C. D. Michel — SBN 144258
TRUTANICH • MICHEL, LLP
180 E. Ocean Blvd., Ste. 200
Long Beach, CA 90802
Tel: (562) 216-4444

Stephen P. Halbrook
LAW OFFICES OF STEPHEN P. HALBROOK
10560 Main Street, Suite 404
Fairfax, Virginia 22030
Tel: (703) 352-7276

Don B. Kates — SBN 039193
BENENSON & KATES
22608 North East 269th Avenue
Battleground, Washington 98604
Tel: (360) 666-2688

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et al., Plaintiffs, v. STATE OF CALIFORNIA, et al., Defendants.	CASE NO. 01CECG03182 **NOTICE OF LODGING FEDERAL AUTHORITY CITED IN PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE MOTION FOR SUMMARY ADJUDICATION**

TO ALL PARTIES TO THIS ACTION AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Plaintiffs' EDWARD W. HUNT et al., hereby lodges with the court the following federal authority cited in our Opposition to Defendants' Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication:

1. *Sabetti v. Dipaolo* (1st Cir. 1994) 16 Fed.3d 16, 17.
2. *U.S. v Cohen Grocery Co.* (1921) 255 U.S. 81.
3. *United States v. Colon-Ortiz* (1st Cir.1989) 866 F.2d 6, 9.
4. *United States v. Harris* (1954) 347 U.S. 612, 617.

Date: January 9, 2007

TRUTANICH • MICHEL, LLP:

C. D. Michel
Attorney for Plaintiffs

EXHIBIT 1

16 F.3d 16
(Cite as: 16 F.3d 16)

H

Sabetti v. DipaoloC.A.1 (Mass.),1994.
United States Court of Appeals,First Circuit.
Matthew SABETTI, Petitioner, Appellant,
v.
Paul DIPAOLO, Respondent, Appellee.
No. 93-1595.

Heard Oct. 8, 1993.
Decided Feb. 10, 1994.

Conviction on jury verdict for knowingly possessing with intent to distribute 28 grams or more of cocaine was reinstated, 411 Mass. 770, 585N.E.2d 1385. Petitioner sought writ of habeas corpus. The United States District Court for the District of Massachusetts, A. David Mazzone, J., denied relief. Petitioner appealed. The Court of Appeals, Breyer, Chief Judge, held that: (1) conviction, under the language of the statute, based on reasonably foreseeable amount of cocaine, rather than on petitioner's actual knowledge of precise amount, did not violate "fair notice" requirement of due process clause, and (2) federal court has no power to apply rule of lenity to state statute.

Affirmed.
West Headnotes
[1] Constitutional Law 92 ⚿258(3.1)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(3) Particular Statutes and Ordinances
92k258(3.1) k. In General. Most Cited Cases

Controlled Substances 96H ⚿6

96H Controlled Substances
96HI In General
96Hk4 Statutes and Other Regulations
96Hk6 k. Validity. Most Cited Cases
(Formerly 138k43.1 Drugs and Narcotics)
Defendant's conviction of "knowingly possessing with intent to distribute twenty-eight grams or more of cocaine" under Massachusetts drug trafficking statute did not violate fair notice requirement of due process clause, since person of ordinary intelligence would not be surprised that statutory language with which defendant was charged prohibited knowingly possessing with intent to distribute amount of cocaine that one might reasonably foresee would amount to at least 28 grams, but which defendant did not actually know weighed that much. U.S.C.A. Const.Amends. 5, 14; M.G.L.A. c. 94C, § 32E(b).

[2] Constitutional Law 92 ⚿258(2)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(2) k. Certainty and Definiteness in General. Most Cited Cases
Within meaning of "fair notice" requirement of due process clause, legislators need not, and often cannot, draft statutes with perfect precision. U.S.C.A. Const.Amends. 5, 14.

[3] Constitutional Law 92 ⚿258(2)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(2) k. Certainty and Definiteness in General. Most Cited Cases

Criminal Law 110 ⚿13.1(1)

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(1) k. In General. Most Cited

Cases
Even small degree of ambiguity in criminal statute, when construed to prohibit what would otherwise reasonably seem to be innocent conduct, can cause significant surprise, for purposes of "fair notice" requirement of due process clause. U.S.C.A. Const.Amends. 5, 14.

[4] Federal Courts 170B ⇐386

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk386 k. State Constitutions and Statutes, Validity and Construction. Most Cited Cases

Federal Courts 170B ⇐404

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk404 k. Arrest and Search; Criminal Law and Procedure. Most Cited Cases
Rule of lenity is rule of statutory construction, and thus federal Court of Appeals has no power to apply it to Massachusetts criminal statute, since Supreme Judicial Court is authoritative interpreter of that state's statutes.

***17** Carol A. Donovan,with whom Committee for Public Counsel Services, Boston, MA, was on brief for appellant.
Nancy W. Geary, Assistant Attorney General, Criminal Bureau, with whom Scott Harshbarger, Attorney General, Boston, MA, was on brief for appellee.

Before BREYER, Chief Judge, BOUDIN and STAHL, Circuit Judges.
BREYER, Chief Judge.
State policemen found petitioner, Matthew Sabetti, and another person sitting in a parked car that contained drug paraphernalia strewn on the floor and, on the back seat, two small plastic bags of cocaine sticking out of a larger gym bag. It was later determined that the cocaine amounted to 38 grams of a very pure mixture. The Commonwealth charged Sabetti with violating a statute that, at the time, prohibited "*knowingly* possessing with intent to distribute twenty-eight grams or more of cocaine. " Mass.Gen.Laws Ann. ch. 94C, § 32E(b) (West 1984) (ellipses omitted) (emphasis added) (statute reprinted in appendix). The trial judge instructed the jury that to convict Sabetti it must find, in effect, 1) that he knowingly possessed the two bags (with intent to distribute the cocaine) *and* 2) that he actually *knew* that the bags contained at least 28 grams of cocaine (i.e., an ounce). The jury found Sabetti guilty. The trial court, finding the evidence insufficient to show specific knowledge of 28 grams or more, set aside the verdict. But, the Supreme Judicial Court reinstated the verdict, on the ground that the statute does not require the government to prove the defendant's actual knowledge of amount-though, we add, the facts here indicate that the amount was reasonably foreseeable.

Sabetti now seeks federal habeas corpus. He argues that his conviction violates the "fair notice" requirement of the federal Constitution's Due Process Clause. *See, e.g., United States v. Batchelder,* 442 U.S. 114, 123, 99 S.Ct. 2198, 2203, 60 L.Ed.2d 755 (1979); *United States v. Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989 (1954); *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939); *Connally v. General Construction Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); *United States v. Colon-Ortiz,* 866 F.2d 6, 8 (1st Cir.), *cert. denied,* 490 U.S. 1051, 109 S.Ct. 1966, 104 L.Ed.2d 434 (1989). The federal district court rejected Sabetti's argument. And, so do we.

As both sides agree, "[i]t is well-settled that due process requires that criminal statutes put individuals on sufficient notice as to whether their contemplated conduct is prohibited." *See Colon-Ortiz,* 866 F.2d at 8 (citations omitted). As both sides also seem to agree, a criminal statute *fails* to provide fair notice if a "person of ordinary intelligence," *Harriss,* 347 U.S. at 617, 74 S.Ct. at 811, "examining [only] the language of the statute," *Colon-Ortiz,* 866 F.2d at 9, would be in some way surprised that it prohibited the conduct in question. "It is not enough," we have explained, for the true

meaning of the statute "to be apparent *elsewhere,*" in extra-textual materials such as legislative history or analogous statutes. *Id.* (emphasis added). The idea is that ordinary individuals trying to conform their conduct to law should be able to do so by reading the *face* of a statute-not by having to appeal to outside legal materials. At the same time, the person of ordinary intelligence is also a person of common sense, with knowledge of "common understanding[s] and practices," *Jordan v. De George,* 341 U.S. 223, 232, 71 S.Ct. 703, 708, 95 L.Ed. 886 (1951) (citation omitted), which he brings fully to bear in "examining the language of the statute."

[1] In this case, we do not think the person of ordinary intelligence would be the least bit surprised to learn that the pertinent statutory language-"knowingly possessing with intent to distribute twenty-eight grams or more of cocaine" -was construed to prohibit***18** the conduct for which Sabetti was convicted: knowingly possessing with intent to distribute an amount of cocaine that one might reasonably foresee would amount to at least 28 grams but which the defendant did not *actually* know weighed that much. We acknowledge that, if one reads the statute *in a vacuum,* one might think the word "knowingly" could as easily be construed to apply to the words " twenty-eight grams" as not. But, bringing common sense to bear, we have little doubt the average person would be skeptical of the idea of a legislature really insisting that a prosecutor prove actual knowledge of a precise amount-often an impossible task-rather than knowledge simply of a small amount (e.g., two plastic bags' worth) that could easily turn out to weigh, say, an ounce. After all, most people know that the degree of harm drugs cause in the world is related, not to *perceived* amounts of drugs, but to *actual* amounts.

Our conclusion is supported by the fact that we have searched the case law and have not found cases in which a garden-variety, textual ambiguity of the kind at issue here has risen to the level of a due process violation. *See, e.g., Stout v. Dallman,* 492 F.2d 992 (6th Cir.1974) (finding, on habeas review, no "fair notice" violation when state court construed armed robbery statute requiring defendant to be "armed with a pistol, knife, *or other dangerous weapon*" to cover defendant who smacked his victim on the head with an unidentified hard object) (emphasis added).

[2] Nor is this surprising. Legislators need not, and often cannot, draft statutes with perfect precision. *See Stansberry v. Holmes,* 613 F.2d 1285, 1289 (5th Cir.) ("A provision need not ... be cast in terms that are mathematically precise....") (citations omitted), *cert. denied,* 449 U.S. 886, 101 S.Ct. 240, 66 L.Ed.2d 112 (1980). If run-of-the-mill statutory ambiguities *were* enough to violate the Constitution, no court could ever clarify statutes through judicial interpretation, for the first person against whom the clarified version applied (and likely others as well) could argue that he was unfairly surprised and thus his due process rights were violated. Courts, of course, clarify textual ambiguities all the time.

[3] We *have* found cases, to be sure, in which courts seem wary of run-of-the-mill statutory ambiguities, but these cases tend to involve statutes that criminalize conduct that the average person generally considers *innocent. See, e.g., Kolender v. Lawson,* 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (statute restricting persons from wandering the streets without identification); *United States v. Anzalone,* 766 F.2d 676 (1st Cir.1985) (statute requiring reporting of currency transactions over $10,000). Of course, even a small degree of ambiguity, when construed to prohibit what would otherwise reasonably seem to be innocent conduct, can cause significant surprise. The instant case is quite different: no one thinks that cocaine drug dealing, even in small amounts, is innocent conduct.

We have also found some cases indicating a "fair notice" violation in a statute that criminalizes (or sets penalties for) obviously *non*-innocent conduct such as drug dealing. But, these cases tend to involve ambiguities that cannot easily be called run-of-the-mill. In *United States v. Colon-Ortiz,* 866 F.2d 6 (1st Cir.), *cert. denied,* 490 U.S. 1051, 109 S.Ct. 1966, 104 L.Ed.2d 434 (1989), for example, we faced a (federal) drug statute that said that violators "shall be sentenced to a [minimum five-year] term of imprisonment, a [limited] fine, *or*

both." 21 U.S.C. § 841(b)(1)(B) (ellipses omitted) (emphasis added) (since amended). The court interpreted the provision to mean that the only discretionary part of the sentence was the imposition of a fine; the imposition of a minimum five-year prison term was not discretionary. In doing so, however, the court recognized that such an interpretation flies directly in the face of the ordinary person's reading of the phrase "or both" and could only be justified by regarding "or both" as an "inadvertent drafting error" that should be " stricken from the statute." *Colon-Ortiz,* 866 F.2d at 10. Again, our case is quite different: as suggested above, the ambiguity at issue here-whether a word near the beginning of a sentence ("knowingly") modifies ***19** a phrase near the end ("twenty-eight grams")-was entirely ordinary.

