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BOOK REVIEWS

Legal Problems in International Trade and Investment. Proceedings of the 1961 Conference on International Trade and Investment conducted at the Yale Law School. Dobbs Ferry, New York: Oceana Publications, Inc., 1962. Pp. xiii, 265. $12.50.

Take one part professors, one part practicing lawyers, add a dash of lawyers-in-government and another of house consul, thoroughly homogenize and the product is an annual meeting of the American Society of International Law, that is to say, an aggregation of astute characters. Do the same thing on a slightly smaller scale and—dare I say it—with even more discrimination, and you have what was done by the student World Community Association of the Yale Law School in March, 1961. This conference on Legal Problems in International Trade and Investment brought together fourteen specialists whose collaboration produced a cabochoned gem of high polish, rather than one of many facets.

The book which eventuated a year later from the publication of the proceedings of this conference defies routine review techniques. It even escapes the ambit of the subtle approaches so delightfully suggested by Wolfgang Friedmann in his article entitled "Reviewmanship: How to Be Successful in Reviewing Books Without Really Trying."[1] The publisher has provided on the jacket an arresting quote from each contributor. What to do?

First, it might be observed the book adds zest to a robust ferment in progress in American legal education. The quickening of interest on the part of the public, the business community, the practicing bar, government, and the law schools in the legal problems of international transactions is rapidly giving a new dimension to traditional international law, a new perspective to comparative law techniques, and a new impetus to interdisciplinary attack on these vital, practical, and fascinating issues.

For the novice, be he layman, lawyer, or student, this book clearly presents the basic problems, their political overtones, and some techniques for solutions. For the international practitioner, or

[1] 14 J. LEGAL ED. 508 (1962).

for the lawyer with a client who is at the threshold of doing a bit of business abroad, it collects essential material in a single volume.

Of particular value is the discriminating bibliography of "Selected English Language Materials on Doing Business Abroad." This appendix is appropriately indexed under Antitrust, Commercial Law, Copyrights, Patents and Trademarks, Corporations, Foreign Exchange, International Arbitration, Investment, Regional Markets, and Taxation and Trade.

In a most readable and relatively short volume we encounter a rich collection of knowledge. Mark S. Massel, Brookings Institution, defines the lawyer's role in international trade and stresses his need for a basic grasp of business background, facility in negotiation, the effective use of economic and political analysis and of statistical and accounting methods. Above all, he must have a flexible, pragmatic, cosmopolitan approach, including the ability to work with foreign lawyers.

Richard N. Gardner, Deputy Assistant Secretary of State for International Organization Affairs, discusses United States foreign economic policy and points out our growing dependence on the world economy, our balance of payment and liquidity problems, the necessity for revision in United States trade policy, the need for reform of the world's international financial structure, the urgency of internal reform by countries receiving foreign aid, and the need for greater concentration and coördination of all assistance to developing countries through the United Nations.

James G. Johnson, Jr., New York lawyer, deals with problems of organization for overseas operations, coming to grips with tax burdens, repatriation of profits, types of business organization, capital structure and degree of foreign ownership, restrictive local laws, possible subsidy inducements, and the importance of integration of a specific foreign operation in the over-all program of a parent company.

Stanley D. Metzger, Georgetown law professor, examines United States trade policy both historically and prospectively. He emphasizes, in the light of European Economic Community developments, the urgency to broaden presidential powers to negotiate tariffs. Fortunately this has largely been accomplished by the Trade Act of 1962.

Corwin D. Edwards, professor in the University of Chicago

Graduate School of Business, scrutinizes the existing antitrust laws of foreign countries and observes that normally a substantial middle class of independent businessmen and a representative democratic government are prerequisite to laws regulating business. In post-war Europe the desire to eliminate price controls, arrest inflation, increase productivity, and encourage competition all combined to produce widespread national anti-cartel controls. The traditional complacency with which powerful business is contemplated in Europe, stemming from its socialistic tradition, causes its measures to control business to be essentially administrative rather than judicial, directed primarily to stability rather than expansion. Great managerial functions are entrusted to the state in economic affairs, blurring the line separating private business from public action. He concludes that inevitably there will be a trend to harmonize national laws regulating business within the framework of an expanding European Economic Community.

