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A New Liability for Government Contractor

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keepers themselves?",[63] *Holt* exemplifies an increasing willingness by courts to use the full extent of their powers to protect the rights of convicts. And though the eighth amendment should not be used as a vehicle for judicial imposition of modern penal reforms, it seems to be an adequate basis for setting minimum standards of decency below which no man, convict or not, will be forced to sink.

Paul D. Schoonover

A New Liability for Government Contractors

An employee of M. O. Seckinger Company was injured while installing steam pipes at the Paris Island Marine Depot in South Carolina under a contract between Seckinger and the United States. After receiving workmen's compensation[1] payments from Seckinger, he sued the United States under the Federal Tort Claims Act,[2] alleging that the Government's negligence was the sole and proximate cause of his injuries. The United States sought to implead Seckinger as a joint tortfeasor, but the trial court dismissed the third-party complaint without prejudice. The trial court found that the negligence of the Government was the sole cause of the employee's injuries, and awarded him $45,000. The United States did not appeal this judgment, but paid it and sued Seckinger, seeking indemnification based on a contract clause which provided that Seckinger would be liable for all damages to persons or property that occurred as a result of its fault or negligence in connection with the prosecution of the work. The trial court dismissed the complaint because (1) the suit was barred by res judicata, and (2) the responsibility clause could not be construed to allow indemnification for the indemnitee's own negligence.[3] On appeal, the Fifth Circuit rejected the trial court's first ground of decision, but agreed with the second.[4] It reasoned that, in view of the prior action, the Government was necessarily seeking indemnification for its own negligence. Noting that federal law controls the interpretation of contracts to which the United States is a party, the court adopted, as the federal rule, the "majority rule" that intent to indemnify for the indemnitee's own negligence must be clear and unequivocal. Finding no such expression of intent, the court concluded that no indemnification could be required.[5] The United States Supreme Court granted certiorari.[6] *Held, reversed and*

[63] "Sed quis custodiet ipsos custodes?," D. JUVENAL, SATIRES, VI, line 347.

[1] S.C. CODE ANN. §§ 72-121 to -128 (1962) (§§ 72-123 to -126 were repealed in 1969, and § 72-126.1 was added).

[2] 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1969).

[3] This is the holding of the trial court as given in United States v. Seckinger, 408 F.2d 146, 148-49 (5th Cir. 1969).

[4] 408 F.2d 146 (5th Cir. 1969).

[5] *Id.* at 153.

[6] United States v. Seckinger, 396 U.S. 815 (1969). In its petition for certiorari, the Government advised the Court that there were over 200 cases pending involving the same or similar clauses. Government Petition for Certiorari at 7, United States v. Seckinger, *supra.*

remanded: The responsibility clause calls for indemnity on the basis of comparative negligence; therefore, the United States is entitled to recover from the contractor that portion of the damages caused by the contractor's negligence. *United States v. Seckinger*, 397 U.S. 204 (1970).

I. Contract Interpretation Under Federal Law

Scope of the Federal Common Law. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[7] a case decided on the same day as *Erie R.R. v. Tompkins*,[8] the Supreme Court recognized that federal common law controls in non-diversity actions.[9] In the absence of a constitutional rule of decision or congressional directive, federal courts "are free to apply the traditional common-law technique of decision and to draw upon sources of the common law"[10] in fashioning their own rule of decision. A federal court will often examine the laws and decisions of the various states in its search for a uniform federal rule.[11] If the federal interest is not substantial and there is no particular need for uniformity, a federal court may choose the law of the forum state as the applicable law in federal courts of that state.[12]

Rules of Contract Interpretation. Federal law controls interpretation of contracts to which the United States is a party.[13] Among the federal common-law principles applied to contract interpretation is the maxim that a contract should be most strongly construed against the drafter.[14] This maxim becomes particularly important when there exists a vast difference in the bargaining power of the parties, and the contract was drawn by the stronger party.[15] Another maxim of federal common law

[7] 304 U.S. 92 (1938).

[8] 304 U.S. 64 (1938). Under *Erie* substantive law of the forum state, not federal general common law, controls in diversity actions.

