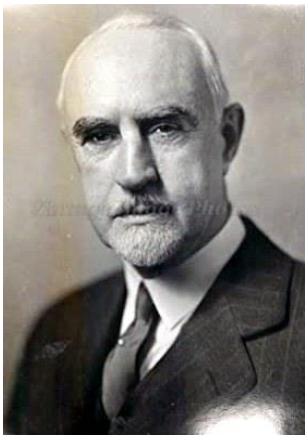
Ex parte Fahey (1947): The Supreme Court Declines to Issue a Writ of Mandamus

John Q. Barrett[*]

In 1932, a new United States law, the Federal Home Loan Bank Act, created a five-member agency, the Federal Home Loan Bank Board. The law directed the Board, through regional Federal Home Loan Banks, to provide credit to and to supervise the nation's savings and loan associations, building and loan associations, and similar saving and lending institutions, thereby supporting their operations.

In 1933, President Franklin D. Roosevelt appointed John H. Fahey to the Board, and he became its chairman. Fahey had been a newspaper publisher and a founder of the U.S. Chamber of Commerce. Under his chairmanship, the Board concurrently administered other major programs. One was the Home Owners' Loan Corporation, which spent billions of dollars to stem the nation's mortgage foreclosure crisis during the Great Depression and saved millions of people from homelessness.



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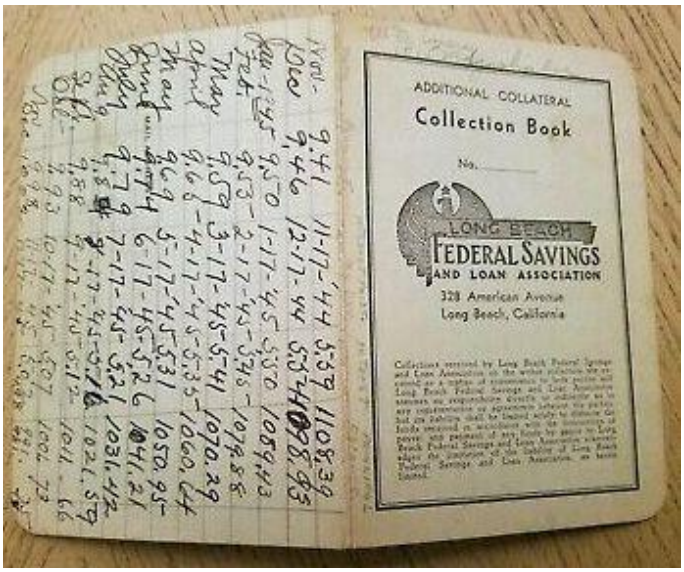
This post is about the U.S. Supreme Court litigation that began in 1946, when the Federal Home Loan Bank Administration seized the Long Beach Federal Savings and Loan Association in Long Beach, California. The agency determined that this S&L was violating laws, had unfit management, and was jeopardizing the interests of its members, creditors, and the public. So the agency appointed Albert V. Ammann as conservator. He immediately took possession of and began to manage the Long Beach S&L and its assets.



The Federal Home Loan Bank Administration took this action pursuant to detailed regulations that its Board, chaired by Fahey, had promulgated. These regulations specified the various circumstances in which the agency could appoint conservators to take over and run savings and loan associations. The Board's legal authority to make and then to enforce such regulations was Section 5(d) of the Home Owners' Loan Act of 1933. It gave the Federal Home Loan Bank Board (Fahey and others)

> full power to provide in the rules or regulations herein authorized for the reorganization, consolidation, merger, or liquidation of [Savings and Loan] associations, including the power to appoint a conservator or receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

The Long Beach S&L's ousted management and shareholders went to federal court to challenge the legality of the seizure. In the U.S. District Court for the Southern District of California, shareholder Paul Mallonee and other plaintiffs sued Fahey, Ammann, and other federal officials. Because the case questioned the constitutionality of a federal law (Section 5(d)), it was assigned to a special three-judge court.

The District Court held that the Federal Home Loan Bank Administration's seizure of the Long Beach S&L was invalid because its statutory basis, Section 5(d), was an unconstitutionally standard-less delegation of Congress's legislative powers to the Federal Home Loan Bank Board.[1] The Court relied on two U.S. Supreme Court decisions from 1935, *Panama Refining Company v. Ryan*[2] and *A.L.A. Schechter Poultry Corporation v. United States*,[3] that had explained and applied this non-delegation doctrine to strike down federal agency law enforcement actions as unconstitutional. The District Court thus removed conservator Ammann and returned the Long Beach S&L to its prior management.

The United States (Fahey, Ammann, and the Federal Home Loan Bank Board) immediately asked the District Court to stay its judgment pending appeal. The U.S. Supreme Court was virtually certain to review this judgment because, assuming the U.S. filed an appeal, the Supreme Court would hear it under its then-mandatory appellate jurisdiction in cases where as a federal law has been held unconstitutional. Nonetheless, the District Court denied the United States' stay motion, returning possession and control of the Long Beach S&L to its former management.