Sigmund Timberg, District of Columbia practicing attorney, reviews the Common Market effect on antitrust, patent, and trademark policy and sets forth the applicable basic articles of the Treaty of Rome, pertinent national legislation (or the absence thereof) in member countries, and the discrepancies and conflicts between these. The expressed goal of the Treaty of Rome was to achieve "the approximation of national legislation to the extent necessary for the functioning of the Common Market." Weak public opinion in Europe against monopoly, the possibility of administrative emasculation in granting exemptions under the Treaty, the existing conflict in national laws within the Community, the divergence of backgrounds of national enforcing officials, and competing national interests are retarding factors. Harmonizing factors are the quests to eliminate trade barriers, encourage technological development, provide uniform conditions of competition, and achieve standard industrial property legislation in the member states. Common Market Regulation 17, implementing the trade regulation articles of the Treaty of Rome was enacted subsequent to the publication of the book.

George W. Haight, New York legal advisor to Royal Dutch Shell Group Companies, pinpoints the international impact of the Sherman Act in prohibiting, regardless of the nationality of the parties, "unreasonable" restraints on United States "trade or com-

merce . . . with foreign nations," the uncertainties and impediments to foreign private investment resulting therefrom, and the complications arising where a foreign government itself participates with private American capital in a restrictive joint venture abroad—all this tightly annotated with the leading pertinent United States judicial authority. He concludes with a forceful argument that "there is no right in international law either to take the property of aliens owned in a foreign country or to regulate their conduct there, and that confiscatory measures cannot operate extra-territorially." Hence, there is no "antitrust jurisdiction over the industrial and commercial activities of foreign nationals in foreign countries."

Eric Stein, Professor and co-director of Michigan's International Legal Studies Program, presents a brilliant comparison of the objectives, organization, and functioning of EEC and EFTA, examining particularly the direct supra-national lawmaking function and national law-harmonizing function of EEC. He concludes with a reasoned suggestion that the time is ripe "for a more effective political consultation arrangement within the Atlantic Community."

Martin Domke, Editor of the Arbitration Journal and Professor of Law at New York University, brings his experience to bear on the role of third-party arbitration in resolving disputes arising out of international trade. He describes the numerous regional and global arbitrational facilities now available and others in process of formation, the sweep of reciprocal arbitrational agreements, the place of statutory arbitration law in international disputes, the world trend towards uniform arbitration laws, and the problem of enforcing foreign awards.

George W. Ray, Jr., General Counsel to the Arabian American Oil Company, addresses himself to the "facts of life really" which form the legal basis of middle east oil agreements. Provocatively, he says "oil in the Middle East is found, produced, manufactured into products, transported, dealt with and exported pursuant to a contract system with a state on one side of each arrangement and one or more oil companies on the other . . . . The company, in making the agreement, indicates its confidence that the state will protect it in the exercise of its rights and in the performance of the obligations created by the agreement . . . . The agreement comprises a . . . joint venture . . . in which the company will run the oil business; a venture in which the state will maintain the environment which will make the running of that business possible . . . .

[T]hese agreements are binding upon the parties to them . . . . Both will continue to collaborate in implementing the agreements understandably."

Hale Boggs, Congressman representing Louisiana's Second District and author of tax legislation designed to encourage private investment abroad, assures us that in 1961 "there is no fundamental disequilibrium involving the dollar," characterizing as pessimistic the view "that we are already priced out of foreign markets and that we must undertake drastic domestic measures to stabilize our balance of payments." He points out that "restriction of United States private foreign investment is not the right approach . . . . [since] . . . the investment which gives rise to these [competing] imports is likely to be made whether the funds come from America, or some place else . . . . [I]t is the system of free private investment that we are attempting to establish in the eyes of the developing countries as the best system yet devised for organizing the long-range economic development of a country." His plea to continue Western Hemisphere Trade Corporation and China Trade Act provisions, and the practice of taxing the profits of foreign subsidiaries only when such profits are returned to the United States parents as inducements to foreign private investment, seem to have been only partially heeded by the Congress just adjourned.

