

## Free speech

# 8. Freedom of speech issues in *Peach v Toohey* and a hypothetical variant of that case

### ABSTRACT

The purpose of this article is to consider the tensions within Australian free speech jurisprudence based on a hypothetical variant of the facts of the decision of the Supreme Court of the Northern Territory in *Peach v Toohey*. In particular, this article briefly explores the competing legal interests that operate when journalists seek access to restricted areas, in this case aboriginal land, in the course of an investigation. After considering the case and the issues it raises the author develops a hypothetical that draws out some of the deeper tensions in this area of the law. The article concludes with proposals for new approaches to the test developed by the High Court of Australia in *Lange v Australian Broadcasting Corporation* for the balancing of freedom to discuss political and governmental affairs – including the public right to know – against other legitimate objectives such as the maintenance of property rights and the privacy interests that can be associated with property rights.

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### Introduction

THE PURPOSE of this article is to consider some of the wider issues raised by a recent decision of the Supreme Court of the Northern Territory, *Peach v Toohey* ([2003] NTSC 57). In particular this article briefly explores the competing legal interests that operate when journalists

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seek access to restricted areas, in this case aboriginal land, in the course of an investigation. After considering the case and the issues it raises this paper concludes with proposals for new approaches to the test developed by the High Court of Australia in *Lange v Australian Broadcasting Corporation* ((1997) 189 CLR 520) for the balancing of the freedom to discuss political and governmental affairs – including the public right to know – against other legitimate objectives such as the maintenance of property rights and the privacy interests that can be associated with property rights.

### **Peach v Toohey**

On the 23 October 2002, an Aboriginal man died after being shot in the chest by police during a confrontation at Wadeye (Port Keats) between fighting members of two opposing Aboriginal groups. A second man was shot and wounded. The incident attracted some media attention that exposed a culture of violence in that community. Subsequently the Magistrates Court cancelled its proposed sittings at Port Keats, which had been scheduled for the November 11. This took place after the police told the circuit magistrate, Jenny Blokland SM, that due to expected violence in the community they could not guarantee the safety of members of the court party travelling to and from Port Keats, nor between the airport and the courthouse (see [2003] NTSC 57 at paragraph [6]). This was because the funeral for the dead boy was happening in the same week that magistrate Blokland was scheduled to go to Port Keats; and hundreds of people were expected to attend.

On the November 8, Paul Toohey of *The Australian* published a story that reported these developments. By way of a follow-up, between the November 8 and the 13 he made repeated attempts to obtain a permit to visit the community. Specifically, he hoped to attend the funeral of the dead man and interview his family. His application for a permit was repeatedly refused.

Despite this, on the November 13, Toohey entered Aboriginal land to continue his investigation. The facts that follow appear in the judgment of Angel J of the Supreme Court, in a form admitted by Toohey at trial:

On the morning of Wednesday, 13 November, this year, Wadeye Community was holding a funeral for a local man who had died during an incident approximately two weeks before.

The incident that the male died in was the subject of media interest and the defendant in the matter was one of many journalists who contacted

the Kardu Numida Community Government Council requesting permission to enter Wadeye Community in relation to the matter.

The council, out of respect for the deceased's family and community feelings, advised all those who inquired for these reasons that they, as the issuing body under the Aboriginal Lands Act, would not give permission for them to attend Wadeye Community.

The defendant recontacted members of the council on several further occasions for comment on the incident or for permission to and on each occasion he was advised that they did not wish to speak to him and that they would not give him permission to enter the community.

On the day of Wednesday, 13 November this year, the defendant drove to Port Keats Community in a hire vehicle and upon attendance at the community took photographs [of a deserted oval where the boy had been shot] and attempted to interview members of the deceased's family immediately after the funeral.

The family of the deceased became upset at the defendant attempting to interview them and made a complaint to members of the council about the defendant being in the community. The council then contacted police and advised that they wished to lay a complaint under the *Aboriginal Lands Act* of the defendant being in the community without a permit and requested [that] the defendant be prosecuted.