[4] Finally, petitioner argues in his habeas petition that the "rule of lenity" (i.e., the rule saying that ambiguous criminal statutes should be construed favorably to defendants) requires a judgment in his favor. That rule, however, is one of statutory interpretation. We have no power to apply it to a state statute, for the Supreme Judicial Court, not this court, is the authoritative interpreter of state statutes. And, Sabetti has not pointed to anything in the federal Constitution-other than, of course, the "fair notice" guaranty, which, we have just held, is satisfied here-that would *require* a state court to apply the rule of lenity when interpreting a state statute.

For the reasons stated, the judgment of the district court is

Affirmed.

APPENDIX

Massachusetts General Laws Annotated

§ 32E. Trafficking in marihuana, cocaine, heroin, morphine, opium, etc.

....

(*b*) Any person who trafficks in cocaine or any salt thereof by knowingly or intentionally manufacturing, distributing, or dispensing or possessing with intent to manufacture, distribute, or dispense or by bringing into the commonwealth a net weight of twenty-eight grams or more of cocaine or any salt thereof or a net weight of twenty-eight grams or more of any mixture containing cocaine or any salt thereof shall, if the net weight of cocaine or any salt thereof or any mixture thereof is:-

(1) Twenty-eight grams or more, but less than one hundred grams, be punished by a term of imprisonment in the state prison for not less than three nor more than fifteen years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(2) One hundred grams or more, but less than two hundred grams, be punished by a term of imprisonment in the state prison for not less than five nor more than fifteen years and a fine of not less than five thousand nor more than fifty thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(3) Two hundred grams or more, be punished by a term of imprisonment in the state prison for not less than ten nor more than fifteen years and a fine of not less than twenty thousand nor more than two hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

C.A.1 (Mass.),1994.
Sabetti v. Dipaolo
16 F.3d 16

END OF DOCUMENT

EXHIBIT 2

255 U.S. 81, 41 S.Ct. 298, 14 A.L.R. 1045, 65 L.Ed. 516
(Cite as: 255 U.S. 81, 41 S.Ct. 298)

▷

UNITED STATES v. L. COHEN GROCERY CO.U.S. 1921

Supreme Court of the United States.
UNITED STATES
v.
L. COHEN GROCERY CO.
No. 324.

Argued Oct. 18, 19 and 20, 1920.
Decided Feb. 28, 1921.

In Error to the District Court of the United States for the Eastern District of Missouri.

Criminal prosecution by the United States against the L. Cohen Grocery Company. The indictment was quashed on demurrer (264 Fed. 218), and the United States brings error. Affirmed.

West Headnotes

Criminal Law 110 ⚿13.1(1)

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(1) k. In General. Most Cited Cases

The limitation on the power of Congress contained in U.S.C.A.Const. Amends. 5, 6, so far as they prohibit the delegation of legislative powers to courts and juries, the penalizing of indefinite acts, and the denial of the right of citizens to be informed of the nature and cause of the accusation against them, are not suspended or changed by the mere existence of a state of war.

Criminal Law 110 ⚿13.1(10)

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(2) Particular Statutes, Application to
110k13.1(10) k. Licenses and Occupations; Monopolies and Trade Regulation. Most Cited Cases

Lever Act, § 4, 40 Stat. 277, as amended by Act Oct. 22, 1919, tit. 1, § 2, making it unlawful to conspire, combine, agree, or arrange with any other person to exact excessive prices for necessaries, is not sufficiently specific to create a standard, and inform accused of the accusation against him, and is void under U.S.C.A.Const. Amends. 5, 6.

War and National Emergency 402 ⚿167.1

402 War and National Emergency
402II Measures and Acts in Exercise of War and Emergency Powers
402II(B) Price Control
402k167 Offenses Against Price Controls
402k167.1 k. In General. Most Cited Cases
(Formerly 402k167)

Act Oct. 22, 1919, tit. 1, § 2, 41 Stat. 297, re-enacting Lever Act, § 4, 40 Stat. 277, and making it unlawful for any person willfully to make any unjust or unreasonable rate or charge in handling or dealing in or with necessaries, embraces the charging of unjust or unreasonable prices on a sale of necessaries.

War and National Emergency 402 ⚿167.1

402 War and National Emergency
402II Measures and Acts in Exercise of War and Emergency Powers
402II(B) Price Control
402k167 Offenses Against Price Controls
402k167.1 k. In General. Most Cited Cases
(Formerly 402k167)

The penalty imposed by Act Oct. 22, 1919, tit. 1, § 2, 41 Stat. 297, for violations of that section, apply to the making of any unjust or unreasonable rate or charge in dealing in necessaries, though Lever Act, §

4, 40 Stat. 277, as originally enacted, contained no penalty.

****298 *82** Mr. Solicitor General Frierson, for the United States.
***85** Mr. Chester H. Krum, of St. Louis, Mo., for defendant in error.
****299** Mr. Chief Justice WHITE delivered the opinion of the Court.
Required on this direct appeal to decide whether Congress under the Constitution had authority to adopt ***86** section 4 of the Lever Act as re-enacted in 1919, we reproduce the section so far as relevant (Act Oct. 22, 1919, tit. 1, c. 80, § 2, 41 Stat. 297):
'That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person * * * (e) to exact excessive prices for any necessaries. * * * Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both. * * *'

The text thus reproduced is followed by two provisos exempting from the operation either of the section or of the act enumerated persons or classes of persons engaged in agricultural or similar pursuits.

Comparing the re-enacted section with the original text (Act Aug. 10, 1917, c. 53, § 4, 40 Stat. 276 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115 1/8 ff]), it will be seen that the only changes made by the re-enactment were the insertion of the penalty clause and an enlargement of the enumerated exemptions.

In each of two counts the defendant, the Cohen Grocery Company, alleged to be a dealer in sugar and other necessaries in the city of St. Louis, was charged with violating this section by willfully and feloniously making an unjust and unreasonable rate and charge in handling and dealing in a certain necessary; the specification in the first count being a sale for $10.07 of about 50 pounds of sugar, and that in the second, of a 100-pound bag of sugar for $19.50.

The defendant demurred on the following grounds: (a) That both counts were so vague as not to inform it of the nature and cause of the accusation; (b) that the statute upon which the indictment was based was subject to the same infirmity because it was so indefinite as not to enable it to be known what was forbidden, and ***87** therefore amounted to a delegation by Congress of legislative power to courts and juries to determine what acts should be held to be criminal and punishable; and (c) that as the country was virtually at peace Congress had no power to regulate the subject with which the section dealt. In passing on the demurrer the court, declaring that this court had settled that until the official declaration of peace there was a status of war, nevertheless decided that such conclusion was wholly negligible as to the other issues raised by the demurrer, since it was equally well settled by this court that the mere status of war did not of its own force suspend or limit the effect of the Constitution, but only caused limitations which the Constitution made applicable as the necessary and appropriate result of the status of war, to become operative. Holding that this latter result was not the case as to the particular provisions of the Fifth and Sixth Amendments which it had under consideration; that is, as to the prohibitions which those amendments imposed upon Congress against delegating legislative power to courts and juries, against penalizing indefinite acts, and against depriving the citizen of the right to be informed of the nature and cause of the accusation against him, the court, giving effect to the amendments in question, came to consider the grounds of demurrer relating to those subjects. In doing so and referring to an opinion previously expressed by it in charging a jury, the court said:
'Congress alone has power to define crimes against the United States. This power cannot be delegated either to the courts or to the juries of this country. * * *
'Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it

does not inform defendant of the nature and cause of the accusation against him, ***88** I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained.'

The indictment was therefore quashed.

In cases submitted at about the same time with the one before us, and involving identical questions with those here in issue, it is contended that the section does not embrace the matters charged. We come, therefore, on our own motion in this case to dispose of that subject, since, if well founded, the contention would render a consideration of the constitutional questions unnecessary. The basis upon which the contention rests is that the words of the section do not embrace the price at which a commodity is sold, and, at any rate, the receipt of such price is not thereby intended to be penalized. We are of opinion, however, that these propositions are without merit, first, because the words of the section, as re-enacted, are broad enough to embrace the price for which a commodity is sold; and, second, because as the amended section plainly imposes a penalty for the acts which it includes when committed after its passage, the fact that the section before its re-enactment contained no penalty is of no moment. This must be the case unless it can be said that the failure at one time to impose a penalty for a forbidden act furnishes an adequate ground for preventing the subsequent enforcement of a penalty which is specifically and unmistakably provided.

We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war ****300** could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon. Ex parte Milligan, 4 Wall. 2, 121-127, 18 L. Ed. 281; Monongahela Navigation Co. v. United States, 148 U. S. 312, 336, 13 Sup. Ct. 622, 37 L. Ed. 463; United States v. Joint Traffic Association, 171 U. S. 505, 571, 19 Sup. Ct. 25, 43 L. Ed. 259; McCray v. United States, 195 U. S. 27, 61, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; ***89** United States v. Cress, 243 U. S. 316, 326;[FN1] Hamilton v. Kentucky Distilleries Company, 251 U. S. 146, 156, 40 Sup. Ct. 106, 64 L. Ed. 194. It follows that in testing the operation of the Constitution upon the subject here involved the question of the existence or nonexistence of a state of war becomes negligible, and we put it out of view.

FN1 37 Sup. Ct. 380, 61 L. Ed. 746.

The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words 'that it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction, finds abundant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightended judges in seeking to carry out the statute in cases brought before them are vividly ***90** portrayed. As illustrative of this situation we append in the margin a statement from one of the briefs on the subject. [FN2] And again, this condition would be

additionally ***91** obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used ****301** as a basis to render the section possible of execution.

> FN2 In U. S. v. Leonard, District Judge Howe, of the Northern District of New York, held that in determining whether or not a price was unreasonable, the jury should take into consideration *'what prices the defendants paid for the goods in the market*-whether they bought them in the ordinary course of trade, paying the market price at the time, the length of time defendants have carried them in stock, the expense of carrying on the business, what a fair and reasonable profit on the goods would be, and all the other facts and circumstances in and about the transaction, *but not how much the market price had advanced from the time the goods were purchased to the time they were sold.*'

In U. S. v. Oglesby Grocery Co., 264 Fed. 691, District Judge Sibley of the Northern District of Georgia, said:

'The words used by Congress in reference to a well-established course of business *fairly indicate the usual and established scale of charges and prices in peace times as a basis, coupled with some flexibility in view of changing conditions.* The statute may be construed to forbid, in time of war, any departure from the usual and established scale of charges and prices in time of peace, which is not justified by some special circumstance of the commodity or dealer.'

