[37] As pointed out by a commentator, legal recognition of vested seniority rights makes meaningful this duty to discuss with employee representatives the effects of the impending plant removal.[38] The issue of employee rights upon plant removal is guaranteed a context in which employees are able to meaningfully support their demands.[39] This is consonant with the national labor policy since it promotes peaceful settlement of industrial disputes.

Thus, there are considerations of national labor policy more significant and pertinent to the issue of vested seniority rights than the *Robertshaw* court would admit, and, on the basis of *Wiley,* it is arguable that these considerations take precedence over private contract rights. As these policy considerations were overlooked in *Robertshaw,* so also were the equitable considerations and their bearing on the seniority and plant removal.

Equitable considerations are an important source of progressive change for a legal system that, adhering to precedent alone, would otherwise become outdated. A strictly precedented approach to problems could not meaningfully resolve legal difficulties by applying rules from decisions made in the context of conditions differing considerably from those of present industrial life.[40]

Two equitable considerations, both national in scope, are pertinent to the decision to overrule *Glidden* and to eliminate vested seniority and its job security ramifications. The first is the present and increasing national concern for two groups of people: the Black Americans and the older worker. One problem common to both groups is the difficulty encountered by them in obtaining satisfactory employment. Race and education militate against job placement for the first group while age and relative unadaptability likewise limit employment opportunities for the second. As a result of these factors members of these groups evidence a high degree of "job anxiety" and are strongly interested in availing themselves of the protection offered by the seniority provisions which govern

36 *Id.* The failure to hire the employees of the abandoned plant is not determinative of continuity where that failure is itself the issue. Monroe Sander Corp. v. Livingston, 377 F.2d 6, 12 (2d Cir.), *cert. denied,* 389 U.S. 831 (1967).

37 NLRB v. Rapid Bindry, Inc., 293 F.2d 170, 176 (2d Cir. 1961).

38 Note, *Plant Removal and the Survival of Seniority Rights: The Glidden Case,* 37 IND. L.J. 380, 381-82 (1962).

39 *Id.* at 397.

40 There are two ready examples of the importance and the influence of equitable considerations upon judicial decisions. The first is Brandeis' famous economic brief for *Muller v. Oregon,* 208 U.S. 412 (1908). Brandeis sought to uphold the validity of a state law prescribing a ten hour maximum working day for women. Opposing counsel proposed a defense based on the freedom of workers to contract for their own working hours. Brandeis' brief contained two pages of legal argument and over one hundred pages of argument based on economic and sociological data. It was the first time that "argument in a Supreme Court case was based

layoff and rehire.[41] A study in California investigated the reaction of employees of one company which transferred its operations from a plant in San Francisco to one in the Los Angeles area; the company made provisions enabling those of its employees so desiring to transfer to the new plant while retaining the seniority earned at the old one.[42] The reaction among the employees reflected the job security desires of the two above-mentioned groups of employees. Job security was the prime motive for the one-third of the eligible employees who expressed a preference to transfer.[43] Not surprisingly, this one-third consisted primarily of Black Americans and older workers. Thus the retention of seniority rights at the new plant was a most important factor in the decision of the men to actually undertake a transfer.[44] Apparently the retention of seniority rights as an assurance of job security was significant enough to counterbalance the general tendency of the labor market to be immobile, and the more particular tendency of the older worker to resist a change of domicile.[45] Clearly then, the job security assured by judicial endorsement of vested seniority rights which can extend beyond the term of the collective bargaining agreement and to new locations of operations would be in harmony with the national interest in aiding and protecting these two groups of people.

A second national equitable consideration centers on the problem of plant pirating, which, until recently, had even been effectively subsidized by the federal government. Through the use of industrial bond financing, municipalities had successfully induced manufacturers to remove their plants to new sites paid for and built by the municipality at little or no cost to the manufacturer.[46] This was made possible by the fact that interest on municipal industrial development bonds had been, until 1968, exempt from federal taxation.[47] Prior to 1968, the federal government tolerated the misuse[48] of the bonds by municipalities to entice manufacturers to leave their established locations and relocate — pri-

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not on dead legal precedents, but on the living facts of industrial America. Brandeis brought law and life together. [H]e made the law grow a hundred years in a day." A. MASON, BRANDEIS A FREE MAN'S LIFE 245 (1946).