Police located the defendant driving along the main street of the community. He was apprehended and taken to the police station. He was asked why he had entered Aboriginal land without a permit. He stated that he believed it was necessary to do so in order to obtain the story. He also admitted to not having a permit. He was [fingerprinted and had his film destroyed and his tape confiscated and his car searched] charged, bailed and escorted from the community, and the bail conditions were immediately to leave the community.

Wadeye Community is approximately 200 ks within the Daly River Aboriginal Land Reserve which is gazetted Aboriginal land. The defendant was in Wadeye Community without a permit.

The additional facts in parentheses were not included in the judgement of Angel J.

On November 19, Toohey appeared before Stipendiary Magistrate David Loadman in the Darwin Court of Summary Jurisdiction on a charge that he had breached s4 of the *Aboriginal Land Rights Act* (NT), which requires people entering aboriginal land to obtain a permit before they do so. Toohey pleaded guilty. However Magistrate Loadman, while finding the respondent guilty,

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exercised his discretion under local sentencing legislation not to record a conviction and dismissed the charge. Section 8(1) of the *Sentencing Act* (NT) provides: ‘Conviction or non-conviction (1) In deciding whether or not to record a conviction, a court shall have regard to the circumstances of the case including – the character, antecedents, age, health or mental condition of the offender; the extent, if any, to which the offence is of a trivial nature; or the extent, if any, to which the offence was committed under extenuating circumstances.’ Loadman accepted the submissions of counsel for Toohey, Mr Geoff James, that Toohey ‘had a higher duty than a duty to this obscure and ill-considered law’.

The prosecuting sergeant demurred, describing Toohey’s entry onto Aboriginal land without a permit as intentional, and one that should be punished.

Magistrate Loadman disagreed, and reflecting on his personal experiences in South Africa, said:

I left South Africa because of many of the things that Mr James has adverted to and of course much more. I lived in a society where the freedom of the press was simply circumscribed by a ruthless government which oppressed all political views other than those which it found favour with.

I guess for that reason I am biased at least in relation to the function that I must discharge here today. There are matters in respect of which Mr James has adverted to which in my private capacity I have a great deal of sympathy with. I don’t propose however to usurp my function as a magistrate by allowing that ability to use this opportunity to make any comment in relation to – or of a political nature in relation to the permit system. Those who feel the concern are recorded by Mr James, people will have to make their own minds up about that.

However, undoubtedly it is the case that the existence of the system in relation to this matter and the employment of the powers under the system in relation to this matter did in fact potentially, albeit in the case of [a] breach that was not so, served to keep the Australian public in the dark as to whatever it was that occurred in Port Keats, not only when these three men were injured but thereafter.

Obviously in light of what I said to begin with, that is repugnant to me. I cannot conceive why in this wonderful country anybody should be free from the scrutiny of the press and the agencies of the lawful authorities in the Northern Territory and anywhere else in the Commonwealth of

Australia. Nevertheless, as I said to Mr James in any event, that is a matter for the legislature, it is not a matter for the courts.

...

I am persuaded that in the circumstances in which Mr Toohey found himself were such that it almost would have been a dereliction of his duty as an investigative journalist to allow to go unpublished, unrevealed and unventilated the events which gave rise to the unfortunate death of this young man.

...

In the event, I'm clearly in the circumstances intending to act as I now do, I find that Mr Toohey is guilty of the offence with which he was charged. I do not proceed to convict him and I do not impose any other penalty.

The Crown appealed on two grounds. They argued that Magistrate Loadman wrongly exercised his discretion not to record a conviction, on the basis that the order was manifestly inadequate in the circumstances of the case.