[9] Generally, federal common law will control in cases involving a federal interest that might be compromised by adjudication in a state court applying state law. *See, e.g.*, United States v. Yazell, 382 U.S. 341 (1966); Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956). Some of the more important areas in which federal common law controls are cases that: (1) arise under the Constitution, laws, or treaties of the United States (D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942)); (2) involve a substantial federal interest in uniformity of law (Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)); (3) involve matters of essentially federal character (United States v. Standard Oil Co., 332 U.S. 301 (1947)); (4) obviously could not be decided by state law, as in disputes between the states (Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938)); (5) involve international law (Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)); and (6) arise under admiralty and maritime jurisdiction (The Thomas Jefferson, 6 U.S. (10 Wheat.) 465 (1825)).

[10] D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 465 (1942) (Jackson, J., concurring). This opinion is frequently cited as an excellent statement of the nature of federal common law. *See, e.g.*, C. Wright, The Law of Federal Courts § 60, at 248 (2d ed. 1970).

[11] *See, e.g.*, United States v. Seckinger, 408 F.2d 146 (5th Cir. 1969).

[12] United States v. Yazell, 382 U.S. 341, 357 (1966). *Cf.* United States v. Standard Oil Co., 332 U.S. 301 (1947), in which the Court found a substantial federal interest in the right of the United States to reimbursement for loss of services and medical expenses of an injured soldier. However, the Court left the creation of such a right to Congress, traditionally the guardian of the nation's funds and property. *Id.* at 315-17.

[13] United States v. County of Allegheny, 322 U.S. 174, 183 (1944).

[14] *See* United States v. Standard Rice Co., 323 U.S. 106 (1944).

[15] *See* Calderon v. Atlas S.S. Co., 170 U.S. 272 (1898); Peter Kiewit Sons' Co. v. United States, 109 Ct. Cl. 390, 418 (1947).

is that contracts should be interpreted to reflect the intention of the parties at the time the contract was executed.[16] Federal courts should not allow the United States any advantage of interpretation that a private party would not have under the same circumstances,[17] and federal courts will not revise a Government contract on the grounds that a more prudent one might have been made.[18]

Generally, parties have the freedom to include in a contract any legal provisions that they may desire, including indemnity clauses.[19] A majority of states[20] have adopted a restrictive rule with regard to the construction of indemnity clauses that allegedly require indemnity for the indemnitee's own negligence.[21] This majority rule [hereinafter referred to as the clear-intent rule] requires that the intention of the parties to include indemnification for the indemnitee's own negligence must be expressed clearly and unequivocally on the face of the contract.[22] The clear-intent rule is based on the reluctance of courts to allow a negligent indemnitee to invoke general language of indemnification to recover from a faultless indemnitor.[23] This desire to protect indemnitors from unforeseen burdens is illustrated by one federal case which held that although the contract called for the indemnitor to hold the indemnitee harmless from damages caused by the indemnitor's negligence, the clause would not be enforceable where there was concurrent negligence.[24] However, some courts have allowed full indemnity under ambiguous clauses, even in the absence of any indemnity clause, if a contract for indemnity could be implied from the circumstances.[25]

When the contract in question is a construction contract, the right to indemnity in the absence of an unambiguous indemnity clause is generally predicated on the extent of control exercised by each party over the premises, instrumentalities, and working conditions at the time of the injury involved.[26] However, if the injury is to an employee of the con-

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[16] Hollerbach v. United States, 233 U.S. 165, 171-72 (1914); Canal Co. v. Hill, 82 U.S. (15 Wall.) 94, 99-100 (1872).

[17] United States v. Standard Rice Co., 323 U.S. 106, 111 (1944).

[18] *Id.*; United States v. American Sur. Co., 322 U.S. 96, 102 (1944).

[19] *See generally* 17 C.J.S. *Contracts* § 190 (1963).

[20] Federal courts may adopt state law as a rule of decision. *See* notes 10-12 *supra*, and accompanying text.

[21] *See* Annot., 175 A.L.R. 8, 29-38 (1948).