Of equal fame is the development of the manufacturer's strict liability to consumers in derogation of the contract notion of the necessity for privity. This basic change in the law was prompted by a desire to protect the general public. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1122-23 (1960).

41 Gordon & McCorry, *Plant Relocation and Job Security: A Case Study*, 11 IND. & LAB. REL. REV. 13, 34-36 (1957). Job anxiety refers to the worker's worry that he may lose his present job and that it will be very difficult to secure new employment. Selznick & Vollmer, *Rule of Law in Industry: Seniority Rights*, 1 INDUSTRIAL RELATIONS, May 1962, at 97, 105-06.

42 The results of this study are reprinted in Gordon & McCorry, *supra* note 41.

43 *Id.* at 31.

44 *Id.* at 34.

45 *Id.* at 13. The assurance that seniority would carry over to the new job site would remove a great deal of the uncertainty inherent in a change of residence and job location and would make the hesitant worker more willing to move.

46 For a general treatment of industrial development bond financing, see Martori & Bliss, *Taxation of Municipal Bond Interest — "Interested Speculation" and One Step Forward*, 44 NOTRE DAME LAWYER 191, 201-11 (1968); Fernbach, *Subsidized Plant Migration*, 73 AM. FEDERATIONALIST, July 1966, at 8.

47 Section 107 of the Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, 82 Stat. 251, ended the exemption for industrial development bonds. *See* Martori & Bliss, *supra* note 46, at 208 & n.117.

48 *See Hearings on Revision of the Federal Income Tax Laws Before the House Comm. on Ways and Means*, 86 Cong., 1st Sess., at 732 (1959).

marily in the South — where costs, especially labor, would be lower. The total number of plant removals directly caused by the scheme is unascertainable, but fragmentary figures viewed in relation to the recent rapid growth of the use of industrial development bonds give an indication of their impact on industrial pirating.[49] This organized plant pirating was going on while the government and the courts were making no special efforts to aid the worker whose job was transferred to a different part of the country. In fact, *Glidden,* which was an overt effort to aid the employee suddenly made jobless, was repudiated and attacked on all sides. It should be noted that this plant removal problem has not been entirely resolved by the elimination of the interest tax exemption for municipal bonds. There still remain provisions for issues of $1 million or less of tax exempt industrial bonds.[50] The mood of the influential Southern bloc in Congress is not one of acceptance of the legislative curtailment of this method of financing regional development. Chairman Wilbur Mills of the House Ways and Means Committee has introduced a bill which would negate the legislation removing the tax exemption from industrial development bonds.[51] In addition, a glance through any of the leading national magazines will show that state and local governments are actively encouraging plant removal. In light of these actions by federal, state, and local governments, it may be argued that ordinary notions of equity dictate that some action is due on behalf of the displaced worker to correct this calculated injustice. Overruling *Glidden* with barely a passing nod toward these equitable considerations is an illustration of the manner in which this serious problem has been ignored.

It is apparent that there is a problem for the employees in the area of plant removal and seniority rights. It is equally clear that the *Glidden* court recognized this problem and attempted to alleviate it. The reaction of the courts to this attempt, crowned by the formal overruling in the instant case, indicates a reluctance by the courts to endorse the *Glidden* concept of vested seniority rights. Because of the need to provide greater economic security for the working man, especially to those who would benefit most from vested seniority, the progress of the equitable and humanitarian ideas represented by the *Glidden* holding is not likely to be halted by this reversal. They will reappear either in an opinion of a court more receptive to considerations of national labor policy and equity, or they will find endorsement by the legislature. In the interim, workers must continue to seek establishment of these rights through their particular employment agreements.