### **The Supreme Court appeal**

On the 30 May 2003, Justice David Angel of the Supreme Court of the Northern Territory upheld the Crown appeal. While Angel J regarded Toohey as 'a person of good character and high standing in his professional life', noting that he had won a Walkley Award and had 'a national profile for writing articles concerning violence on Aboriginal communities' he concluded that the breach of the permit system had not been a trivial offence. Under the sentencing legislation, the magistrate should have taken the nature of the offence into account before exonerating him. Because he had not taken that relevant consideration into account in sentencing, the magistrate's decision disclosed an error of law and the appeal had to be allowed (this contrasts with *Cobiac v Liddy* (1969) 119 CLR 257 at 275 – there must be sufficient facts to justify an exercise of discretion declining to convict and dismissing a complaint – adopted by Rice J, with whom Nader and Kearney JJ agreed in *R v Allinson* (1978) 49 NTR 38 at 43). Justice Angel said that a judge exercising such a discretion cannot allow himself or herself to be carried away by sympathy and use their discretion to defeat the intention of the Parliament as expressed in the land rights legislation (*Bailey v Laczko* (1978) 20 ALR 658 at 661; *Crafter v Schubert* [1934] SASR 84 at 86). In the circumstances the offence should not have been considered to be trivial (*Eupene v Hales* (2000)

10 NTLR 16 at 27). On this point, Angel J said that:

The conduct of the respondent can not reasonably be said to be of a trivial nature. His offence was constituted by a deliberate contravention of the statute committed in full knowledge that he was not welcome at Wadey on the day of the funeral. The respondent's duty as a journalist was to act lawfully, not unlawfully in contravention of the provisions of the *Aboriginal Land Act* (NT). The respondent had unsuccessfully applied for a permit on more than one occasion and was informed that he could not travel into the Port Keats community on the day of the funeral. The refusal to grant a permit was confined to the day of the funeral. The respondent had every reason to think he would be granted a permit some time shortly following the day of the funeral when he could conduct his business as a journalist. No reason was advanced why his attendance at Port Keats on the day of the funeral would achieve anything that could not be achieved on a day thereafter. As the appellant submitted, a funeral and its immediate aftermath is ordinarily a private affair to which the media can be invited, or for that matter, from which the media can be excluded. The funeral was but a temporary interruption to the continuing media coverage of events at Port Keats, which, given an inquest, were in no danger of going 'unpublished, unrevealed and unventilated'. In these circumstances the respondent's 'duty as an investigative journalist' referred to by [the Magistrate] does not constitute an extenuating circumstance for the purposes of [the application of the sentencing legislation]. The respondent's offence, if not a typical example of a breach of the section, is more serious in that it was wilful and calculated.

Justice Angel said that Magistrate Loadman had erred in his taking account of the need to prevent 'the Australian public' from being kept 'in the dark'. In the circumstances, even taking account of Toohey's good character he ought to have recorded a conviction. However Justice Angel declined to order a fine because Toohey had been arrested and bailed in circumstances where a summons might have been sufficient, and because it transpired that when he was arrested the police destroyed his film and audiotape (the legal justification for this police action remains unclear).

Paul Toohey's account of the events and the justifications for this approach as an investigative journalist are quite different. Toohey had learned that armed police from the Tactical Response Group were attending the funeral. Police had already shot two young men, and if the violence the police

prosecutor had assured Magistrate Blokland would occur did occur, then Toohey wanted to be there to cast an independent eye on the events. Toohey says that was really his only reason for going to Port Keats on the day of the funeral. These facts were confirmed by the NT Court of Appeal in its judgment upholding Toohey's later appeal from the judgment of Angel J.

### **Grounds for a constitutional challenge?**

Did Toohey or *The Australian* have any further legal recourse? Could they challenge the constitutionality of the permit system on free speech grounds? To challenge the operation of the permit system in these circumstances it would have been necessary to argue that provisions of the *Aboriginal Land Act* (NT) were invalid. As noted above section 4 is the critical section. It provides the local community with a power to deny access in largely unqualified terms.

However the section is also expressed to be subject to any provision to the contrary in a law of the Territory. The freedom to discuss political and governmental affairs drawn by implication from the Commonwealth Constitution is a law that applies in the Territory and any challenge to s4 would commence with the proposition that the provision is somehow repugnant to the constitutional freedom to discuss political and governmental affairs and an allied freedom of movement.

In *Lange v ABC*, the unanimous High Court recognised that the Constitution limits 'legislative and executive power to deny the electors and their representatives information concerning the executive branch of government'. This includes 'the affairs of statutory authorities' such as the police 'which are obliged to report to the legislature or to a minister who is responsible to the legislature'. To that extent, Toohey's investigations relating to police conduct and related matters on Aboriginal land seem to fall squarely within the scope of the activity protected by the freedom to discuss political and governmental affairs. Toohey's investigations were important to the public's right to know how the police might behave at Ports Keats, and this reflects on the administration of the Police Department by the Minister for Police and the Government of the Northern Territory.