Judge McCall, of the Western District of Tennessee, in his charge to the grand jury, stated that, if a shoe dealer bought two orders of exactly the same kind of shoes at different times and at different prices, the first lot at $8 per pair and the second lot after the price had gone up to $12 per pair 'and then he sells both lots of those shoes at $18, he is profiteering clearly upon the first lot if that only cost him $8. Now he does that upon the theory that if he sells these shoes out and goes into the market and buys again he will have to pay the higher price, but that doesn't excuse him. He is entitled to make a reasonable profit, but he certainly hasn't the right to take advantage of the former low purchase and take the same profit on them that he gets on the $12 shoes.'

In U. S. v. Myatt, 264 Fed. 442, district Judge Connor, of the Eastern District of North Carolina, said:

'It will be observed that the statute does not declare it unlawful to make an unjust or unreasonable profit upon sugar. The profit made is not the test, and may be entirely irrelevant to the guilt of the defendant. He may, within the language of the statute, make an unreasonable, and therefore unlawful, 'rate or charge' without making any profit, or the rate or charge made may involve a loss to him upon the purchasing price.'

District Judge Hand, of the Northern District of New York, in his charge to the grand jury, said:

'Furthermore, it is not the particular profits that the individual himself makes which is the basis of the unreasonable charge, but it is whether the charge is such as gives unreasonable profit-not to him, but if established generally in the trade. The law does not mean to say that all people shall charge the same profit. If I am a particularly skillful merchant or manufacturer and I can make profits which are greater than the run of people in my business, I am allowed to make those profits. So much am I allowed. But if I am charging more than a reasonable price, taking the industry as a whole, I am not allowed to keep that profit because on other items I am sustaining a loss.'

In U. S. v. Goldberg, District Judge Bledsoe, of the Southern District of California, charged the jury that, in passing on the question of the reasonableness of prices for sugar the jury should take into considerations, among other circumstances, the following:

'That there was, if you find that there was, a market price here in the community or generally with respect to the profit that normally should be made upon sugar sold either by manufacturers or jobbers and retailers.'

In U. S. v. Culbertson, etc., Co., District Judge Rudkin, of the Eastern District of Washington, on the trial of defendant on July 8, 1920, charged the jury, among other things, that as a matter of law,

defendant was entitled to sell its goods on the basis of the actual *market* value at the time and place of sale over and above the expense of handling the goods, and a reasonable profit, and that the original cost price became immaterial, except as it threw some light upon the market value.

That it results from the consideration which we have stated that the section before us was void for repugnancy to the Constitution is not open to question. United States v. Reese, 92 U. S. 214, 219-220, 23 L. Ed. 563; United States v. Brewer, 139 U. S. 278, 288, 11 Sup. Ct. 538, 35 L. Ed. 190; Todd v. United States, 158 U. S. 278, ***92** 282, 15 Sup. Ct. 889, 39 L. Ed. 982. And see United States v. Sharp, 27 Fed. Cas. 1041, 1043; Chicago & Northwestern R. R. Co. v. Dey (C. C.) 35 Fed. 866, 876, 1 L. R. A. 744; Tozer v. United States (C. C.) 52 Fed. 917, 919, 920; United States v. Capital Traction Co., 34 App. D. C. 592, 19 Ann. Cas. 68; United States v. Pennsylvania R. R. Co., 242 U. S. 208, 237-238, 37 Sup. Ct. 95, 61 L. Ed. 251.

But decided cases are referred to which it is insisted sustain the contrary view. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417; Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 123; Fox v. State of Washington, 236 U. S. 273, 35 Sup. Ct. 383, 59 L. Ed. 573; Miller v. Strahl, 239 U. S. 426, 36 Sup. Ct. 147, 60 L. Ed. 364; Omaechevarria v. Idaho, 246 U. S. 343, 38 Sup. Ct. 323, 62 L. Ed. 763. We need not stop to review them, however, first, because their inappositeness is necessarily demonstrated when it is observed that if the contention as to their effect were true it would result, in view of the text of the statute, that no standard whatever was required, no information as to the nature and cause of the accusation was essential, and that it was competent to delegate legislative power, in the very teeth of the settled significance of the Fifth and Sixth Amendments and of other plainly applicable provisions of the Constitution; and, second, because the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded. Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them. International Harvester Co. v. Kentucky, 234 U. S. 216, 221, 34 Sup. Ct. 853, 58 L. Ed. 1284; Collins v. Kentucky, 234 U. S. 634, 637, 34 Sup. Ct. 924, 58 L. Ed. 1510; American Seeding Machine Co. v. Kentucky, 236 U. S. 660, 662, 35 Sup. Ct. 456, 59 L. Ed. 773. And see United States v. Pennsylvania R. R. Co., 242 U. S. 208, 237, 238, 37 Sup. Ct. 95, 61 L. Ed. 251.

It follows from what we have said that, not forgetful of our duty to sustain the constitutionality of the statute ***93** if ground can possibly be found to do so, we are nevertheless compelled in this case to say that we think the court below was clearly right in holding the statute void for repugnancy to the Constitution, and its judgment quashing the indictment on that ground must be, and it is, hereby affirmed.

Affirmed.

Mr. Justice PITNEY and Mr. Justice BRANDEIS concur in the result.

Mr. Justice DAY took no part in the consideration or decision of this case.Mr. Justice PITNEY, concurring.

I concur in the judgment of the court, but not in the reasoning upon which it is rested.

Defendant was indicted upon two counts, alike in form, charging in each case that it 'did willfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to wit, sugar,' in that it demanded, exacted and collected excessive prices for specified quantities of sugar purchased from it in violation of the Lever Act (Act Oct. 22, 1919, c. 80, tit. 1, § 2, 41 Stat. 297, 298, amending section 4 of Act Aug. 10, 1917, c. 53, 40 Stat. 276, 277). I am convinced that the exacting of excessive prices upon the sale of merchandise is not within the meaning of that provision of the act which is cited as denouncing it; that the act does not make it a criminal offense; that for this reason the demurrer to the indictment was properly sustained; and that whether the provision is in conflict with the Fifth or Sixth Amendment is a

question not necessarily raised, and which ought not to be passed upon.

In order to appreciate the point it is necessary to quote entire so much of the section as defines the crimes thereby denounced. It reads as follows:
***94** 'That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section 6 of this act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, ****302** combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: Provided, * * *' etc.

For a definition of 'hoarding,' the section refers to section 6 of the original act (40 Stat. 278 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115 1/8 gg]), which declares that necessaries shall be deemed to be hoarded, within the meaning of the act, when (inter alia) 'withheld, whether by possession or under any contract or arrangement, from the market by any person for the purpose of unreasonably increasing or diminishing the price.'

The court holds that the words 'to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries' are broad enough to embrace the exaction of an excessive price upon a sale of such ***95** merchandise. Why Congress should employ so unskillful and ambiguous a phrase for the purpose, when it would have been easy to express the supposed purpose in briefer and more lucid words, it is difficult to understand. If the words were to be taken alone, and without reference to the context, it might be possible to stretch their meaning so as to include the exaction of an excessive price. But to do this with a statute defining a criminal offense would, it seems to me, be inconsistent with established rules for construing penal statutes; not only so, but it would violate the rule that a statute is not to be so construed as to bring in into conflict with the Constitution, unless such construction is imperatively required by its plain words. The construction adopted by the court is not thus required. 'To make a rate or charge in handling or dealing in or with' merchandise, imports the fixing of compensation for services, rather than the price at which goods are to be sold. It may refer to charges for buying, selling, hauling, handling, storage, or the like.

But the clause in question does not stand alone. It forms a part of a section in which the question of prices is dealt with four times: once in the initial prohibition against destroying any necessaries for the purpose of enhancing the price; a second time in the prohibition of hoarding, defined as including a withholding from market for the purpose of unreasonably increasing or diminishing the price; a third time in the prohibition of a conspiracy to limit the production of necessaries in order to enhance the price; and, finally, in the prohibition of a conspiracy 'to exact excessive prices for any necessaries.' It seems to me clear, upon the plainest principles of construction that the change of phrase must be deemed to import a difference of purpose, and that 'to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries' must be taken to mean something else than the exaction of an excessive price. It should be ***96** observed how closely it is coupled with a cognate offense: 'To engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any

necessaries.' Evidently the words 'in handling or dealing,' etc., qualify 'wasteful practice or device,' as well as 'unjust or unreasonable rate or charge.'

That it is not altogether evident what was intended to be included within 'unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' may be conceded. So much the more reason for not extending the words by construction so as to make criminal that which is not clearly within their meaning, and for not giving to them a meaning which brings the act into conflict with the Constitution, and for not expanding the unconstitutional reach of the act, supposing that even without the particular application now made of the quoted words it would be repugnant to the fundamental law.

It is to my mind plain that section 4 was not intended to control the individual dealer with respect to the prices that he might exact, beyond prohibiting him from destroying any necessaries for the purpose of enhancing the price, and from withholding them from the market for a like purpose. So long as he acts alone he is left uncontrolled except by the ordinary processes of competition, his own sense of fairness, and his own interest. A conspiracy with others to exact excessive prices is an entirely different matter and *that* is clearly prohibited.

And this bring me to another point: Section 4 naturally divides itselt into two parts; the first portion denounces a number of substantive offenses; the second portion denounces a conspiracy to commit any one of a number of offenses, but these do not in terms include any of the offenses specifically prohibited in the earlier ***97** portion. This, as it seems to me, is significant. Section 37 of theCriminal Code (Act March 4, 1909, c. 321, 35 Stat. 1088, 1096 [Comp. St. § 10201]), makes it criminal for two or more persons to conspire to commit any offense against the United States, if one or more of them do any act to effect the object of the conspiracy. Hence it was not necessary for Congress to declare in the Lever Act that a conspiracy to commit any of the offenses defined in the first part of section 4 was punishable criminally. But ****303** it proceeded in the latter part to declare that a conspiracy to do any one of certain other acts, should be criminal. It seems to me too plain for argument that, under the circumstances, the inclusion in that part of the section of certain acts as forming the object of a criminal conspiracy amounts to a legislative declaration that, in the absence of conspiracy, those acts are not intended to be punished criminally. One of them is 'to exact excessive prices for any necessaries.'

Still further: Sections 14 and 25 of the original act (40 Stat. 281, 284 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115 1/8 kk, 3115 1/8 q]) specifically deal with the question of official price-fixing of certain articles of prime necessity-wheat, coal, and coke-and furnish additional evidence that in the framing of this act, when Congress had price-fixing in mind and the regulation of 'prices,' it employed that simple term, and that it did not refer to prices in the provision of section 4 upon which the indictment in this case rests.

For these reasons, I regard it as unnecessary to pass upon the question whether that provision is in conflict with the Constitution of the United States.

Mr. Justice BRANDEIS concurs in this opinion.
U.S. 1921
U.S. v. L. Cohen Grocery Co.
255 U.S. 81, 41 S.Ct. 298, 14 A.L.R. 1045, 65 L.Ed. 516

END OF DOCUMENT

EXHIBIT 3

Westlaw.

866 F.2d 6
(Cite as: 866 F.2d 6)

U.S. v. Colon-OrtizC.A.1 (Mass.),1989.
United States Court of Appeals,First Circuit.
UNITED STATES of America, Appellee,
v.
Edwin COLON-ORTIZ, Defendant, Appellant.
Nos. 88-1238, 88-1327.

Heard Nov. 4, 1988.
Decided Jan. 24, 1989.