David R. Tillinghast, New York City practicing attorney, deftly debunks a number of purported policy reasons for the existing structure of United States taxation of foreign income, lucidly explaining current practices with regard to "tax havens" and "base companies," and calling for a rethinking of the basic idea that tax should be deferred on foreign income until it is remitted to the United States. In view of what the last Congress did, and what is urged upon the next Congress in tax matters, the author's concluding sentence that "the entire subject will provide long months of debate in the years immediately ahead" is indeed prophetic.

Matthew J. Kust, practicing attorney of Washington, D.C., analyzes the tax treaty policy of the United States as applied to under-industrialized countries, finding it wanting—particularly as to the parsimonious criteria required to grant "tax sparing" (allowing a foreign tax credit for taxes waived by a foreign country to induce investment as though those taxes had actually been paid). He concludes that we "should defer to the country of source in tax treaties with under-industrialized countries. Since the United States

already does this with its foreign tax credit there is no further need for tax treaties with these countries except to elmininate the nullification by the United States tax laws of the tax concessions granted American private enterprise."

Finally, Walter A. Slowinski, practicing attorney of Washington, D.C., and Professor of Comparative Tax Law at the Georgetown University Law Center, submitted "A Selected Outline and Bibliography on Tax Aspects of Organizing International Operations" of definitely superior merit.

All bases duly touched, we may now leave the field by observing that a few typographical errors speak for themselves but do not impede the amazing flow of knowledge.

Perhaps the most significant thing about this material is what it did to two members of this reviewer's seminar in international law, who at their own expense traveled from Chapel Hill to New Haven to listen to the original presentations. They returned with broadened vision, set on fire by what they had heard. A careful reading may cause the most sophisticated to experience a warm glow.

SEYMOUR W. WURFEL

PROFESSOR OF LAW
UNIVERSITY OF NORTH CAROLINA

Price Discrimination Under the Robinson-Patman Act. By Fredric M. Rowe. Boston: Little, Brown & Company, 1962. Pp. xxx, 675. $22.50.

The Robinson-Patman Act was depression legislation initiated as a reaction to the emergence of chain store competition by besieged wholesalers and brokers fearful for their survival. In the words of Representative Patman, "one certain big concern had really caused the passage of this act, the A & P Tea Company."[1] The alleged evils sought to be remedied were the price and other concessions which large buyers, such as A & P, were able to exact from sellers, giving them an advantage over their smaller competitors. Instead of attacking the practices of large buyers directly, Congress took a backhanded approach of outlawing the granting of such discrimination by sellers and by attacking the receipt of discriminatory concessions

[1] *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary on Bills to Amend Sections 2 & 3 of the Clayton Act,* 84th Cong., 2d Sess. 57 (1956), quoted in ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT at 3, 534 [hereinafter cited as ROWE].

known by the buyer to be illegal from the seller's vantage. Thus the Robinson-Patman Act, though professing to be an antitrust law, has heavy overtones of NRA which results in a legal split personalty. Congress, faced with the dilemma of competition or protection, compromised by producing a scissors-and-paste-pot statute whose obscure proscriptions have remained an enigma for over twenty-five years. Congress and the courts have yet to resolve the apparent contradictions between the Robinson-Patman Act policy of protecting a particular business class from its competition, and the philosophy of the other antitrust laws which profess to promote competition. As a result, this statute, perhaps more than any other written by Congress, has provided a field-day in vituperation.[2]

While the act may be abhorred it may not be ignored with impunity. To disregard the act may result in contracts being held void,[3] private treble damage suits,[4] administrative proceedings by the Federal Trade Commission, or perhaps, in exceptional cases, criminal actions by the Department of Justice.[5] Although the Commission proceedings normally end only in cease and desist orders, these orders have sharp teeth in that they may cost a firm up to $5,000 in fines and penalties for each day of violation[6] of orders which are often phrased in legalistic boiler plate paraphrasing of the vague text of the act itself.[7]

Granting that the act cannot be ignored, the question remains, how can one understand its imponderables, let alone comply with them? This is the object of Mr. Rowe's comprehensive treatment of the origin, interpretation and enforcement of the act.