Michael C. Crowe

CRIMINAL LAW — PROBABLE CAUSE — DETENTION UPON REASONABLE SUSPICION FOR BRIEF PERIOD OF TIME UPHELD IF SUSPECT IS INFORMED OF FIFTH AND SIXTH AMENDMENT RIGHTS. — On October 4, 1964, Mrs. Addie

49 Figures for Mississippi for the eighteen years between 1936 and 1954 show that one hundred and three industrial planst which were built, expanded or under construction, were financed by industrial development bonds. This figure is put in proper prospective by considering that the use of the bonds mushroomed after that period. In 1957 about $7 million worth of bonds were floated; in 1958, about $26 million were floated. *Id.* at 730-31.

50 Revenue and Expenditure Control Act of 1968, § 107(a)(6)(A), Pub. L. No. 90-364.

51 Wall Street Journal, July 10, 1968, at 4, col. 3.

Brown was fatally stabbed while in the elevator of her apartment building in the Bronx, New York. There were no witnesses to the stabbing, and no one saw the killer leave the scene of the crime. The police subsequently conducted an extensive search of the apartment building and the surrounding neighborhood, and learned that one Melvin Morales, a known narcotics addict whose mother lived in the same building, had not been seen since the killing. When Mrs. Morales was questioned by the police, she stated that she did not know the whereabouts of her son. Ten days after the crime, Morales had still not returned to his mother's home, although he had frequented it often in the past. With these facts in mind and with no other substantial leads in the case, the police staked out Mrs. Morales' beauty shop. The suspect appeared at his mother's place of business on October 13, 1964, and was apprehended by detectives. He was not placed under arrest; he was merely told that the police had been looking for him, and was driven to the police station. Mrs. Morales was not permitted to talk to her son.

Upon arrival at the police station and prior to interrogation, Morales was informed of the subject matter of the investigation, his right to remain silent, his right to counsel, and the fact that any statement made could be used against him. Within a short time, Morales confessed to killing Addie Brown. He was then formally arrested, and his confession was reduced to writing and signed by him.

Morales was convicted of felony murder by a jury in the Supreme Court, New York County, and was sentenced to life imprisonment. The appellate division unanimously affirmed without opinion. The New York Court of Appeals sustained the conviction and *held:* a suspect may, upon reasonable suspicion, be detained for a reasonable and brief period of time for questioning under carefully controlled conditions that protect his fifth and sixth amendment rights. *People v. Morales,* 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1968).

Appellant's primary defense was based on the premise that he had been "unreasonably detained" by the police when they initially apprehended him. Both parties recognized that the probable cause necessary for a valid arrest did not exist at the time of apprehension. The state argued that something less than probable cause would suffice for "reasonable detention." Appellant contended that the grounds necessary for both arrest and detention were identical; neither could validly be imposed without probable cause.

An arrest is "the apprehending or restraining of one's person, in order to be forthcoming to answer for an alleged or suspected crime."[1] Blackstone's classic definition has been retained as a matter of common law for two centuries, and contemporary attempts to define the concept have not varied greatly from that definition.[2]

There is no specific definition of arrest contained in the Federal Constitution. The fourth amendment does not speak in terms of arrest but rather pro-

1 4 BLACKSTONE, COMMENTARIES *289.

2 *See, e.g.,* ALI, CODE OF CRIMINAL PROCEDURE § 18 (1931): "Arrest is the taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense." N.Y. CODE CRIM. PROC. § 167 (Supp. 1968): "Arrest is the taking of a person into custody that he may be held to answer for an offense."

vides that: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . particularly describing . . . the persons . . . to be seized."