Defendant who had been charged with conspiring to distribute cocaine and with distributing more than 500 grams of cocaine moved to dismiss distribution count based on alleged due process deficiency in relevant penalty provision. The United States District Court for the District of Massachusetts, Walter Jay Skinner, J., denied defendant's motion and entered judgment on conditional guilty plea convicting defendants of both counts charged, and defendant appealed. The Court of Appeals, Caffrey, Senior District Judge, sitting by designation, held that: (1) ambiguity in federal narcotics statute which could be resolved only by reference to legislative history and accompanying statutory provisions, as to whether jail-time was mandated for defendant's offense, violated due process, but (2) due process deficiency in statute did not result in reversible error.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ⚿258(2)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(2) k. Certainty and Definiteness in General. Most Cited Cases
Penal statute is sufficiently clear to satisfy due process only if it is clear on its face, without need to resort to any other source to determine legislature's intent. U.S.C.A. Const.Amend. 14.

[2] Constitutional Law 92 ⚿258(2)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(2) k. Certainty and Definiteness in General. Most Cited Cases
Penal statute is not sufficiently clear to satisfy due process, where person of ordinary intelligence would have to guess at its meaning. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 ⚿258(3.1)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(3) Particular Statutes and Ordinances
92k258(3.1) k. In General. Most Cited Cases
(Formerly 92k258(3))

Controlled Substances 96H ⚿6

96H Controlled Substances
96HI In General
96Hk4 Statutes and Other Regulations
96Hk6 k. Validity. Most Cited Cases
(Formerly 138k43.1, 138k43 Drugs and Narcotics)
Ambiguity in federal narcotics statute which could be resolved only by reference to legislative history and accompanying statutory provisions, as to whether jail-time was mandated for particular offense, violated narcotics defendant's due process rights. U.S.C.A. Const.Amend. 14; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(B), as amended, 21 U.S.C.A. § 841(b)(1)(B).

[4] Criminal Law 110 ⚿1177

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1177 k. Sentence and Judgment and Proceedings After Judgment. Most Cited Cases
Defendant's narcotics conviction did not have to be reversed based on ambiguity in sentencing statute as to whether jail-time was mandated for defendant's offense, where district judge stated that he would have imposed some jail-time even if he interpreted statute to permit probation or suspended sentence. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(B), as amended, 21 U.S.C.A. § 841(b)(1)(B).

[5] Statutes 361 ⇐206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases
Though statutes should generally be interpreted to give effect to every provision, provision resulting from legislative inadvertence or mistake should not be given effect.

*7 Charles P. McGinty, Federal Defender Office, Boston, Mass., for defendant, appellant.
Kevin E. Sharkey, Sp. Asst. U.S. Atty., with whom Frank L. McNamara, Jr., U.S. Atty., Boston, Mass., was on brief, for appellee.

Before BOWNES and SELYA, Circuit Judges, and CAFFREY,[FN*] Senior District Judge.

FN* Of the District of Massachusetts, sitting by designation.

CAFFREY, Senior District Judge.
The defendant, Edwin Colon-Ortiz, appeals from the district court's denial of his motion to dismiss and the court's judgment of conviction. Ortiz entered a conditional plea of guilty to one count of conspiring to distribute more than 500 grams of cocaine in violation of 21 U.S.C. § 846 and one count of distributing more than 500 grams of cocaine in violation of 21 U.S.C. § 841(a)(1). Defendant argues that the penalty language of Section 841(b)(1)(B) violates due process because it provides for two inconsistent penalty schemes. Though we find that the "or both" language of Section 841(b)(1)(B) should probably be stricken by the Congress to cure a potential notice deficiency, we nonetheless affirm both the district court's denial of defendant's motion to dismiss and the court's judgment of conviction.

I.

The relevant facts are few and are not in dispute. In August of 1987, defendant was arrested by Drug Enforcement Administration ("DEA") agents in Dorchester, Massachusetts. Defendant later admitted that on August 18, 1987 he delivered approximately one kilogram of cocaine in a transaction initiated by a co-defendant with an undercover agent and an informant. After his co-defendant picked up the cocaine at a storage site, Ortiz delivered the drugs to the informant's apartment. Upon leaving the apartment, defendant was arrested by DEA agents. Defendant stated that his motive for participating in the delivery was money. Defendant was released pending trial.

Ortiz was charged in a September 2, 1987 indictment with conspiring to distribute cocaine and with distributing more than 500 grams of cocaine. Defendant moved to dismiss the distribution count on the basis that the relevant penalty provision is constitutionally deficient. The district court orally denied the motion. Defendant then entered a conditional guilty plea on both counts, reserving the right to appeal the court's denial of the motion to dismiss. On December 21, 1987, the district court sentenced Ortiz to one year on the conspiracy count and a concurrent sentence of five years imprisonment on the distribution ***8** count.[FN1] Defendant has been allowed to consolidate the appeals from the motion denial and the judgment of conviction.

FN1. The defendant also received a

four-year special parole term on the distribution count.

II.

The penalty provision at issue in this appeal is codified at 21 U.S.C. § 841(b)(1)(B). Section 841(b)(1)(B) sets forth the penalties for violations involving the distribution of 500 grams or more of mixtures containing cocaine:
such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

21 U.S.C. § 841(b)(1)(B). The statute further provides: "Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein." *Id.*

The defendant argues that this statute violates due process by imposing two inconsistent penalty schemes, one allowing the court to impose merely a fine, and the other requiring the imposition of a five-year minimum term of imprisonment. Defendant argues that the statute should be declared unconstitutional because it fails to provide adequate notice of the contemplated penalties for a Section 841(a)(1) violation. Ortiz further argues that the statute "fails to provide an explicit standard [for] judges and thus encourage[s] arbitrary ... enforcement." Defendant seeks the dismissal either of all charges against him or at least of the Section 841(a)(1) count.

The government concedes that the "or both" language in the statute, when read in isolation, raises the question of whether a fine may be imposed in lieu of a prison term under Section 841(b)(1)(B). The government contends, however, that when all of the statutory language is read together, it is clear that Congress intended every defendant sentenced under Section 841(b)(1)(B) to serve a five-year minimum term of imprisonment, in addition to paying any fine imposed by the court. The government also relies on the legislative history of the 1986 Amendments to 21 U.S.C. § 841 which, according to the government, "leaves no doubt that a minimum mandatory penalty was intended by the Congress in this case." Brief for Appellee at 8.

III.

The Fifth Amendment of the United States Constitution provides that "[n]o person shall ... be deprived of life, liberty or property, without due process of law...." It is well-settled that due process requires that criminal statutes put individuals on sufficient notice as to whether their contemplated conduct is prohibited and would thereby subject them to prosecution. *United States v. Batchelder,* 442 U.S. 114, 123, 99 S.Ct. 2198, 2204, 60 L.Ed.2d 755 (1979); *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). As this Court explained in *United States v. Anzalone,* 766 F.2d 676 (1st Cir.1985), the Constitution mandates that "before any person is held responsible for violation of the criminal laws of this country, the conduct for which he is held accountable [must] be prohibited with sufficient specificity to forewarn of the proscription of said conduct." *Id.* at 678 (citations omitted). It is also true that "sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder,* 442 U.S. at 123, 99 S.Ct. at 2204 (citing *United States v. Evans,* 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); ***9***United States v. Brown,* 333 U.S. 18, 68 S.Ct. 376, 92 L.Ed. 442 (1948)).

[1][2] To satisfy due process notice requirements, a penal statute must be clear on its face. As the United States Supreme Court explained in *United States v. Harriss,* 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954): "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair

notice that his contemplated conduct is forbidden by the statute." *Id.* at 617, 74 S.Ct. at 812. The person of ordinary intelligence similarly should not have to guess at the meaning of penalty provisions, or else those provisions are not sufficiently clear to satisfy due process concerns. It is not enough for the congressional intent to be apparent elsewhere if it is not apparent by examining the language of the statute. No amount of explicit reference in the legislative history of the statute can cure this deficiency.

[3] We cannot say that Section 841(b)(1)(B) as drafted affords fair notice to individuals as to the consequences of violating the Section 841(a)(1) liability provision. The express language of the statute describes two penalty schemes that are directly contradictory. Given the "or both" language contained in the first sentence, the penalty provision would appear to allow a court to consider the imposition of a prison term or a fine to be alternatives: "such person shall be sentenced to a term of imprisonment ... a fine ... or both." The language that concludes the subparagraph, however, is strong indication that the statute calls for a mandatory term of imprisonment: " Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein." The language of the statute is not only inconsistent, but is directly contradictory. This lack of clarity on the face of Section 841(b)(1)(B) constitutes a notice deficiency and raises serious due process concerns.

The government relies heavily on a recent district court opinion to support its position that Section 841(b)(1)(B) passes constitutional muster. In *United States v. Restrepo,* 676 F.Supp. 368 (D.Mass.1987), the court concluded that the statute is sufficiently clear to withstand a due process challenge. The court explained: "I am able to resolve the 'inconsistency' in the penalty section of the Anti-Drug Abuse Act by looking at the accompanying statutory provisions and legislative history. Where Congress' intent has been expressed so clearly, I will not construe the statute in a way that will frustrate that intent." *Id.* at 375. Whether congressional intent may be ascertained by looking at accompanying statutory provisions and legislative history, however, is in no way dispositive of the question of whether the statute satisfies due process requirements. The statutory language itself must be clear enough so that persons of ordinary intelligence will not have to "guess at its meaning and differ as to its application." *Connally v. General Construction Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). We cannot say that such a person reading Section 841(b)(1)(B) would be put on notice that the statute requires the imposition of a prison term, given the "or both" language in the first sentence.[FN2]

> FN2. Indeed, in the instant case the district court originally denied defendant's motion to dismiss on the basis that Section 841(b)(1)(B) is internally consistent and allows the court to impose simply a fine. In its final Memorandum and Order denying the motion, however, the court concluded that the statute mandates a minimum five-year term of imprisonment. *United States v. Ortiz,* No. 87-297, slip op. at 3 (D.Mass. Feb. 7, 1988). As the defendant rightly asks: "If a learned federal judge has trouble understanding the statute, where then do the 'ordinary people ' ... stand?" Brief for Appellant at 8.

Though we disagree with the government's position that ascertaining congressional intent by means of the legislative history of Section 841(b)(1)(B) cures any inconsistency on the face of the statute, we agree that the relevant legislative history and accompanying statutory provisions establish definitively that Congress intended ***10** to impose a minimum mandatory five-year prison term under Section 841(b)(1)(B). As the comprehensive discussion provided by the district court in *Restrepo* points out, the legislative history of the 1986 Amendments to 21 U.S.C. § 841 contains numerous and explicit references to mandatory prison terms. 676 F.Supp. at 373-75. For example, Senator Byrd commented on the penalty provisions of the anti-drug bill:

[W]e have to make sure that the would-be criminal knows that if he commits a crime and gets caught, his punishment will be sure and certain. He must know that there will be no escape hatch through which he can avoid a term of years in the penitentiary. He must know in advance exactly how lengthy that prison term is going to be. He must know that no matter how good a lawyer he gets, how experienced, how expensive, how well-known, and how clever and sharp, that lawyer will not be able to keep him out of jail once he has been found guilty in a court of law. And that will be because the laws we pass will henceforth make it abundantly clear that a jail term must be imposed and a jail term must be served.
... [T]he language I originally proposed has been included in the penalty section of this bipartisan bill which will require that for certain crimes involving drugs, the convicted defendant must-I repeat must-be sentenced to the penitentiary. He must serve jail time. He will know that in advance because it will be the law. It will not be a matter of the judge's discretion for these types of crimes. It will be a requirement imposed by law on the sentencing judge.
....
Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail-a minimum of 5 years for the first offense and 10 years for the second.