Mr. Rowe's book is one in the distinguished "Trade Regulations Series" under the able editorship of Professor S. Chesterfield Oppen-

[2] See, *e.g.*, critiques cited in ROWE ix-xiii, 535. Critical comment has come from all directions as indicated by the sample contained in ROWE at 535 n.4. *E.g.* "Misfits in words or phrases are not infrequently encountered when bills have been amended in the midst of debate on the floor of one or the other of the Houses of Congress. This statute was amended on the floors of both Houses. It is not surprising that the final product is not perfectly meshed, as it might have been had it come undisturbed from the drafting board of a skilled draftsman." Exquisite Form Brassiere, Inc. v. FTC, 1961 Trade Cas. 78605, 78610 (D.C. Cir.).

[3] ROWE § 16.15.

[4] *Id.* §§ 16.14-.16.

[5] *Id.* § 15.7. One such criminal action resulted in fines of $187,500, plus suspended jail sentences for company officials. *Ibid.*

[6] ROWE § 16.11. See Austern, *$5,000 Per Day,* 21 A.B.A. ANTITRUST SEC. REP. (1962).

[7] ROWE § 16.10.

heim, Dean of American antitrust law, and co-chairman of the Attorney General's National Committee to Study the Antitrust Laws. Mr. Rowe is eminently qualified to speak in this area. He is a practicing specialist in antitrust law in general, and the Robinson-Patman Act in particular, and has been involved directly or indirectly in many of the leading cases discussed in his book. To be able to vicariously pick the brain of such a leading authority on the Robinson-Patman Act for the mere fee of $22.50 is a rare bargain in this day of inflation.

A casual perusal of the detailed table of contents cannot but impress one as to the comprehensive coverage afforded the act. The author begins with the historical origin of the act, giving the legislative background to its enactment, a knowledge of which the ambiguities contained in the act require to understand how such a hodgepodge of confusion could ever have been born. In addition to the legislative history of the Robinson-Patman Act contained in the text, the author has thoughtfully included an appendix consisting of the bills culminating in the act, together with the legislative committee reports. This again is just another illustration of the completeness with which the author approaches his difficult subject. The usefulness of the book as a working tool is further enhanced by the inclusion of a table of cases, a well organized topical index and a selected bibliography following each chapter, in addition to a profundity of comprehensive footnotes.

Following the discussion of general legislative history, the author reviews the elementary economics of the Robinson-Patman Act. The underlying legal-economic concepts and premises of the act are as essential to a competent understanding of the law as is its legislative development inasmuch as the law affects the price mechanism which is the "central nervous system of the economy."[8] The word "price discrimination" has a popular connotation of illegality, whereas, legally and economically speaking, it is a neutral condition. Price discrimination may in fact be unfair or injurious, or, on the other hand, it may be the very underpinnings of competition. The price discrimination advanced today may, by erosion, result in a lower prevailing price tomorrow. Conversely, prohibiting individual price haggling may result in a seller choosing to grant no lower price at

[8] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940), quoted in ROWE at 24.

all, thereby effecting an inflexible higher general price, unresponsive to the catalytic effect of individual price concessions.

The requirement that all prices be uniform may result in economically unequal treatment of buyers where a seller's cost of sale varies between his customers. If price is determined by cost factors the price should vary according to the cost of servicing each customer. Thus even with the elementary question of what is a uniform price, or what is "equal" treatment, economic concepts may be at war with legal or popular definitions. The Federal Trade Commission initially must determine whether the delivered prices are to be equal or whether the "mill-net" returns based on costs of servicing the particular customer must be equal. In point of fact, the Commission has adopted each theory at different times, although the prevailing view in the application of the delivered price theory, rather than the "mill-net" theory, in cases other than basing point pricing systems.[9] This view is more realistic inasmuch as, contrary to some opinion, price variations are not directly tied to cost but are a result of the competitive processes, cost being only one limiting element in determining price.

The economic-legal concepts of the Robinson-Patman Act are further compounded by historical functional pricing practices by which prices are determined according to the status or class of the particular business, *i.e.*, wholesaler, retailer, or manufacturer, which in turn is determined by the function which it performs. Blind functional classification used as a basis for determining price differences can serve to thwart competition and the development of integrated firms in which more than one function is performed.