Historically, the real problem has not occurred in attempting to give arrest a federal definition, but rather in answering the fundamental question of when and under what circumstances the state can "apprehend" or "restrain" one's person, in order that he be forthcoming to answer for an alleged or suspected crime. Using the fourth amendment as a guideline, an arrest can be made only when there is "probable cause" for taking such action. Probable cause has been said to exist when "the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."[3] Ultimately, the decision as to the existence of non-technical criteria necessary for the establishment of probable cause rests with the police officer. His mere suspicion that a crime has been committed is not enough.[4] However, he is not required to possess that quantum of legal evidence necessary to convict. If the policeman could reasonably and prudently have believed that a crime had been committed, and that the accused had committed that crime, probable cause exists and a legal arrest can be made regardless of the ultimate guilt or innocence of the accused.[5]

Examining the facts of the *Morales* case in light of the probable cause doctrine, it must be concluded that, at the time of apprehension, the police did not have the right to arrest Morales. There were no positive leads in the case. The investigation turned to Morales only because of his suspicious disappearance after the murder. Apparently aware of the absence of probable cause, the police were very careful not to formally arrest Morales. They were equally careful to inform him of his fifth and sixth amendment rights. The police saw their actions as a necessary investigatory step, a step which would aid the investigation process without violating the detained's individual rights.

Appellant advanced the traditional argument that the law recognizes only the two categories of arrest and freedom, and that detention (*i.e.*, restraining of one's freedom without probable cause) is a denial of those rights guaranteed by the fourth amendment.[6] Although there is some common law authority for this police power of detention,[7] the first serious attempt at its delineation came with the drafting of the Uniform Arrest Act.[8] Section 2 of the Act provides:

> (1) A peace officer may stop any person abroad whom he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.

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3 Henry v. United States, 361 U.S. 98, 102 (1959).
4 Wong Sun v. United States, 371 U.S. 471, 484 (1963).
5 Henry v. United States, 361 U.S. 98, 102 (1959).
6 Brief for Appellant at 9-10, People v. Morales, 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1968).
7 *See* HALE, PLEAS OF THE CROWN *96; 2 W. HAWKINS, PLEAS OF THE CROWN 122 (6th ed. 1787).
8 The Act appears in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320-21 (1942).

> (2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.
> (3) The total period of detention provided for by this section shall not exceed two hours. Such detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.[9]

The Act, with some minor changes, has been adopted by three states: Delaware,[10] New Hampshire,[11] and Rhode Island.[12] Effective police performance is claimed to be the justification for the Act. One of the leading proponents of the Act has contended that since the detention period is not to be considered in the terms of formal arrest, probable cause is not a necessary requirement for detention.[13] Although the suspect has been restrained so that he might answer for a suspected crime, he has not been formally arrested simply because the Act refuses to label such detention period an "arrest." Despite the opposition of critics who see the distinction between arrest and detention as one in name only,[14] the Uniform Arrest Act has withstood the test of constitutionality at the state level. Rhode Island's Supreme Court, in the case of *Kavanagh v. Stenhouse,*[15] stated that: "If the period of detention is reasonably limited, is unaccompanied by unreasonable or unnecessary restraint, and is based upon circumstances reasonably suggestive of criminal involvement, the legislature may lawfully make a distinction between such mere detention and an arrest."[16] On appeal to the Supreme Court of the United States, the case was dismissed for want of federal jurisdiction.[17] In *De Salvatore v. Delaware,*[18] the Delaware Supreme Court also specifically upheld the constitutionality of the statute.[19] Even in light of these decisions, however, the effect of the Act is at best minimal. Adoption by only three states during the twenty-six year life of the Act supports this conclusion.

A far more serious and controversial attempt to legislatively create a "less than arrest state," founded upon something other than probable cause, has come with the New York "stop and frisk" Act.[20] That Act provides:

> 1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the offenses specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

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9 *Id.*
10 DEL. CODE ANN. tit. 11, § 1902 (1953).
11 N.H. REV. STAT. ANN. § 594:2 (1955).
12 R.I. GEN. LAWS ANN. § 12-7-1 (1956).
13 *See* Warner, *supra* note 8, at 322.
14 *See* Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L.C. & P.S. 402, 403 (1960); Foote, *Law and Police Practice: Safeguards in the Law of Arrest,* 52 NW. U.L. REV. 16, 19 (1957).
15 93 R.I. 252, 174 A.2d 560 (1961), *appeal dismissed,* 368 U.S. 516 (1962).
16 *Id.* at —, 174 A.2d at 562.
17 368 U.S. 516 (1962).
18 52 Del. 550, 163 A.2d 244 (1960).
19 *Id.* at —, 163 A.2d at 249.
20 N.Y. CODE CRIM. PROC. § 180-a (Supp. 1968).