132 Cong.Rec. S14,301 (daily ed. Sept. 30, 1986).
In addition, Subtitle C of the Anti-Drug Abuse Act of 1986 refers to Section 841(b) of Subtitle A of the same Act:An individual convicted under this section of an offense for which a mandatory minimum term of imprisonment is applicable shall not be eligible for parole under Section 4202 of title 18, United States Code until the individual has served the mandatory term of imprisonment required by section 401(b) [21 U.S.C. § 841(b)] as enhanced by this section.

Pub.L. No. 99-570, § 1102 (Oct. 27, 1986).
Notwithstanding the inconsistent statutory language of Section 841(b)(1)(B), the congressional intent is obvious by looking at relevant legislative history and accompanying statutory provisions.

In light of this evident congressional intent, we find that the "or both" language in Section 841(b)(1)(B) was an inadvertent drafting error, and should be stricken from the statute. As the court in *Citizens to Save Spencer County v. EPA,* 600 F.2d 844 (D.C.Cir.1979), explained: "It is obvious, but bears repeating, that in legislative (as in judicial) affairs, allowance must be made for human error and inadvertence." *Id.* at 871-72. *See also Zambardino v. Schweiker,* 668 F.2d 194, 199 (3d Cir.1981) (courts must at times recognize the existence of sheer inadvertence in the legislative process).

IV.

[4] Ortiz contends that his motion to dismiss should have been granted and that his conviction should be reversed due to the inconsistency in Section 841(b)(1)(B). Though we find that such inconsistency existed due to the "or both" language in the first sentence of the statute, we also find that this defendant was not harmed by the deficiency.
The district court explained in its Memorandum and Order denying defendant's motion to dismiss that the most lenient reading of the sentencing provision would not have helped this defendant: " [A]mbiguity requires the application of the most lenient interpretation of the sentencing provision.
In this case that would mean only that the court would have had ***11** the option of the imposition of a suspended sentnece [sic] or probation with a fine, an option I would not have chosen anyway." *United States v. Ortiz,* No. 87-297, slip op. at 2 (D.Mass. Feb. 17, 1988). Given the district court's determination that the defendant should receive some term of imprisonment, under any reading of the statute the court was required to impose the five-year minimum sentence.

Defendant argues that all of Section 841(b)(1)(B) should be declared unconstitutional given the notice deficiency caused by the "or both" language.
Defendant relies on a recent decision of the

Supreme Judicial Court of Massachusetts that declared a similar sentencing provision unconstitutional due to inconsistency in the statutory language. *Commonwealth v. Gagnon,* 387 Mass. 567, 441 N.E.2d 753 (1982), *cert. denied,* 461 U.S. 921, 103 S.Ct. 2077, 77 L.Ed.2d 292 (1983). The *Gagnon* court determined that the statute was unconstitutionally vague, however, only after the court examined the legislative history and context of the section and found that the legislative intent could not be ascertained. *Id.* 387 Mass. at 569-74, 441 N.E.2d 753. After reviewing the legislative history of Section 841(b)(1)(B), and after looking to its context, we are able to conclude that Congress clearly intended to impose mandatory prison terms under this sentencing provision. The notice deficiency in the statute can be cured easily by striking the "or both" language, which clarifies on the face of the statute what penalties defendants risk in violating the Section 841(a)(1) liability provision.

[5] In adopting this interpretation of Section 841(b)(1)(B), we are merely "applying what Congress has enacted after ascertaining what it is that Congress has enacted." *Carpenters' Union v. Labor Board,* 357 U.S. 93, 100, 78 S.Ct. 1011, 1016, 2 L.Ed.2d 1186 (1958). Though a statute should generally be interpreted to give effect to every provision, a provision resulting from legislative inadvertence or mistake should not be given effect. *United States v. Babcock,* 530 F.2d 1051, 1053 (D.C.Cir.1976); 2A Sutherland, *Statutes and Statutory Construction* § 46.06 (C. Sands rev. 4th ed. 1984). Accordingly, we rule that the correct interpretation of the statute is to disregard the "or both" language, thus clarifying the penalties for violating Section 841(a)(1).

The district court's order denying defendant's motion to dismiss and the court's judgment of conviction are affirmed.

C.A.1 (Mass.),1989.
U.S. v. Colon-Ortiz
866 F.2d 6

END OF DOCUMENT

EXHIBIT 4

347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989
(Cite as: 347 U.S. 612, 74 S.Ct. 808)

Briefs and Other Related Documents
UNITED STATES v. HARRISSU.S. 1954.

Supreme Court of the United States
UNITED STATES
v.
HARRISS et al.
No. 32.

Argued Oct. 19, 1953.
Decided June 7, 1954.

Defendants were charged by information with violation of the Federal Regulation of Lobbying Act. The United States District Court for the District of Columbia, 109 F.Supp. 641, dismissed the information on ground that the Act is unconstitutional, and the government's appeal was taken directly to Supreme Court, under the Criminal Appeals Act. The Supreme Court, Mr. Chief Justice Warren, held that the Act meets the constitutional requirement of definiteness, and that the sections thereof, under which the information was laid, do not violate constitutional guarantees of freedom to speak, publish and petition the government.

Judgment reversed and cause remanded.

Mr. Justice Douglas, Mr. Justice Jackson, and Mr. Justice Black, dissented.

West Headnotes

[1] Federal Courts 170B ⚿491

170B Federal Courts
170BVII Supreme Court
170BVII(D) Other Federal Courts, Review of Decisions of
170Bk491 k. Other Federal Courts in General. Most Cited Cases
(Formerly 106k385(6))

Supreme Court's review under Criminal Appeals Act is limited to a decision on the alleged invalidity of statute on which information is based, for government's appeal does not open the whole case, and in making its decision, Supreme Court judges statute on its face. 18 U.S.C.A. § 3731.

[2] Criminal Law 110 ⚿13.1(1)

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(1) k. In General. Most Cited Cases
(Formerly 110k13)

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, the underlying principle being that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

[3] Criminal Law 110 ⚿13.1(1)

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(1) k. In General. Most Cited Cases
(Formerly 110k13)

If the general class of offenses to which a statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise.

[4] Constitutional Law 92 ⚿48(4.1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k48 Presumptions and Construction in Favor of Constitutionality
92k48(4) Application to Particular

Legislation or Action or to Particular Constitutional Questions

92k48(4.1) k. In General. Most Cited Cases

(Formerly 92k48(4), 92k48)

If general class of offenses to which a statute is directed can be made constitutionally definite by a reasonable construction of the statute, Supreme Court is under a duty to give the statute that construction.

[5] Constitutional Law 92 ⚿48(1)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(1) k. In General. Most Cited Cases

(Formerly 92k48)

Supreme Court, if fairly possible, must construe congressional enactments so as to avoid a danger of unconstitutionality.

[6] Statutes 361 ⚿24

361 Statutes

361I Enactment, Requisites, and Validity in General

361k24 k. Lobbying or Misconduct. Most Cited Cases

Coverage under Federal Regulation of Lobbying Act is limited to those persons, except for specified political committees, who solicit, collect or receive contributions of money or other thing of value, and then only if the principal purpose of either the persons or the contributions is to aid in the passage or defeat of any legislation by Congress or to influence directly or indirectly the passage or defeat of any legislation by Congress, and in any event, the solicitation, collection or receipt of money or other thing of value is a prerequisite to coverage under the Act. Federal Regulation of Lobbying Act, §§ 302-311, 305, 307(a, b), 308, 2 U.S.C.A. §§ 261-270, 264, 266(a, b), 267.

[7] Statutes 361 ⚿24

361 Statutes

361I Enactment, Requisites, and Validity in General

361k24 k. Lobbying or Misconduct. Most Cited Cases

"Lobbying", within Federal Regulation of Lobbying Act, refers only to lobbying in its commonly accepted sense, that is, to direct communication with members of Congress on pending or proposed federal legislation. Federal Regulation of Lobbying Act, §§ 302-311, 307(a, b), 2 U.S.C.A. §§ 261-270, 266(a, b).

[8] Statutes 361 ⚿24

361 Statutes

361I Enactment, Requisites, and Validity in General

361k24 k. Lobbying or Misconduct. Most Cited Cases

The "principal purpose" requirement of Federal Regulation of Lobbying Act was adopted merely to exclude from its scope those contributions and persons having only an incidental purpose of influencing legislation, and conversely, the requirement excludes neither a contribution which in substantial part is to be used to influence legislation through direct communication with Congress nor a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress. Federal Regulation of Lobbying Act, §§ 302-311, 307(a, b), 2 U.S.C.A. §§ 261-270, 266(a, b).

[9] Constitutional Law 92 ⚿48(4.1)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(4) Application to Particular Legislation or Action or to Particular Constitutional Questions

92k48(4.1) k. In General. Most Cited Cases
(Formerly 92k48(4), 92k48)
The Supreme Court, in construing Federal Regulation of Lobbying Act narrowly to avoid constitutional doubts, was required to avoid a construction that would seriously impair effectiveness of Act in coping with the problem that it was designed to alleviate. Federal Regulation of Lobbying Act, §§ 302-311, 2 U.S.C.A. §§ 261-270.

[10] Criminal Law 110 ⚿13.1(11)

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(2) Particular Statutes, Application to
110k13.1(11) k. Public Officers and Employees; Elections. Most Cited Cases
(Formerly 110k13)
The Federal Regulation of Lobbying Act meets the constitutional requirement of definiteness. Federal Regulation of Lobbying Act, §§ 302-311, 2 U.S.C.A. §§ 261-270.

[11] Constitutional Law 92 ⚿90.1(1)

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(1) k. In General. Most Cited Cases
(Formerly 92k90)

Constitutional Law 92 ⚿91

92 Constitutional Law
92V Personal, Civil and Political Rights
92k91 k. Right of Assembly and Petition. Most Cited Cases

Statutes 361 ⚿24

361 Statutes
361I Enactment, Requisites, and Validity in General
361k24 k. Lobbying or Misconduct. Most Cited Cases
Federal Regulations of Lobbying Act provision requiring designated reports to Congress from every person receiving any contributions or expending any money for purpose of influencing the passage or defeat of legislation by Congress, and Lobbying Act provision which requires any person who shall engage himself for pay or for any consideration for purpose of attempting to influence passage or defeat of any legislation to register with Congress and make disclosures, do not violate constitutional guarantees of freedom to speak, publish and petition the government. Federal Regulations of Lobbying Act, §§ 305, 308, 2 U.S.C.A. §§ 264, 267; U.S.C.A.Const. Amend. 1.

[12] Constitutional Law 92 ⚿90.1(1)

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(1) k. In General. Most Cited Cases
(Formerly 92k90)

Statutes 361 ⚿24

361 Statutes
361I Enactment, Requisites, and Validity in General
361k24 k. Lobbying or Misconduct. Most Cited Cases
Even if Federal Regulations of Lobbying Act with respect to persons other than those defined therein, might act as a deterrent to their exercise of First Amendment rights, such restraint would be at most an indirect one resulting self-censorship, comparable in many ways to restraint resulting from criminal libel laws, and hazard of such restraint is too remote to require striking down statute which on its face is otherwise plainly within area of congressional power and is designed to safeguard a vital national interest. Federal Regulations of Lobbying Act, §§ 302-311, 307, 2 U.S.C.A. §§ 261-270, 266; U.S.C.A.Const. Amend. 1.