Following a survey of the structure of the price discrimination law, including jurisdictional elements, prohibitions, offenses and enforcement, together with a brief reference to other pertinent statutes, including the Federal Trade Commission Act, the Sherman Antitrust Act and the state price statutes, the author turns to Robinson-Patman Act in detail. He systematically runs through each of its separate provisions, including the price discrimination proscriptions of section 2(a); brokerage arrangements under section 2(c); promotional arrangements under sections 2(d) and (e); and the buyers liability for the knowing receipt of illegal discriminations under section 2(f); together with section 2(b)'s special exculpatory pro-

[9] ROWE § 5.1.

viso of good faith meeting a competitor's equally low price, and 2(a)'s cost justification, and changing conditions defenses.

A special section is devoted to the criminal liabilities for price discrimination under section 3 of the Robinson-Patman Act, which was a separate bill proposed in the Senate as a substitute by opponents of the controversial Patman Bill, and was then tacked onto the House bill—contributing to the hodge-podge of the entire legislative pattern. As noted by the author, the enforcement of section 3 has been rather ineffectual to date and the provisions of this criminal section have been plagued by recurrent constitutional doubts which may be decided in a case now pending before the Supreme Court.[10] Also discussed are certain legislative proposals which would make a violation of section 3 a cause for private enforcement, and counter proposals to repeal this section as a "dangerous surplusage."

The author has included a chapter which covers the enforcement procedures and practices before the Federal Trade Commission under its revised 1961 rules. This is the first complete review of practice before the Commission under the current rules and should be worth the price of admission to any practicing attorney who may have occasion to have dealings with the Federal Trade Commission. This review discusses the consultation and guidance procedures at the Commission; investigation procedures, including general limitations on the Commission's investigations; disposition of formal charges, including the new consent and settlement procedures; and sanctions and compliance under the act, including the enforcement of orders under the 1959 amendment to section 11 of the Clayton Act, which makes unappealed orders final within 60 days after their issuance. Also included is a discussion of controversial proposals for Commission authority to issue administrative temporary cease and desist orders for all statutes it administers, including the Robinson-Patman Act. Under this proposal, the Commission could issue a temporary cease and desist order wherever it had "reason to believe" that a violation existed, and that its injunction would serve the public interest pending the complaint proceeding. Respondent would then be permitted to show cause to the Federal Trade Commission why its cease and desist order should not issue. The author points out that temporary administrative injunctions would be ill-conceived for

[10] United States v. National Dairy Prods. Corp., 196 F. Supp. 155 (W.D. Mo. 1961), *prob. juris, noted,* 368 U.S. 808, *set for rehearing,* 369 U.S. 833 (1962); ROWE § 15.9.

such complex pricing problems, would further hamper a firm's pricing freedom, and would shift the burden to respondent to prove his innocence. Mr. Rowe emphasizes the distinction between a court, sitting independently, issuing a cease and desist order on an application of the Commission or the Department of Justice on the one hand, and the Commission—not a disinterested party—summarily issuing a cease and desist order on the basis of its own complaint. The enforcement chapter concludes with a review of private enforcement of the act wherein private parties may obtain an injunction or receive treble damages, or both.

In the final chapter, the author's own views as chief critic of the act become more sharply focused. Entitled "The Robinson-Patman Act in Perspective," this chapter criticizes this "relic of the Great Depression," pointing to the "ambivalent aims" of the statute "couched in prose of prolixity not precision."[11] The result of this "political process of pressure, counter pressure and compromise" is a "cryptic and sloppy legislative enactment, whose ineptitudes and solecisms opened up more legal questions than they closed."[12]

Robinson-Patman Act enforcement has shown that it probably restrains more competition than it enforces and has become a "numbers game," after a large number of successful orders, which largely missed the object of the enactment. The attack on the "big buyer" has boomeranged to fall most heavily on the smaller competitor which the act intended to benefit. In reviewing the administration of the act the author graphically illustrates the paradox. This is largely attributed to the Commission's over-zealous enforcement of the 2(c) brokerage clause which by its nature would victimize the smaller respondents from the "backwaters" of business who would try to lower their prices by taking a cut in their brokers commission, or by adding a jobbing business, or shaving their fee. The result of the enforcement of this section has been "a feather bedding guarantee for the organized food brokers aboard a legal gravy train—at the expense of cost-cutting forms of distribution."[13] The total enforcement imbalance has been augmented during the past five years, during which time no less than 65% of the total complaints and 70% of total orders concerned the 2(c) and 2(d) brokerage and promotional proceedings.[14] Each of these sections present a lesser burden