[22] 41 AM. JUR. 2D *Indemnity* § 15, at 701 (1968). The process of interpreting such an indemnity clause has been described as one in which "the law . . . steps in and tells the parties that while it need not be done in any particular language or form, unless the intention is *unequivocally expressed in the plainest of words*, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence. The question then is: *does the specific contract in dispute clearly reflect such a purpose*?" Batson-Cook Co. v. Industrial Steel Erectors, 257 F.2d 410, 412 (5th Cir. 1958) (emphasis added).

[23] Associated Eng'rs Inc. v. Job, 370 F.2d 633, 651 (8th Cir. 1966).

[24] Shamrock Towing Co. v. New York, 16 F.2d 199 (2d Cir. 1926).

[25] *See* 41 AM. JUR. 2D *Indemnity* §§ 19, 24 (1968). In Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., 350 U.S. 124 (1956), the Court, over a strong dissent, allowed full indemnity implied from a breach of an implied warranty of workmanlike performance. The Fifth Circuit subsequently noted that "[T]he implied warranty established in *Ryan* is a product of the admiralty courts and a creature of the admiralty law . . . . The cases in which the doctrine has been applied have been admiralty cases which presented substantially similar circumstances to those existing in *Ryan*." Central Strikstof Verkoopkanter v. Walsh Stevedoring Co., 380 F.2d 523, 529 (5th Cir. 1967).

[26] *See* Annot., 97 A.L.R.2d 616, 626-32 (1964).

tractor-indemnitor, and is caused by the active or primary negligence of the owner-indemnitee, the tendency of most courts has been to deny indemnity unless the indemnity clause expressly included injuries occasioned by the indemnitee.[27]

The Federal Tort Claims Act and Workmen's Compensation. Under the Federal Tort Claims Act[28] [FTCA], which was enacted in 1946, the sovereign immunity of the United States to suits in tort is waived, and the United States is generally liable for the torts of its agents if a private person would be liable under the same circumstances.[29] Congress indicated that the substantive law to be applied under the FTCA is the law of the state in which the injury complained of occurred.[30] Recognizing the congressional intent to treat the United States as a private party by applying state tort law, it has been held, under the FTCA, that the United States may be impleaded as a joint tortfeasor and may be liable for contribution where local law allows it.[31] The right to and liability for contribution are governed by local, not federal, law.[32] Approximately one-half of the states allow contribution among joint tortfeasors either by statute or judicial decision,[33] but South Carolina has not yet followed this trend.[34]

Workmen's compensation statutes, in effect in all of the states, have substantially altered common-law tort rights and remedies. Generally, workmen's compensation statutes terminate a private employer's common-law liability and substitute a duty to pay a prescribed compensation not based on fault.[35] It is uniformly held that acceptance of a workmen's compensation award by an injured employee bars any action he might have at common law against his employer.[36] A majority of states have also held that a third-party tortfeasor may not recover contribution from a concurrently negligent employer, the rationale being that such contribution would subject the employer to double liability and allow the employee a double recovery against the employer, contrary to the "sole remedy" provisions of the workmen's compensation statutes.[37] South Carolina follows a modified version of this majority rule. If the employer has paid a workmen's compensation award, a third-party tortfeasor may have the amount of that award deducted from the judgment prior to paying it; or, if the employee elected to go against the third party alone and did

[27] *See* Annot., 27 A.L.R.3d 663, 752-66 (1969).

[28] 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1969).

[29] 28 U.S.C. §§ 1346(b), 2674 (1964). Congressional exceptions to this general liability are at 28 U.S.C. § 2680 (1964).

[30] 28 U.S.C. § 1346(b) (1964); Richards v. United States, 369 U.S. 1 (1962).

[31] United States v. Yellow Cab Co., 340 U.S. 543 (1951).

[32] *Id.*; United States v. Arizona, 216 F.2d 248 (9th Cir. 1954) (state law governs unless the internal management of the United States is involved in some special way).

[33] *See* W. PROSSER, THE LAW OF TORTS 274-75 (3d ed. 1964).