It should be noted that the application of the implied freedom to discuss political and governmental affairs to the territories was not an essential integer of the reasoning in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (see particularly at 566). Lange's defamation action had been brought in New South Wales. However the unanimous judgment in *Lange*

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makes the conclusion that the implied freedom of speech applies in the territories irresistible (even though at least one of the justices of the High Court has since questioned *Lange*: see *ABC v Lenah Game Meats* (2001) 208 CLR 199 at 331 per Callinan J).

Pressing these wrinkles into the fabric, the basic and applicable principles are that the freedom of communication does not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. The second is that the law is reasonably appropriate and adapted to that end.

The leading decision illustrating the operation of the *Lange* test, and the closest analogous case in Australia's nascent free speech jurisprudence is *Levy v Victoria* ((1997) 189 CLR 579). *Levy v Victoria* concerned Victorian regulations that prohibited people from entering areas where shooting was taking place during duck hunting season. The regulations were unanimously upheld by the members of the High Court as being reasonably appropriate and adapted to the legitimate end of protecting public safety in the circumstances (*Levy* at 599, 608, 614-615, 620, 627, 647).

Adopting that line, a challenge to the permit system would be likely to meet the argument that the system is a reasonably appropriate and adapted way of recognising traditional Aboriginal ownership of land and regulating access to that land. The historical recognition of Aboriginal land rights and the compelling justifications for doing so would provide a potent justification for a conclusion that the law should be upheld in the event of challenge. In addition, analogies could be developed with the rights protected by the common law of trespass. It would be highly likely that a Court would find that the recognition of traditional Aboriginal ownership of land, along with the permit system to regulate access to that land to be both compatible with the system of representative and responsible government that is ordained by the Constitution and also reasonably and appropriately adapted to that legitimate end.

However, while I think this would help on the question as to whether this is apt to deal with the facts in *Peach v Toohey* remains. What *Peach v Toohey* really demonstrates is that the application of a statute in context can result in a conflict between two legitimate ends. The legitimate interest of Aboriginal people in maintaining power to control access to their land cannot be doubted.



But the legitimate interest of the public to expose questionable police practices cannot be doubted either (that is, assuming that there had been questionable police practices). Which interest should prevail?

### **Teasing out the competing legitimate objectives**

Ultimately the answer to this question, as far as the reader is concerned, depends on the weight which one gives to the relative values of aboriginal self-determination (including the enjoyment of exclusive or close-to-exclusive property rights) and the public right to know. The answer to the question as far as an Australian court would be concerned is that the legislature's determination of the relative weight of the policy goals is settled by the legislation in issue (so long as the end is legitimate – a test which smacks of circularity). In this way the *Lange* approach reflects a deep-seated commitment to the doctrine of parliamentary supremacy.

I don't propose a solution here. Rather, I would like to pose a hypothetical to draw out what seems to be a critical weakness of the Australian constitutional principles of free speech when it comes to the resolution of situations of this nature. I will then discuss what types of changes might be necessary to advance the principle of the public right to know. I am conscious that the suggestions made here might be considered by some observers to be quite implausible but they are made in a spirit of academic inquiry rather than as an attempt to justify an incremental advance in legal doctrine.

Again, *for argument's sake*, take the facts in *Peach v Toohey* and alter them: assume for a moment that access to the community had been denied because the relevant decision-maker had been subject to improper influence by the police. I am not suggesting or inferring this happened, I am just developing this hypothetical to make a point. Assume also that the reporter in question had been alerted to the fact of improper influence by a reliable, but confidential, source.