[11] ROWE at 535.
[12] *Ibid.*
[13] *Id.* at 540.
[14] *Id.* at 538.

on the Commission which leads the author to conclude that the Commission follows a "Parkinson's law of FTC enforcement; that Robinson-Patman proceedings proliferate with the ease of making a case."[15]

Ironically, the Commission's abandonment *sua sponte* of the enforcement of section 2(f), relating to buyer liability, against those buyers who obtained discriminatory receipts in the guise of advertising or promotional concessions, has compounded this lop-sided enforcement. With the Supreme Court's *Automatic Canteen* decision[16] in 1953, the Commission exaggerated its defeat by misinterrupting its own burden of proof in 2(f) cases which resulted in fewer 2(f) cases being brought for many years. It decided to attack buyers receiving allegedly unproportional promotional allowances and facilities under section 5 of the Federal Trade Commission Act instead of section 2(f) of the Robinson-Patman Act. Finally, the paradox is heightened when the Commission's renewed efforts to enforce 2(f) were directed at countervailing actions by joint buying groups of small merchants organized to obtain the quantity discounts and special concessions available only to their larger competitors. The result was not only a failure to restrain "big buyers," but a negation of the act's professed "spirit of encouragement to the cooperative movement."[17] The statistics reported by the author show that the Robinson-Patman respondent was "rarely a titan of the market, but more typically . . . the smaller concern trapped in a legal maze."[18]

One lesson which the small concern might learn from this is that the larger companies have learned better how to live with the act. Also, the Robinson-Patman Act must be contrasted to the other antitrust laws which are directed and enforced mainly against the activities of larger businesses whose purposes or effects are to unreasonably restrain interstate commerce. This is why this statute, of all of the antitrust laws, must necessarily be included in the realm of the local practicing attorney, as well as the antitrust specialist.

Although the author is highly critical of the Commission's "preoccupation with scalps rather than policy considerations"[19] he also recognizes that, due to the political climate, this particular statute in

[15] *Id.* at 539.
[16] Automatic Canteen Co. v. FTC, 340 U.S. 231 (1951).
[17] ROWE at 542.
[18] *Ibid.*
[19] *Id.* at 548.

one form or another is here to stay. While talented legal counsel may find a way to avoid the operations of the statute, the act still hampers the every day spontaneous pricing activities in the market and "nurtures a cartel mentality which saps the drive of vigorous competition."[20] Where businessmen, aware of the statute, finally acquiese and become conditioned to maintaining inflexible prices, the next step is to insure that competitors fall in line by industry-wide enforcement proceedings and uniform voluntary compliance. The final result is "creeping cartelism" closely akin to the days of the NRA.[21]

With the prognosis that the act is no doubt here to stay in one form or another, the author has concluded that its history portends little likelihood of more enlightened administration by the Commission. Instead, the author notes that "improvement of the act appears more likely in the courts than at the agency level."[22] The formula proposed by the author to harmonize the Robinson-Patman Act with the other antitrust laws is contained in the Supreme Court's language in the *Automatic Canteen*:[23]

> Although due consideration is to be accorded to administrative construction where alternative interpretation is fairly open, it is our duty to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress.

This approach would require greater emphasis on competition and less on shielding competitors from the rigors of competition. To accomplish this the author would encourage greater latitude in the act's exculpatory provisions and more limited application of the absolute liability of the brokerage and promotional provisions.

Mr. Rowe displays a rare talent with words that will gratify the technician, impress the scholar, titillate the cynic, arouse the reformist and, at time perhaps, inspire the poet. More than this, his is the best handbook on the imponderable but vital law of price discrimination which affects every pricing practice of every business, large or

[20] *Id.* at 550.

[21] *Id.* at 551. One writer has referred to the Robinson-Patman Act as a "price fixing statute hiding in the clothes of anti-monopoly and pro-competition symbols." Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, 1 A.B.A. ANTITRUST SEC. REP. 60, 61 (1952).

[22] ROWE at 555.

[23] *Ibid.;* Automatic Canteen Co. v. FTC, 346 U.S. 61, 74 (1953).