[34] The leading case is James v. Western Union Tel. Co., 130 S.C. 533, 126 S.E. 653 (1925).

[35] W. PROSSER, *supra* note 33, at 555. These statutes are designed to provide an injured employee with immediate relief, limit an employer's liability for injury to the amount of the workmen's compensation award, and avoid the expense and antagonism involved in common law negligence actions. *Id.*

[36] *See* 58 AM. JUR. *Workmen's Compensation* § 48 (1948, Supp. 1970); S.C. CODE ANN. § 72-121 (1962).

[37] *See* Annot., 53 A.L.R.2d 977 (1957) (classifying jurisdictions).

not collect a compensation award, the third party may force the employer to contribute an amount not greater than the employer's liability under workmen's compensation.[38]

The Effect of an Indemnity Contract on the Right to Contribution. In jurisdictions that do allow contribution among joint tortfeasors, a third-party tortfeasor is generally not entitled to contribution from a concurrently negligent employer who has already paid a workmen's compensation award.[39]

Parties to a contract may, however, agree as to who shall bear the risk of a damage award if either or both are negligent, and an indemnity agreement providing that the indemnitor shall indemnify the indemnitee for damages resulting from the indemnitor's own negligence is one way to insure that the indemnitee will not have to pay entire damages in jurisdictions that would not allow him to recover contribution.[40]

If an indemnitee-tortfeasor has paid a judgment obtained by the injured party, a question arises as to what extent, if any, the indemnitee is bound by findings of fact in the judgment against him. The authorities which have considered the collateral estoppel question have uniformly held that the indemnitee is bound by the judgment for which he seeks indemnity, and that he cannot bring an action against the indemnitor if that prior judgment rests on a fact fatal to recovery under the indemnity clause.[41] In the case of a third-party tortfeasor attempting to recover from a concurrently negligent employer solely under an indemnity contract, indemnity will generally be allowed if (1) the indemnity clause does cover and was intended to cover the injury and subsequent liability involved,[42] and (2) the action by the indemnitee against the indemnitor is not barred by a finding of fact fatal to recovery.

II. The Responsibility Clause

U.S. Standard Form No. 23-Rev., the required form for Government fixed-price construction contracts, provides in article 10:

[38] S.C. Code Ann. §§ 72-121 to -128 (1962) (statutory scheme); Burns v. Carolina Power & Light Co., 88 F. Supp. 769 (E.D.S.C. 1950), *aff'd*, 193 F.2d 525 (4th Cir. 1951), *cert. denied*, 344 U.S. 863 (1952); *cf.* Simon v. Strock, 209 S.C. 134, 39 S.E.2d 209 (1946) (payment of award relieves employer of further liability and bars any other action against him). The South Carolina supreme court has indicated that decisions of the North Carolina supreme court in point are entitled to great respect, as the South Carolina workmen's compensation statute was closely patterned on that of North Carolina. Nolan v. Daley, 222 S.C. 407, 73 S.E.2d 449 (1952). North Carolina follows the majority rule. *See* note 37 *supra*, and accompanying text. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

[39] *See, e.g.*, Bertone v. Turco Prods., 252 F.2d 726 (3d Cir. 1958) (applying New Jersey law); Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953). Denial of contribution in such a case is usually based on the theory that a contribution defendant must be originally liable to the injured party, and original liability of an employer to an injured employee does not exist under workmen's compensation. *See* notes 35-36 *supra*, and accompanying text.

[40] *See* 18 Am. Jur. 2d *Contribution* § 2 (1964).

[41] *See* cases collected in Annot., 24 A.L.R.2d 329 (1952, Supp. 1970). This is an exception to the general rule that a prior judgment is not res judicata unless both parties were parties or privies to that prior suit. Commissioner v. Sunnen, 333 U.S. 111 (1948). *See generally* 46 Am. Jur. 2d *Judgments* § 521 (1969).

[42] *See, e.g.*, Batson-Cook v. Industrial Steel Erectors, 257 F.2d 410 (5th Cir. 1958); Herman Chanen Constr. Co. v. Guy Apple Masonry Co., 9 Ariz. App. 445, 453 P.2d 541 (1969).