[13] Constitutional Law 92 ⇐46(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k46 Necessity of Determination
92k46(1) k. In General. Most Cited Cases
Where penalty provision of Federal Regulation of Lobbying Act had not yet been applied to defendants charged with violation of the Act, nor would it ever be so applied if defendants should be found innocent of charges against them, Supreme Court, on government's appeal from dismissal of information, would not pass on defendants' contention that the penalty provision is a patent violation of First Amendment guarantees of freedom of speech and right to petition the Government. Federal Regulation of Lobbying Act, § 310(b), 2 U.S.C.A. § 269(b); U.S.C.A.Const. Amend. 1.

[14] Statutes 361 ⇐64(2)

361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(2) k. Acts Relating to Particular Subjects in General. Most Cited Cases
Where prohibition of second part of penalty section of Federal Regulation of Lobbying Act is expressly stated to be in addition to penalties provided for in first part of such section, and such first part makes violation a misdemeanor, punishable by fine or imprisonment or both, elimination of the second part, should it ever be declared unconstitutional, would still leave a statute defining specific duties and providing a specific penalty for violation of any such duty, and hence there would be no obstacle to giving effect to the separability clause of the Act as to the second part of penalty section, if it should ever prove necessary. Federal Regulation of Lobbying Act, § 310(a, b), 2 U.S.C.A. § 269(a, b); Legislative Reorganization Act of 1946, § 1(b), 60 Stat. 814.

****810** Mr. ***613** Oscar H. Davis, Washington, D.C., for appellant.
Messrs. Burton K. Wheeler, Washington, D.C., Hugh Howell, Atlanta, Ga., for appellee.
Mr. Chief Justice WARREN delivered the opinion of the Court.
The appellees were charged by information with violation of the Federal Regulation of Lobbying Act, 60 Stat. 812, 839, 2 U.S.C. ss 261-270, 2 U.S.C.A. ss 261-270. Relying on its previous ***614** decision in National Association of Manufacturers v. McGrath, D.C., 103 F.Supp. 510, vacated as moot, 344 U.S. 804, 73 S.Ct. 313, 97 L.Ed. 627, the District Court dismissed the information on the ground that the Act is unconstitutional. The case is here on direct appeal under the Criminal Appeals Act, 18 U.S.C. s 3731, 18 U.S.C.A. s 3731.

Seven counts of the information are laid under s 305, which requires designated reports to Congress from every person 'receiving any contributions or expending any money' for the purpose of influencing the passage or defeat of any legislation by Congress.[FN1] One such count charges the National Farm Committee, a Texas corporation,***615** with failure to report the solicitation and receipt of contributions to influence the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and the defeat of legislation which would cause a decline in those prices. The remaining six counts under s 305 charge defendants Moore and Harriss with failure to report expenditures having the same single purpose. Some of the alleged expenditures consist of the payment of compensation to others to communicate face-to-face with members of Congress, at public functions and committee hearings, concerning legislation affecting agricultural ****811** prices; the other alleged expenditures relate largely to the costs of a campaign to induce various interested groups and individuals to communicate by letter with members of Congress on such legislation.

FN1. Section 305 provides:
'(a) Every person receiving any contributions or expending any money for the purposes designated in subparagraph (a) or (b) of section 307 shall file with the Clerk between the first and tenth day of

each calendar quarter, a statement containing complete as of the day next preceding the date of filing-
'(1) the name and address of each person who has made a contribution of $500 or more not mentioned in the preceding report; except that the first report filed pursuant to this title shall contain the name and address of each person who has made any contribution of $500 or more to such person since the effective date of this title;
'(2) the total sum of the contributions made to or for such person during the calendar year and not stated under paragraph (1);
'(3) the total sum of all contributions made to or for such person during the calendar year;
'(4) the name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of $10 or more has been made by or on behalf of such person, and the amount, date, and purpose of such expenditure;
'(5) the total sum of all expenditures made by or on behalf of such person during the calendar year and not stated under paragraph (4);
'(6) the total sum of expenditures made by or on behalf of such person during the calendar year.
'(b) The statements required to be filed by subsection (a) shall be commulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward.'
The following are 'the purposes designated in subparagraph (a) or (b) of section 307':
'(a) The passage or defeat of any legislation by the Congress of the United States.
'(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.'

The other two counts in the information are laid under s 308, which requires any person 'who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation' to register with Congress and to make specified disclosures.[FN2] These two counts allege in considerable ***616** detail that defendants Moore and Linder were hired to express certain views to Congress as to agricultural prices or to cause others to do so, for the purpose of attempting to influence the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and a defeat of legislation which would cause a decline in such prices; and that pursuant to this undertaking, without having registered as required by ***617** s 308, they arranged to have members of Congress contacted on behalf of these views, either directly by their own emissaries or through an artificially stimulated letter campaign.[FN3]

FN2. Section 308 provides:
'(a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included. Each such person so registering shall, between the first and tenth day of each calendar quarter, so long as his activity continues, file with the Clerk and Secretary a detailed report under oath of all money received and expended by him during the preceding calendar quarter in carrying on his work; to whom paid; for what purposes; and the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editoriasl; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation; nor to any public official acting in his official capacity; nor in the case of any newspaper or other regularly published periodical (including any individual who owns, publishes, or is employed by any such newspaper or periodical) which in the ordinary course of business publishes news items,

editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, or individual, engages in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.
'(b) All information required to be filed under the provisions of this section with the Clerk of the House of Representatives and the Secretary of the Senate shall be compiled by said Clerk and Secretary, acting jointly, as soon as practicable after the close of the calendar quarter with respect to which such information is filed and shall be printed in the Congressional Record.'

FN3. A third count under s 308 was abated on the death of the defendant against whom the charge was made.

[1] We are not concerned here with the sufficiency of the information as a criminal pleading. Our review under the Criminal Appeals Act is limited to a decision on the alleged 'invalidity' of the statute on which the information is based.[FN4] In making this decision, we judge the statute on its face. See ****812**United States v. Petrillo, 332 U.S. 1, 6, 12, 67 S.Ct. 1538, 1541, 1544, 91 L.Ed. 1877. The ' invalidity' of the Lobbying Act is asserted on three grounds: (1) that ss 305, 307, and 308 are too vague and indefinite to meet the requirements of due process; (2) that ss 305 and 308 violate the First Amendment guarantees of freedom of speech, freedom of the press, and the right to petition the Government; (3) that the penalty provision of s 310(b) violates the right of the people under the First Amendment to petition the Government.

FN4. 18 U.S.C. s 3731, 18 U.S.C.A. s 3731 . See United States v. Petrillo, 332 U.S. 1, 5, 67 S.Ct. 1538, 1540, 91 L.Ed. 1877. For 'The Government's appeal does not open the whole case.' United States v. Borden Co., 308 U.S. 188, 193, 60 S.Ct. 182, 186, 84 L.Ed. 181.

I.

[2] The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. [FN5]

FN5. See Jordan v. De George, 341 U.S. 223, 230-232, 71 S.Ct. 703, 707-708, 95 L.Ed. 886; Quarles, Some Statutory Construction Problems and Approaches in Criminal Law, 3 Vand.L.Rev. 531, 539-543; Note, 62 Harv.L.Rev. 77.

***618** [3][4][5] On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise. United States v. Petrillo, 332 U.S. 1, 7, 67 S.Ct. 1538, 1541. Cf. Jordan v. De George, 341 U.S. 223, 231, 71 S.Ct. 703, 707, 95 L.Ed. 886. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction. This was the course adopted in Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, upholding the definiteness of the Civil Rights Act. [FN6]

FN6. Cf. Fox v. Washington, 236 U.S. 273, 35 S.Ct. 383, 59 L.Ed. 573; Musser v. Utah, 333 U.S. 95, 68 S.Ct. 397, 92 L.Ed. 562; Winters v. New York, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840.

This rule as to statutes charged with vagueness is but one aspect of the broader principle that this Court, if fairly possible, must construe congressional enactments so as to avoid a danger of unconstitutionality. United States v. Delaware & Hudson Co., 213 U.S. 366, 407-408, 29 S.Ct. 527, 535, 53 L.Ed. 836; United States v. Congress of Industrial Organizations, 335 U.S. 106, 120-121, 68

S.Ct. 1349, 1356, 92 L.Ed. 1849; United States v. Rumely, 345 U.S. 41, 47, 73 S.Ct. 543, 546, 97 L.Ed. 770. Thus, in the C.I.O. case, supra, this Court held that expenditures by a labor organization for the publication of a weekly periodical urging support for a certain candidate in a forthcoming congressional election were not forbidden by the Federal Corrupt Practices Act, which makes it unlawful for "* * * any labor organization to make a contribution or expenditure in connection with any (congressional) election * * *'.' (335 U.S. 106, 68 S.Ct. 1350.) Similarly, in the Rumely case, supra (345 U.S. 41, 73 S.Ct. 547), this Court construed a House Resolution authorizing investigation of "all lobbying activities intended to influence, encourage, promote, or retard legislation" to cover only " lobbying in its commonly accepted sense,' that is, ' representations made directly to the Congress, its members, or its committees".

[6] The same course is appropriate here. The key section of the Lobbying Act is s 307, entitled ' Persons to Whom Applicable'. Section 307 provides:
'The provisions of this title shall apply to any person (except a political committee as defined in ***619** the Federal Corrupt Practices Act, and duly organized State or local committees of a political party), who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:
'(a) The passage or defeat of any ****813** legislation by the Congress of the United States.
'(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.'

This section modifies the substantive provisions of the Act, including s 305 and s 308. In other words, unless a 'person' falls within the category established by s 307, the disclosure requirements of s 305 and s 308 are inapplicable.[FN7] Thus coverage under the Act is limited to those persons (except for the specified political committees) who solicit, collect, or receive contributions of money or other thing of value, and then only if the principal purpose of either the persons or the contributions is to aid in the accomplishment of the aims set forth in s 307(a) and (b). In any event, the solicitation, collection, or receipt of money or other thing of value is a prerequisite to coverage under the Act.

FN7. Section 302(c) defines the term ' person' as including 'an individual, partnership, committee, association, corporation, and any other organization or group of persons.'

The Government urges a much broader construction-namely, that under s 305 a person must report his expenditures to influence legislation even though he does not solicit, collect, or receive contributions as provided in ***620** s 307.[FN8] Such a construction, we believe, would do violence to the title and language of s 307 as well as its legislative history.[FN9] If the construction urged by the Government is to become law, that is for Congress to accomplish by further legislation.

FN8. The Government's view is based on a variance between the language of s 307 and the language of s 305. Section 307 refers to any person who 'solicits, collects, or receives' contributions; s 305, however, refers not only to 'receiving any contributions' but also to 'expending any money'. It is apparently the Government's contention that s 307-since it makes no reference to expenditures-is inapplicable to the expenditure provisions of s 305. Section 307, however, limits the application of s 305 as a whole, not merely a part of it.

FN9. Both the Senate and House reports on the bill state that 'This section (s 307) defines the application of the title. * * *' S.Rep.No.1400, 79th Cong., 2d Sess., p. 28; Committee Print of H. Rep. on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., p. 34. See also the remarks of Representative Dirksen in

> presenting the bill to the House: 'The gist of the antilobbying provision is contained in section 307.' 92 Cong.Rec. 10088.