Leaving aside the interesting questions arising from the reporter's reliance on confidential sources in this hypothetical, it is plain that while the regulation would, on its face, remain valid under currently applicable rules, a determination of validity on such facts would be a manifestly bad result. It would enable the power to refuse a permit to be abused. Is there any way to reconceive the applicable constitutional principles in a fashion that would advance a journalists' right of access (and consequently the public's right to know) in these circumstances without undue intrusion on the collective property rights

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enjoyed by the aboriginal community? Could the implied freedom of speech be expanded to encompass a public right to know?

In the United States it has been held that ‘the mere avoidance of controversy’ is not a ‘compelling governmental interest’ justifying restriction of free speech. This statement was referred to with apparent approval by Justice Kirby in *Levy v Victoria* (supra, at 641).

However, even though the First Amendment to the US Constitution guarantees freedom of the press, the US Supreme Court has held that this freedom does not immunise journalists from criminal or tortious liability for their conduct (see *Saxbe v Washington Post Co* 417 US 843 (1974) and *Pell v Procunier* 417 US 817 (1974)). The press has no greater right than the public in access to penal institutions, access to which is properly regulated in the interests of public safety; see *Stahl v State* 665 P 2d 839 (journalist convicted for criminal trespass on nuclear power site while reporting on demonstration); *Greer v Spock* 424 US 828 (1976) (no First Amendment right of access to military bases) also Loveland, ‘Newsgathering: Second-Class Right Among First Amendment Freedoms’, (1975) 53 *Texas Law Review* 1440; Collins, T.A., ‘The Press Clause Construed in Context: The Journalists’ Right of Access to Places’ (1988) 52 *Missouri Law Review* 751; Note, ‘And Forgive Them Their Trespasses’ (1990) 103 *Harvard Law Review* 890).

This principle was recently re-confirmed in the decision of the US Supreme Court in *Food Lion v Capital Cities Ltd.* Two ABC television reporters, after using false resumes to get jobs at a Food Lion supermarket, secretly videotaped what appeared to be unwholesome food handling practices at the store. The reporters were investigating allegations that Food Lion employees ground out-of-date beef together with new beef, bleached rank meat to remove its odor, and re-dated (and offered for sale) products not sold before their printed expiration date. The Supreme Court upheld Food Lion’s claim that the journalists had breached their duty of loyalty to the store and that their behaviour was not protected by the First Amendment. There is no presumptive right of access to journalists even in the United States with its comparatively robust tradition of freedom of speech.

### **Striking a new balance?**

No one could question the right of Aboriginal people to their land and my purpose here is not to question land rights and the legal rights and entitlements

that are ordinarily enjoyed by people who occupy land. However, *Peach v Toohey* does raise questions regarding the balance that Australian courts strike between the public right to know and the interests of property-owners. Recognising the right of the local community to deny access is one thing, but upholding that right in circumstances where there may have been questionable police behaviour is another. Are there ways to develop a more creative balance between the interests at stake and ensure that property rights are not used as a blanket prohibition on the public right to know? I only sketch some possibilities in very brief detail here and invite readers to respond with their support or differences of opinion.

In order to publish, the media must gather information. Since access to places is essential to gathering information, this access must be afforded some protection. It is trite to point out that freedom to discuss political and governmental affairs is necessary because ‘the abuse of official power is an especially serious evil’ (Blasi, V., ‘The Checking Value in First Amendment Theory’ [1977] *American Bar Foundation Research Journal* 521, 538). For that reason it has been argued that our understanding of freedom to discuss political and governmental affairs ought be based at least in part (Collins, *supra*):

on the premise that the Government’s right to limit people’s access to government-owned or privately-owned and government-controlled places is circumscribed by its role as servant of the citizens. Restrictions can occur only to further the efficiency of government operations. Otherwise the public need for information requires access to Government facilities. The media must be provided priority access when circumstances dictate the restriction of those wishing to enter a place, or else Government operations will be unseen and unchecked. Careful scrutiny of justifications for exclusions must be given when the public and the media are excluded in order to assure the media is treated in such a way as to be able to do its job effectively. Essentially, the issue is whether the media can function as the media within the restrictions imposed.

This argument cannot be uncritically transferred to every context. There are certainly very significant cultural reasons why aboriginal land should be regarded as a special type of property at any rate (as distinct from, say, prisons,

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where there seems to be a far less compelling State interest in precluding media access). But an approach based on careful scrutiny of justifications for exclusions could settle a more finely-tuned and preferable order of priorities when the problem of conflicting legitimate objectives emerges.