> The contractor shall, without additional expense to the government, obtain all licenses and permits required for the prosecution of the work. *He shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work.* He shall also be responsible for all materials delivered and work performed until completion and final acceptance . . . .[43]

This clause first appeared in Government fixed-price construction contracts in 1938,[44] and the regulations now in force are essentially similar.[45]

The scope of the responsibility clause was considered in *United States v. Haskins*.[46] There, the trial court found that the Government's negligence proximately caused or contributed to the death of one of the contractor's employees. The Tenth Circuit, speaking of the responsibility clause, held that "[t]he language does not embrace the concept of liability for the government's negligence,"[47] and denied the Government any indemnity from the contractor. In interpreting the clause, the court relied heavily on the intent of the Colorado legislature to limit the amount of an employer's liability to the workmen's compensation award.[48] In effect, the *Haskins* court held that for purposes of the responsibility clause, the employer's payment of a workmen's compensation award extinguished any other liability for the injury. In *Maloof v. United States* the construction contract contained both the responsibility clause and a comprehensive "hold-harmless" clause.[49] The district court in *Maloof* held that "Clause 2 [the hold-harmless clause] *is the indemnity agreement.*"[50] The court allowed indemnity based on that clause, impliedly rejecting indemnity based only on the responsibility clause.[51] In *Fisher v. United States*[52] and *United States v. Accrocco*[53] the Government was allowed full indemnity under the responsibility clause, based on a finding of fact that the negligence of the contractor was a proximate cause of the employee's injuries.

A similar contract clause in *Porello v. United States* provided that "[t]he stevedore [Porello] . . . shall be responsible for any and all damage or injury to persons and cargo . . . [and] to any ship . . . [occurring] through the negligence or fault of the Stevedore, his employees, and servants."[54] Porello's employee was injured through the concurring negligence of the company and the Government. He received compensation payments for his injuries, then sued the United States under the Public Vessels Act[55] and obtained a judgment for damages. The United States sought indemnity from Porello under the contract clause, but the Supreme

[43] 44 C.F.R. §§ 54.1(c), 54.13 art. 10 (Supp. 1957) (emphasis added).
[44] 41 C.F.R. §§ 11.1, 11.3, 12.23 art. 10 (1938).
[45] *See* 41 C.F.R. §§ 1-16.401, 1-16.402, 1-16.404, 1-16.901-23A art. 12 (1970).
[46] 395 F.2d 503 (10th Cir. 1968).
[47] *Id.* at 508.
[48] *Id.*
[49] 242 F. Supp. 175, 186 (D. Md. 1965).
[50] *Id.*
[51] *Id. See also* La Sanka v. United States, 346 F.2d 333 (7th Cir. 1965).
[52] 299 F. Supp. 1 (E.D. Pa. 1969).
[53] 297 F. Supp. 966 (D.D.C. 1969). The contract in question in *Accrocco* provided for stringent safety precautions on the part of the contractor.
[54] 330 U.S. 446, 457 (1947).
[55] Public Vessels Act of 1925, 46 U.S.C. §§ 781-90 (1969).

Court declined to decide the claim without evidence regarding the intention of the parties as to the meaning of the clause.[56]

III. UNITED STATES v. SECKINGER

In *United States v. Seckinger* the Supreme Court held that the responsibility clause entitled the Government to indemnity on the basis of comparative negligence. The majority stated that such a holding was appropriate because: (1) the interpretation was consistent with the plain language of the clause; (2) the clear-intent rule would be preserved intact, as each party would be held responsible for the damages caused by its own negligence; and (3) the interpretation was the least favorable to the Government, considering all reasonable and practical constructions, and thus followed the maxim that a contract should be most strongly construed against the drafter. Declining to remand for a determination of the intent of the parties as the Court had done in *Porello*, the majority stated that "there is not only no representation that further proceedings would aid in clarifying the intentions of the parties, but there is at least tacit agreement that the background of the clause has been explored as thoroughly as possible. In these circumstances, we have no alternative but to proceed directly to the contractual construction problem."[57]

Thus, the majority avoided any problem of reconciling their interpretation of the responsibility clause with the probable intent of the parties at the time it was executed, contrary to the object in interpretation of ambiguous contract clauses.[58] The majority, in effect, disregarded this controlling principle of contract interpretation, and proceeded to discuss the desirability of alternate interpretations of the clause.