> 2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.[21]

The stop and frisk law has thus created an intermediate ground between the two absolute categories, freedom and arrest, which have been traditionally recognized by the common law. As can be seen from the statute, its primary purpose is the protection of the police officer. This recognition of the need for police protection is evident in the New York case of *People v. Rivera.*[22] Decided on facts which occurred before the stop and frisk Act took effect, the same court which decided *Morales* held that it is not always unreasonable to search a person absent a warrant, consent, or probable cause for making an arrest.[23] In upholding the appellant's conviction, the court of appeals stated that it is a prime function of police to be alert to suspicious occurrences in the streets. If police officers were to be denied a right of reasonable inquiry, the *Rivera* court observed, a necessary law enforcement function would be frustrated.[24]

Utilizing a rationale nearly identical to that found in *Rivera,* the New York Court of Appeals also upheld the specific constitutionality of stop and frisk in the later cases of *People v. Peters*[25] and *People v. Sibron.*[26] The court judicially sanctioned a "less than arrest state" based upon something other than probable cause:

> Stripped to the barest essentials, "probable cause" requires satisfactory grounds for *believing* that a crime was committed while "reasonable suspicion" requires satisfactory grounds for suspecting that a crime was committed. The difference between these two standards is proportionate to the difference in degree of invasion between an arrest and a detention, between a full search and a frisk. Such a difference in standards is both reasonable and desirable.[27]

The United States Supreme Court denied certiorari in the *Rivera* case,[28] but heard the petitions of both Peters[29] and Sibron.[30] Refusing to deal with the specific question of the constitutionality of the stop and frisk Act, the Court decided the cases on other grounds.[31]

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21 *Id.*
22 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied,* 379 U.S. 978 (1965).
23 *Id.* at 448, 201 N.E.2d at 36, 252 N.Y.S.2d at 464.
24 *Id.*
25 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966), *aff'd on other grounds,* 88 S. Ct. 1889 (1968).
26 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966), *rev'd on other grounds,* 88 S. Ct. 1889 (1968).
27 People v. Peters, 18 N.Y.2d 238, 246-47, 219 N.E.2d 595, 600, 273 N.Y.S.2d 217, 224 (1966).
28 379 U.S. 978 (1965).
29 88 S. Ct. 1889 (1968).
30 *Id.*
31 The Court upheld the conviction of Peters but reversed that of Sibron. In both cases.

The Court's refusal to directly confront the issue of stop and frisk has been overshadowed by the implications of its opinion in *Terry v. Ohio,*[32] decided during the same term. The issue presented in *Terry* was "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for arrest."[33] Accepting many of the same conclusions expressed by the New York Court of Appeals in *Rivera, Peters* and *Sibron,* the Supreme Court held that such a search was not always per se unreasonable.[34] The result of the *Terry* decision is a new ground upon which the search of one's person may be founded. Added to the traditional power to search incident to lawful arrest, or with a warrant issued upon probable cause, is the power to conduct a search for "the protection of the police officer . . . designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[35]

It appears implicit in the *Terry* decision that since there is a right to search based upon less than probable cause, there is also a right to "stop" based upon something other than the probable cause standard. Without such a right to stop, the search sanctioned by the Court could not be undertaken.

The *Morales* decision, however, may not be justified in terms of the Supreme Court's handling of the stop and frisk cases and of *Terry.* Stop and frisk and *Terry* have as their primary purpose the protection of the policeman in his on the street encounters. *Morales* instead involves in custody detention and interrogation justified on the basis of "reasonable suspicion." Explicitly or implicitly, there is nothing in the stop and frisk Act which allows the policeman to conduct his inquiries behind the closed doors of a police station.