To achieve such a balance in the Australian context it would be necessary to reconceive the High Court's test in *Lange v ABC*. The test, as currently formulated, is as follows:

The freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. The second is that the law is reasonably appropriate and adapted to that end.

I want to forward some radical changes to this test to provoke discussion (not because I necessarily endorse these proposals personally, if that mattered). In that spirit, a new qualification to that test could be included to the effect that:

in the event that a law is applied in a way that restricts freedom of speech to discuss political and governmental affairs, that instance of regulation must be subject to close scrutiny, and if the legitimate end sought to be achieved by the relevant law is in fact impeded by the application of the law in context, then there is a presumption that the free speech activity ought be allowed.

That free speech activity could include newsgathering. If it was considered necessary to engineer additional legal safeguards to ensure that journalists taking the exceptional step of entering a property without permission were justified in doing so perhaps an additional test of public interest along the lines of the test developed by the Court in *Lange* applicable to the law of defamation could also be applied (ie. that it is necessary for the public to have an interest in receiving the relevant information). The common law defence of necessity could be adapted when investigative journalists commit a trespass:

In applying the necessity defense, a court would consider the possible existence of an imminent danger to the public, whether alternative means exist to gather the information, and the journalist's belief that she

will abate public harm by her news reporting. In short, the defense forces courts to weigh several important factors to protect the public welfare (Note, 'And Forgive Them Their Trespasses' (1990) 103 *Harvard Law Review* 890, 890).

If additional steps were considered necessary to protect private interests (such as the type of private interests in *Food Lion* and also in the High Court's decision in *ABC v Lenah Game Meats* (2001) 208 CLR 199, then this could be judged and controlled through a suitable process. For example, evidence might be reviewed by a court on an urgent basis (or even, in exceptional cases, on an 'ex parte' basis) and the court could then authorise entry and/or publication, with appropriate conditions. This type of order is made by courts in intellectual property counterfeiting cases where there is a danger that a counterfeiter might destroy evidence if they do not receive a surprise visit from the owner's solicitor. Surely there are circumstances where the public right to know what is going on in restricted areas is at least as serious and important as the rights of an intellectual property owner to prevent infringement of their rights.

## Conclusion

In this article I have engaged in only a very brief consideration of some approaches that might be developed to deal with a critical shortcoming of the *Lange* principle of freedom to discuss political and governmental affairs: the fact that it is impossible under the current approach to effectively rank competing legitimate objectives and develop a more finely-tuned balance of them. The approaches proposed here recognise that laws that are perfectly justifiable in the abstract may be improperly *applied* to obstruct the public's right to know. These proposals raise significant issues that I have not attempted to review in comprehensive detail here. Constructive criticism of the proposals outlined above is welcome.

## Postscript

After this paper was delivered (but before its publication as an article in *PJR*), the NT Court of Appeal delivered judgement in Toohey's appeal from the judgment of the Supreme Court: [2003] NTCA 17. The Court of Appeal upheld Toohey's appeal.

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### **Abbreviations used in this paper**

Legal case citations adopt the following format: (year) volume number citation abbreviation page number of report. So *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 means (year = 1997) volume number is 189, CLR is the abbreviation for the Commonwealth Law Reports and the judgment starts on page 520.

**ALR** stands for Australian Law Reports

**CLR** as indicated above, stands for “Commonwealth Law Reports”, the authorised reports of the judgments of the High Court of Australia

**NTRLR** stands for Northern Territory Law Reports

**NTR** stands for ‘Northern Territory Reports’

**NTSC** stands for ‘Northern Territory Supreme Court’. ‘[2003] NTSC 57’ stands for the 57th electronically published decision of the Northern Territory Supreme Court available on their website, or via the Australasian Legal Information Institute at [www.austlii.edu.au](http://www.austlii.edu.au)

**SASR** stands for South Australian State Reports

**US** stands for ‘United States Reports’, the authorised reports of the judgments of the Supreme Court of the United States

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