[7] We now turn to the alleged vagueness of the purposes set forth in s 307(a) and (b). As in United States v. Rumely, 345 U.S. 41, 47, 73 S.Ct. 543, 546, 97 L.Ed. 770, which involved the interpretation of similar language, we believe this language should be construed to refer only to " lobbying in its commonly accepted sense"-to direct communication with members of Congress on pending or proposed federal legislation. The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyist themselves or through their hirelings or through an artificially stimulated letter campaign.[FN10] It is likewise clear that Congress would have ***621** intended the Act ****814** to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible.[FN11]

> FN10. The Lobbying Act was enacted as Title III of the Legislative Reorganization Act of 1946, which was reported to Congress by the Joint Committee on the Organization of Congress. The Senate and House reports accompanying the bill were identical with respect to Title III. Both declared that the Lobbying Act applies ' chiefly to three distinct classes of so-called lobbyists:
>
> 'First. Those who do not visit the Capitol but initiate propaganda from all over the country, in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts. This class of persons and organizations will be required under the title, not to cease or curtail their activities in any respect, but merely to disclose the sources of their collections and the methods in which they are disbursed.
>
> 'Second. The second class of lobbyists are those who are employed to come to the Capitol under the false impression that they exert some powerful influence over Members of Congress. These individuals spend their time in Washington presumably exerting some mysterious influence with respect to the legislation in which their employers are interested, but carefully conceal from Members of Congress whom they happen to contact the purpose of their presence. The title in no wise prohibits or curtails their activities. It merely requires that they shall register and disclose the sources and purposes of their employment and the amount of their compensation.
>
> 'Third. There is a third class of entirely honest and respectable representatives of business, professional, and philanthropic organizations who come to Washington openly and frankly to express their views for or against legislation, many of whom serve a useful and perfectly legitimate purpose in expressing the views and interpretations of their employers with respect to legislation which concerns them. They will likewise be required to register and state their compensation and the sources of their employment.'
>
> S.Rep.No.1400, 79th Cong., 2d Sess., p. 27; Committee Print of H. Rep. on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., pp. 32-33. See also the statement in the Senate by Senator La Follette, who was Chairman of the Joint Committee, at 92 Cong.Rec. 6367-6368.

> FN11. See the Act's separability clause, note 18, infra, providing that the invalidity of any application of the Act should not affect the validity of its application 'to other persons and circumstances.'

[8][9] There remains for our consideration the meaning of 'the principal purpose' and 'to be used principally to ***622** aid.' The legislative history of the Act indicates that the term 'principal' was adopted merely to exclude from the scope of s 307 those contributions and persons having only an ' incidental' purpose of influencing legislation.[FN12] Conversely, the 'principal purpose' requirement does not exclude a contribution which in substantial part is to be used to influence legislation through direct communication with Congress or a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress.[FN13] If it ****815** were otherwise-if an organization, for example, were exempted ***623** because lobbying was only

one of its main activities-the Act would in large measure be reduced to a mere exhortation against abuse of the legislative process. In construing the Act narrowly to avoid constitutional doubts, we must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate.

FN12. Both the Senate and House reports accompanying the bill state that the Act '* * * does not apply to organizations formed for other purposes whose efforts to influence legislation are merely incidental to the purposes for which formed.' S.Rep.No.1400, 79th Cong., 2d Sess., p. 27; Committee Print of H. Rep. on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., p. 32. In the Senate discussion preceding enactment, Senator Hawkes asked Senator La Follette, Chairman of the Joint Committee in charge of the bill, for an explanation of the ' principal purpose' requirement. In particular, Senator Hawkes sought assurance that multi-purposed organizations like the United States Chamber of Commerce would not be subject to the Act. Senator La Follette refused to give such assurance, stating: 'So far as any organizations or individuals are concerned, I will say to the Senator from New Jersey, it will depend on the type and character of activity which they undertake. * * * I cannot tell the Senator whether they will come under the act. It will depend on the type of activity in which they engage, so far as legislation is concerned. * * * It (the Act) affects all individuals and organizations alike if they engage in a covered activity.' (Italics added.) 92 Cong.Rec. 10151-10152. See also Representative Dirksen's remarks in the House, 92 Cong.Rec. 10088.

FN13. Such a criterion is not novel in federal law. See Int.Rev.Code s 23(o) (2) (income tax), s 812(d) (estate tax), and s 1004(a)(2)(B) (gift tax), 26 U.S.C.A. ss 23(o)(2), 812(d), 1004(a)(2)(B), providing tax exemption for contributions to charitable and educational organizations ' no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.' For illustrative cases applying this criterion, see Sharpe's Estate v. Commissioner, 3 Cir., 148 F.2d 179; Marshall v. Commissioner, 2 Cir., 147 F.2d 75; Faulkner v. Commissioner, 1 Cir., 112 F.2d 987; Huntington National Bank, 13 T.C. 760, 769. Cf. Girard Trust v. Commissioner, 3 Cir., 122 F.2d 108; Leubuscher v. Commissioner, 2 Cir., 54 F.2d 998; Weyl v. Commissioner, 2 Cir., 48 F.2d 811; Slee v. Commissioner, 2 Cir., 42 F.2d 184. See also Annotation, 138 A.L.R. 456.

[10] To summarize, therefore, there are three prerequisites to coverage under s 307: (1) the ' person' must have solicited, collected, or received contributions; (2) one of the main purposes of such ' person,' or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress. And since s 307 modifies the substantive provisions of the Act, our construction of s 307 will of necessity also narrow the scope of s 305 and s 308, the substantive provisions underlying the information in this case. Thus s 305 is limited to those persons who are covered by s 307; and when so covered, they must report all contributions and expenditures having the purpose of attempting to influence legislation through direct communication with Congress. Similarly, s 308 is limited to those persons (with the stated exceptions FN14) who are covered by s 307 and who, in addition, engage themselves ***624** for pay or for any other valuable consideration for the purpose of attempting to influence legislation through direct communication with Congress. Construed in this way, the Lobbying Act meets the constitutional requirement of definiteness.FN15

FN14. For the three exceptions, see note 2, supra.

FN15. Under this construction, the Act is at least as definite as many other criminal statutes which this Court has upheld against a charge of vagueness. E.g., Boyce Motor Lines v. United States, 342 U.S. 337, 72 S.Ct. 329, 330, 96 L.Ed. 367 (regulation providing that drivers of motor vehicles carrying explosives "shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings"); Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 860, 95 L.Ed. 1137 (Smith Act, 18 U.S.C.A. s 2385, making it unlawful for any person to conspire "to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence * * *"); United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 1540, 91 L.Ed. 1877 (statute forbidding coercion of radio stations to employ persons "in excess of the number of employees needed * * * to perform actual services"); Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, and Williams v. United States, 341 U.S. 97, 71 S.Ct. 576, 578, 95 L.Ed. 774 (statute forbidding acts which would deprive a person of "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"); United States v. Wurzbach, 280 U.S. 396, 50 S.Ct. 167, 168, 74, L.Ed. 508 (statute forbidding any candidate for Congress or any officer or employee of the United States to solicit or receive a " contribution for any political purpose whatever" from any other such officer or employee); Omaechevarria v. Idaho, 246 U.S. 343, 38 S.Ct. 323, 324, 62 L.Ed. 763 (statute forbidding pasturing of sheep "on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower"); Fox v. Washington, 236 U.S. 273, 35 S.Ct. 383, 384, 59 L.Ed. 573 (state statute imposing criminal sanctions on "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice * * *"); Nash v. United States, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232 (Sherman Act, 15 U.S.C.A. s 1, forbidding 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations'). Cf. Jordan v. De George, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (statute providing for deportation of persons who have committed crimes involving 'moral turpitude').

***625** II.

[11] Thus construed, ss 305 and 308 also do not violate the freedoms guaranteed****816** by the First Amendment-freedom to speak, publish, and petition the Government.

Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.[FN16]

FN16. Similar legislation has been enacted in over twenty states. See Notes, 56 Yale L.J. 304, 313-316, and 47 Col.L.Rev. 98, 99-103.

Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. It acted in the same spirit and for a similar purpose in passing the Federal Corrupt Practices Act-to maintain the integrity of a basic governmental process. See Burroughs v. United States, 290 U.S. 534, 545, 54 S.Ct. 287, 290, 78 L.Ed. 484.

Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection.***626** And here Congress has used that power in a manner restricted to its appropriate end. We conclude that ss 305 and 308, as applied to persons defined in s 307, do not offend the First Amendment.

[12] It is suggested, however, that the Lobbying Act, with respect to persons other than those defined in s 307, may as a practical matter act as a deterrent to their exercise of First Amendment rights. Hypothetical borderline situations are conjured up in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the Act. Our narrow construction of the Act, precluding as it does reasonable fears, is calculated to avoid such restraint. But, even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws.[FN17] The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.

FN17. Similarly, the Hatch Act probably deters some federal employees from political activity permitted by that statute, but yet was sustained because of the national interest in a nonpolitical civil service. United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754.

****817** III.

[13] The appellees further attack the statute on the ground that the penalty provided in s 310(b) is unconstitutional. That section provides:
'(b) In addition to the penalties provided for in subsection (a), any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from ***627** appearing before a committee of the Congress in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.'

This section, the appellees argue, is a patent violation of the First Amendment guarantees of freedom of speech and the right to petition the Government.

We find it unnecessary to pass on this contention. Unlike ss 305, 307, and 308 which we have judged on their face, s 310(b) has not yet been applied to the appellees, and it will never be so applied if the appellees are found innocent of the charges against them. See United States v. Wurzbach, 280 U.S. 396, 399, 50 S.Ct. 167, 168, 74 L.Ed. 508; United States v. Petrillo, 332 U.S. 1, 9-12, 67 S.Ct. 1538, 1542, 1544, 91 L.Ed. 1877.

[14] Moreover, the Act provides for the separability of any provision found invalid.[FN18] If s 310(b) should ultimately be declared unconstitutional, its elimination would still leave a statute defining specific duties and providing a specific penalty for

violation of any such duty. The prohibition of s 310(b) is expressly stated to be 'In addition to the penalties provided for in subsection (a) * * *'; subsection (a) makes a violation of s 305 or s 308 a misdemeanor, punishable by fine or imprisonment or both. Consequently, there would seem to be no obstacle to giving effect to the separability clause as to s 310(b), if this should ever prove necessary. Compare Electric Bond & Share Co. v. Securities & Exchange Commission, 303 U.S. 419, 433-437, 58 S.Ct. 678, 682-684, 82 L.Ed. 936.

FN18. 60 Stat. 812, 814:
'If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.'

***628** The judgment below is reversed and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice CLARK took no part in the consideration or decision of this case.
Mr. Justice DOUGLAS, with whom Mr. Justice BLACK concurs, dissenting.
I am in sympathy with the effort of the Court to save this statute from the charge that it is so vague and indefinite as to be unconstitutional. My inclinations were that way at the end of the oral argument. But further study changed my mind. I am now convinced that the formula adopted to save this Act is too dangerous for use. It can easily ensnare people who have done no more than exercise their constitutional rights of speech, assembly, and press.

We deal here with the validity of a criminal statute. To use the test of Connally v. General construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, the question is whether this statute 'either forbids or requires the doing of an act in terms so vague that ****818** men of common intelligence must necessarily guess at its meaning and differ as to its application'. If it is so vague, as I think this one is, then it fails to meet the standards required by due process of law. See United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877. In determining that question we consider the statute on its face. As stated in Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888.
'If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. * * * It is the statute, not the accusation***629** under it, that prescribes the rule to govern conduct and warns against transgresson. * * * No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'

And see Winters v. New York, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840.