Justification for the *Morales* decision must come from another source. The court may have been influenced by *United States v. Vita,*[36] in which the defendant charged that the actions of federal agents in handling his custody violated his rights under rule 5(a) of the Federal Rules of Criminal Procedure. The second circuit, however, did not agree with this contention. In upholding Vita's conviction, the court said:

> We believe that when a continuing process of essential investigation is being carried out expeditiously, when the suspect is advised of his constitutional rights, and where there is no reason to believe that the procedures being followed are used merely as an excuse for delay during which a confession can be extracted, detention is not an "arrest," and in any event is not "unnecessary," and an uncoerced confession so obtained is admissible.[37]

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the restraints were considered as arrests, and the decision was made on the basis of probable cause. The Court held that there was probable cause present for the arrest of Peters, thus making the search incidental to a lawful arrest; but it found no probable cause for the arrest of Sibron, and consequently the search made of him was illegal. The Court apparently based its decision on probable cause because it did not wish to deal specifically with the constitutionality of the New York stop and frisk Act.

32 88 S. Ct. 1868 (1968).
33 *Id.* at 1877.
34 *Id.* at 1883.
35 *Id.* at 1884.
36 294 F.2d 524 (2d Cir. 1961).
37 *Id.* at 534.

It perhaps can be charged, with accuracy, that the *Morales* opinion reads like an uncamouflaged combination of the rationale of the Uniform Arrest Act and *United States v. Vita.* However, it is doubtful that the court would rest its rather controversial decision on such shaky precedent. The primary considerations underlying the decision are probably more fundamental. Initially the court reduced the issue to the basic problem of striking a proper balance between the public order and private rights. It concluded that "[n]o citizen has the unrestrained right to do as he pleases in derogation of the right of others. Individual rights are subject to reasonable control by the state for the general welfare of all citizens."[38] When Morales was apprehended for questioning, his right to unrestrained freedom became subject to the general right of society to investigate crime and to bring criminals to justice. The state merely exercised those reasonable controls over individuals that are necessary for the general welfare and protection of all of its citizens. The court did offer an abstract yet rational justification for its decision, by analogizing to the legal precedent found in the Uniform Arrest Act, stop and frisk, and *Vita.* Nevertheless, an examination of the policy interests involved and the court's decision as to the relative importance of those considerations ultimately carried the day.

The decision in *Morales* has thus opened another door in the name of effective police procedure. Realizing that opening the door too wide might give rise to abusive police practices, the detained suspect is guaranteed the protection of his fifth and sixth amendment rights. A right to a reasonable detention is a necessity for effective police operation, but this judicially granted right is not meant to allow the police to revert to those practices described in the Wickersham report.[39]

At present, appellant's petition for certiorari to the United States Supreme Court has not been passed upon. In deciding whether or not to hear the case the Court must consider several factors. First, to what degree is *Terry v. Ohio*[40] going to be extended? Is it "implicit" in *Terry* that since there is a right to search based on less than probable cause there is also a right to "stop" or even further "detain" upon less than probable cause? Is *Terry* a judicial "end run" which will ultimately justify the *Morales* rationale? Second, when the police apprehended Morales, did they not "restrain his person so that he may be forthcoming to answer for an alleged or suspected crime"? The Court must decide whether or not the diluted probable cause standard outlined in *People v. Peters*[41] is going to be diluted even further or rather refortified. Deciding the *Morales* case on the basis of probable cause might force the court into a general re-examination of the arrest theory.

Perhaps most important is the fact that the Court would have to make its decision in light of the contemporary volatile issue of "law and order." A reversal of the decision might place the Court squarely in the middle of a

38 People v. Morales, 22 N.Y.2d 55, 62, 238 N.E.2d 307, 312, 290 N.Y.S.2d 898, 905 (1968).

39 4 UNITED STATES NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

40 88 S. Ct. 1868 (1968).

41 88 S. Ct. 1889 (1968).

political battleground and force it to lower itself to answer some of the more leather-lunged criticism. Whatever its decision, the Court may well have to directly face one fact: apprehending or restraining one's person in order that he may be forthcoming to answer for an alleged or suspected crime, even though camouflaged with another name, is still by classical definition an arrest.

Richard T. Sullivan