In so doing, the Court agreed with the Government's argument that denial of indemnity would deprive the clause of any sensible meaning, and agreed that the clause could only reasonably be construed to require either full or partial indemnity. This rationale fails for two reasons. First, the clause could easily have been construed to require indemnity for any damages except those to an employee of the contractor. This construction would allow for the contractor's reasonable expectation that his liability for such an injury would be limited by workmen's compensation.[59]

More importantly, in pre-FTCA context, the majority itself admits that "the purpose of the clause is totally unclear."[60] The majority does not explain how the passage of the FTCA made clear the meaning of a clause which had appeared eight years earlier. Prior to 1946, the United States could not be sued in tort, and consequently had no reason to secure for itself the right to recover against an alleged joint-tortfeasor.[61] Justice Stewart, in a dissent joined by the Chief Justice and Justice Douglas, stated that "[f]or more than 30 years it has evidently been understood

[56] 330 U.S. at 458.
[57] 397 U.S. at 209.
[58] *See* notes 13-18 *supra*, and accompanying text.
[59] *See* note 38 *supra*, and accompanying text.
[60] 397 U.S. at 208.
[61] *Id.* at 220 (dissenting opinion).

that these words [of the responsibility clause] mean what they rather clearly say—that the contractor cannot hold the Government for losses he incurs resulting from his own negligence."[62] Disagreeing with the majority's assumption that the meaning of the clause suddenly became clear with the passage of the FTCA, Justice Stewart continued:

> Yet we are asked to believe that the drafter of this clause was so prescient as to foresee the day of government tort liability nearly a decade in the future, and so ingenious as to smuggle a provision into a standard contract form that would, when that day arrived, allow the Government to shift its liability onto the backs of its contractors. This theory is nothing short of incredible.[63]

IV. Conclusion

The Supreme Court, as the ultimate arbiter of the federal common law, undeniably has the power to determine and apply rules for the interpretation of Government contracts. In *Seckinger* the Court recognized the controlling principles of contract interpretation, but failed to apply those principles in reaching its decision. The majority accepted the Government's argument that denial of recovery would make the clause meaningless, after asserting that prior to the FTCA the clause was effectively meaningless. The dissent pointed to an interpretation that would have been reasonable both before and after the passage of the FTCA, as well as consistent with the probable intent of the parties. The majority did not even attempt to explain how the parties could have intended the clause to have the meaning found by the Court. The history of the clause and Seckinger's coverage under workmen's compensation make it highly improbable that either party intended the clause to allow any indemnity on the facts of the case. In the absence of proof of contrary intention, the maxim of construction most strongly against the drafter would seem to require that the Court deny indemnity as a matter of law.[64]

The Court indicated that it adopted the clear-intent rule on indemnification for the indemnitee's own negligence. However, it did not explain how the Government, held to be the sole cause of the damages in a prior, unappealed judgment, could possibly be seeking indemnification for other than its own judicially determined negligence. The Court ignored the fact that the finding of sole cause would bar any action under the responsibility clause in every state or federal court that has considered the question.[65] The Court avoided the problem of the prior judgment by stating that "[w]e do not pause to consider what effect, if any, under all the circumstances of this case, the South Carolina judgment could properly have in the instant case."[66] By declining to consider the effect of the prior judgment, the Court implicitly held that it was not binding, and effectively reversed a decision that the Government had failed to appeal.

[62] *Id.* at 218.
[63] *Id.* at 220.
[64] *See* notes 13-18 *supra*, and accompanying text.
[65] *See* note 41 *supra*, and accompanying text.
[66] 397 U.S. at 205-06 n.4.