The question therefore is not what the information charges nor what the proof might be. It is whether the statute itself is sufficiently narrow and precise as to give fair warning.

It is contended that the Act plainly applies

-to persons who pay others to present views to Congress either in committee hearings or by letters or other communications to Congress or Congressmen and

-to persons who spend money to induce others to communicate with Congress.
The Court adopts that view, with one minor limitation which the Court places on the Act-that only persons who solicit, collect, or receive money are included.

The difficulty is that the Act has to be rewritten and words actually added and subtracted to produce that result.

Section 307 makes the Act applicable to anyone who 'directly or indirectly' solicits, collects, or receives contributions 'to be used principally to aid, or the principal purpose of which person is to aid' in either

-the 'passage or defeat of any legislation' by Congress, or

-'To influence, directly or indirectly, the passage or defeat of any legislation' by Congress.

We start with an all-inclusive definition of ' legislation' contained in s 302(e). It means, 'bills, resolutions, amendments, nominations, and other matters ***630** pending or proposed in either House of Congress, and includes any other matter which may be the subject of action by either House.' What is the scope of 'any other matter which may be the subject of action' by Congress? It would seem to include not only pending or proposed legislation but any matter within the legitimate domain of Congress.

What contributions might be used 'principally to aid ' in influencing 'directly or indirectly, the passage or defeat' of any such measure by Congress? When is one retained for the purpose of influencing the ' passage or defeat of any legislation'?

(1) One who addresses a trade union for repeal of a labor law certainly hopes to influence legislation.

(2) So does a manufacturers' association which runs ads in newspapers for a sales tax.

(3) So does a farm group which undertakes to raise money for an educational program to be conducted in newspapers, magazines, and on radio and television, showing the need for revision of our attitude on world trade.

(4) So does a group of oil companies which puts agents in the Nation's capital****819** to sound the alarm at hostile legislation, to exert influence on Congressmen to defeat it, to work on the Hill for the passage of laws favorable to the oil interests.

(5) So does a business, labor, farm, religious, social, racial, or other group which raises money to contact people with the request that they write their Congressman to get a law repealed or modified, to get a proposed law passed, or themselves to propose a law.

Are all of these activities covered by the Act? If one is included why are not the others? The Court apparently excludes the kind of activities listed in categories (1), (2), and (3) and includes part of the activities in (4) and (5)-those which entail contacts with the Congress.

***631** There is, however, difficulty in that course, a difficulty which seems to me to be insuperable. I find no warrant in the Act for drawing the line, as the Court does, between 'direct communication with Congress' and other pressures on Congress. The Act is as much concerned with one, as with the other.

The words 'direct communication with Congress' are not in the Act. Congress was concerned with the raising of money to aid in the passage or defeat of legislation, whatever tactics were used. But the Court not only strikes out one whole group of activities-to influence 'indirectly'-but substitutes a new concept for the remaining group-to influence ' directly.' To influence 'directly' the passage or defeat of legislation includes any number of methods-for example, nationwide radio, television or advertising programs promoting a particular measure, as well as the 'button holing' of Congressmen. To include the latter while excluding the former is to rewrite the Act.

This is not a case where one or more distinct types of 'lobbying' are specifically proscribed and another and different group defined in such loose, broad terms as to make its definition vague and uncertain. Here if we give the words of the Act their ordinary meaning, we do not know what the terminal points are. Judging from the words Congress used, one type of activity which I have enumerated is as much proscribed as another.

The importance of the problem is emphasized by reason of the fact that this legislation is in the domain of the First Amendment. That Amendment provides that 'Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people * * * to petition the Government for a redress of grievances.'

Can Congress require one to register before he

writes an article, makes a speech, files an advertisement, appears ***632** on radio or television, or writes a letter seeking to influence existing, pending, or proposed legislation? That would pose a considerable question under the First Amendment, as Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430, indicates. I do not mean to intimate that Congress is without power to require disclosure of the real principals behind those who come to Congress (or get others to do so) and speak as though they represent the public interest, when in fact they are undisclosed agents of special groups. I mention the First Amendment to emphasize why statutes touching this field should be 'narrowly drawn to prevent the supposed evil,' see Cantwell v. Connecticut, 310 U.S. 296, 307, 60 S.Ct. 900, 905, 84 L.Ed. 1213, and not be cast in such vague and indefinite terms as to cast a cloud on the exercise of constitutional rights. Cf. Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117; Thornhill v. Alabama, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-742, 84 L.Ed. 1093; Winters v. New York, 333 U.S. 507, 509, 68 S.Ct. 665, 667, 92 L.Ed. 840; Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495, 504-505, 72 S.Ct. 777, 781-782, 96 L.Ed. 1098.

****820** If that rule were relaxed, if Congress could impose registration requirements on the exercise of First Amendment rights, saving to the courts the salvage of the good from the bad, and meanwhile causing all who might possibly be covered to act at their peril, the law would in practical effect be a deterrent to the exercise of First Amendment rights. The Court seeks to avoid that consequence by construing the law narrowly as applying only to those who are paid to 'button hole' Congressman or who collect and expend moneys to get others to do so. It may be appropriate in some cases to read a statute with the gloss a court has placed on it in order to save it from the charge of vagueness. See Fox v. Washington, 236 U.S. 273, 277, 35 S.Ct. 383, 384, 59 L.Ed. 573. But I do not think that course is appropriate here.

The language of the Act is so broad that one who writes a letter or makes a speech or publishes an article ***633** or distributes literature or does many of the other things with which appellees are charged has no fair notice when he is close to the prohibited line. No construction we give it today will make clear retroactively the vague standards that confronted appellees when they did the acts now charged against them as criminal. Cf. Pierce v. United States, 314 U.S. 306, 311, 62 S.Ct. 237, 239, 86 L.Ed. 226. Since the Act touches on the exercise of First Amendment rights, and is not narrowly drawn to meet precise evils, its vagueness has some of the evils of a continuous and effective restraint.

Mr. Justice JACKSON, dissenting.

Several reasons lead me to withhold my assent from this decision.

The clearest feature of this case is that it begins with an Act so mischievously vague that the Government charged with its enforcement does not understand it, for some of its important assumptions are rejected by the Court's interpretation. The clearest feature of the Court's decision is that it leaves the country under an Act which is not much like any Act passed by Congress. Of course, when such a question is before us, it is easy to differ as to whether it is more appropriate to strike out or to strike down. But I recall few cases in which the Court has gone so far in rewriting an Act.

The Act passed by Congress would appear to apply to all persons who (1) solicit or receive funds for the purpose of lobbying, (2) receive and expend funds for the purpose of lobbying, or (3) merely expend funds for the purpose of lobbying. The Court at least eliminates this last category from coverage of the Act, though I should suppose that more serious evils affecting the public interest are to be found in the way lobbyists spend their money than in the ways they obtain it. In the present indictments, six counts relate exclusively to failures to ***634** report expenditures while only one appears to rest exclusively on failure to report receipts.

Also, Congress enacted a statute to reach the raising and spending of funds for the purpose of influencing congressional action directly or indirectly. The Court entirely deletes 'indirectly' and narrows 'directly' to mean 'direct communication with members of Congress.' These two constructions leave the Act touching only a part

of the practices Congress deemed sinister.

Finally, as if to compensate for its deletions from the Act, the Court expands the phrase 'the principal purpose' so that it now refers to any contribution which 'in substantial part' is used to influence legislation.

I agree, of course, that we should make liberal interpretations to save legislative Acts, including penal statutes which punish conduct traditionally recognized as morally 'wrong.' Whoever kidnaps, steals, kills, or commits similar ****821** acts of violence upon another is bound to know that he is inviting retribution by society, and many of the statutes which define these long-established crimes are traditionally and perhaps necessarily vague. But we are dealing with a novel offense that has no established bounds and no such normal basis. The criminality of the conduct dealt with here depends entirely upon a purpose to influence legislation. Though there may be many abuses in pursuit of this purpose, this Act does not deal with corruption. These defendants, for example, are indicted for failing to report their activities in raising and spending money to influence legislation in support of farm prices, with no charge of corruption, bribery, deception, or other improper action. This may be a selfish business and against the best interests of the nation as a whole, but it is in an area where legal penalties should be applied only by formulae as precise and clear as our language will permit.

***635** The First Amendment forbids Congress to abridge the right of the people 'to petition the Government for a redress of grievances.' If this right is to have an interpretation consistent with that given to other First Amendment rights, it confers a large immunity upon activities of persons, organizations, groups and classes to obtain what they think is due them from government. Of course, their conflicting claims and propaganda are confusing, annoying and at times, no doubt, deceiving and corrupting. But we may not forget that our constitutional system is to allow the greatest freedom of access to Congress, so that the people may press for their selfish interests, with Congress acting as arbiter of their demands and conflicts.

In matters of this nature, it does not seem wise to leave the scope of a criminal Act, close to impinging on the right of petition, dependent upon judicial construction for its limitations. Judicial construction, constitutional or statutory, always is subject to hazards of judicial reconstruction. One may rely on today's narrow interpretation only at his peril, for some later Court may expand the Act to include, in accordance with its terms, what today the Court excludes. This recently happened with the anti-trust laws, which the Court cites as being similarly vague. This Court, in a criminal case, sustained an indictment by admittedly changing repeated and long-established constitutional and statutory interpretations. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440. The ex post facto provision of our Constitution has not been held to protect the citizen against a retroactive change in decisional law, but it does against such a prejudicial change in legislation. As long as this statute stands on the books, its vagueness will be a contingent threat to activities which the Court today rules out, the contingency being a change of views by the Court as hereafter constituted.

***636** The Court's opinion presupposes, and I do not disagree, that Congress has power to regulate lobbying for hire as a business or profession and to require such agents to disclose their principals, their activities, and their receipts. However, to reach the real evils of lobbying without cutting into the constitutional right of petition is a difficult and delicate task for which the Court's action today gives little guidance. I am in doubt whether the Act as construed does not permit applications which would abridge the right of petition, for which clear, safe and workable channels must be maintained. I think we should point out the defects and limitations which condemn this Act so clearly that the Court cannot sustain it as written, and leave its rewriting to Congress. After all, it is Congress that should know from experience both the good in the right of petition and the evils of professional lobbying.

U.S. 1954.
U.S. v. Harriss

347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989
(Cite as: 347 U.S. 612, 74 S.Ct. 808)

347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989

Briefs and Other Related Documents (Back to top)

• 1953 WL 78477 (Appellate Brief) Statement as to Jurisdiction (Apr. 1953)

END OF DOCUMENT

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On January 9, 2007, I served the foregoing document(s) described as

NOTICE OF LODGING FEDERAL AUTHORITY CITED IN PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE MOTION FOR SUMMARY ADJUDICATION

on the interested parties in this action by placing
[ ] **the original**
[X] **a true and correct copy**
thereof enclosed in sealed envelope(s) addressed as follows:

Douglas J. Woods
Attorney General's Office
1300 "I" Street, Ste. 125
Sacramento, CA 94244-2550

___ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U. S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on January 9, 2007, at Long Beach, California.

___ (PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

_X_ (MAIL OVERNIGHT) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on January 9, 2007, at Long Beach, California.

_X_ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

___ (FEDERAL) I declare that I am employed in the office of the member of the bar of this court at whose direction the service was made.

CLAUDIA AYALA