The United States asked the U.S. Supreme Court to stay execution of this District Court decree or, if the S&L's previous management had already take back control of it, to place conservator Ammann back in control. Justice Wiley Rutledge, and later the full U.S. Supreme Court, granted the United States' motion to stay enforcement of the District Court's "release the S&L" decree.[4] The Court also noted its probable jurisdiction over the appeal.[5]

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[1] *See Mallonee v. Fahey*, 68 F. Supp. 418 (S.D. Calif. 1946).

[2] 293 U.S. 388 (1935).

[3] 295 U.S. 495 (1935).

[4] Justice Rutledge entered his stay order on October 1, 1946. On December 9, the Court denied appellees' motion to vacate Justice Rutledge's stay and restore the Long Beach S&L to its former management.

[5] The Court noted probable jurisdiction on December 9, 1946.

In Spring 1947, before the appeal was argued to the Supreme Court, the Long Beach S&L plaintiffs asked the District Court to award them attorneys' fees and expenses. U.S. District Court Judge Peirson M. Hall, a member of the three-judge panel, granted this motion, ordering the U.S. to pay plaintiffs nearly $70,000.

Thereafter, on April 11, 1947, a couple of weeks before the appeal was due to be argued in the U.S. Supreme Court, the United States (Fahey, et al., represented by George T. Washington, Acting Solicitor General of the U.S.) filed an unusual petition. The U.S. asked the Justices to act as a matter of original jurisdiction to grant the U.S. leave to file a petition for a writ of "mandamus and/or prohibition and/or injunction" against Judge Hall, directing him to vacate his fee award, prohibiting him from making any such award in the future, and enjoining the U.S. from paying anything to the Long Beach plaintiffs. In effect, the U.S. was asking the Supreme Court to hear its objections to Judge Hall's order, and then to shut him down.

On April 30, the Supreme Court heard oral arguments in both cases.[6] In *Fahey v. Mallonee*, it heard the United States' appeal of the District Court decision holding Section 5(d) unconstitutional.

Immediately thereafter, the Court heard oral arguments in *Fahey v. Hall*, the United States' would-be mandamus case against Judge Hall.

In the principal case, Oscar H. Davis of the U.S. Department of Justice argued for the United States as appellant. He was opposed by two private lawyers from California: Wyckoff Westover, representing Mallonee and the other Long Beach S&L shareholders, and Charles K. Chapman, representing the S&L itself.

In the U.S. case against Judge Hall, Mr. Davis again argued on behalf of the government (Fahey, Ammann, and others, in their official capacities), this time as petitioner. Judge Hall, the respondent, was represented by the S&L's lawyer Mr. Chapman, and by a second California attorney, Welburn Mayock.

The Supreme Court decided both cases on June 23, 1947. In each, Justice Robert H. Jackson wrote the opinion for the unanimous Court.

[6] *See* JOURNAL, SUPREME COURT OF THE UNITED STATES (Apr. 30, 1947), at 237-38.

In *Fahey v. Mallonee*, the case concerning the lawfulness of the Federal Home Loan Bank Administration's seizure of the Long Beach S&L, the Supreme Court reversed the District Court.[7] The Supreme Court, distinguishing its 1935 non-delegation doctrine precedents from the case at hand, held that Section 5(d) was constitutional. The Court also held that the Long Beach S&L Association through, derivatively, its shareholders, was not a proper party to challenge the validity of Section 5(d). Jackson explained that because the Act was the basis of both the S&L's corporate existence (conferring benefits on it) and the Board's oversight powers in cases of S&L misconduct, the Association could not in effect use the former to challenge the latter. The Supreme Court thus remanded the case to the District Court for it to decide the remaining parties' challenges to the validity of the S&L seizure.

The case again Judge Hall was decided under the name *Ex parte Fahey*.[8] The Court unanimously denied the U.S. petition even to consider issuing extraordinary writs (mandamus and/or prohibition) and/or injunctions against Judge Hall's fee awards. Justice Jackson, writing for the Court, explained that the propriety of ordering conservator Ammann to make payments to the Long Beach S&L shareholders and officers could be determined later, on appeal, after the District Court on remand decided the legality of the seizure. Jackson explained that mandamus and other extraordinary remedies against Judge Hall were not called for at this preliminary stage of the litigation:

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes.
>
> We find nothing in this case to warrant their use. An allowance of $50,000 [to the Long Beach S&L plaintiffs for attorney fees and costs] will hardly destroy a twenty-six

[7] *See* 332 U.S. 245 (1947), *available at* www.law.cornell.edu/supremecourt/text/332/245.
[8] *See* 332 U.S. 258, *available at* https://supreme.justia.com/cases/federal/us/332/258/.

> million dollar association during the time it would take to prosecute an appeal. The status of one of the applicants in the principal case [i.e., conservator Ammann] is now settled so that he has standing to take all authorized appeals. We hold that the applicants' grievance is one to be pursued by appeal at the proper time and to the appropriate court, rather than by resort to our original jurisdiction for extraordinary writs.[9]

* * *

By the way, Justice Robert H. Jackson was acquainted with Federal Home Loan Bank Commissioner John H. Fahey. And other Justices of the 1947 U.S. Supreme Court probably also knew Fahey. The Court then consisted entirely of President Roosevelt and President Truman appointees. Most had previously served, as Jackson had, in national government offices during those New Deal and World War II years. In small-town Washington, D.C., people knew each other.

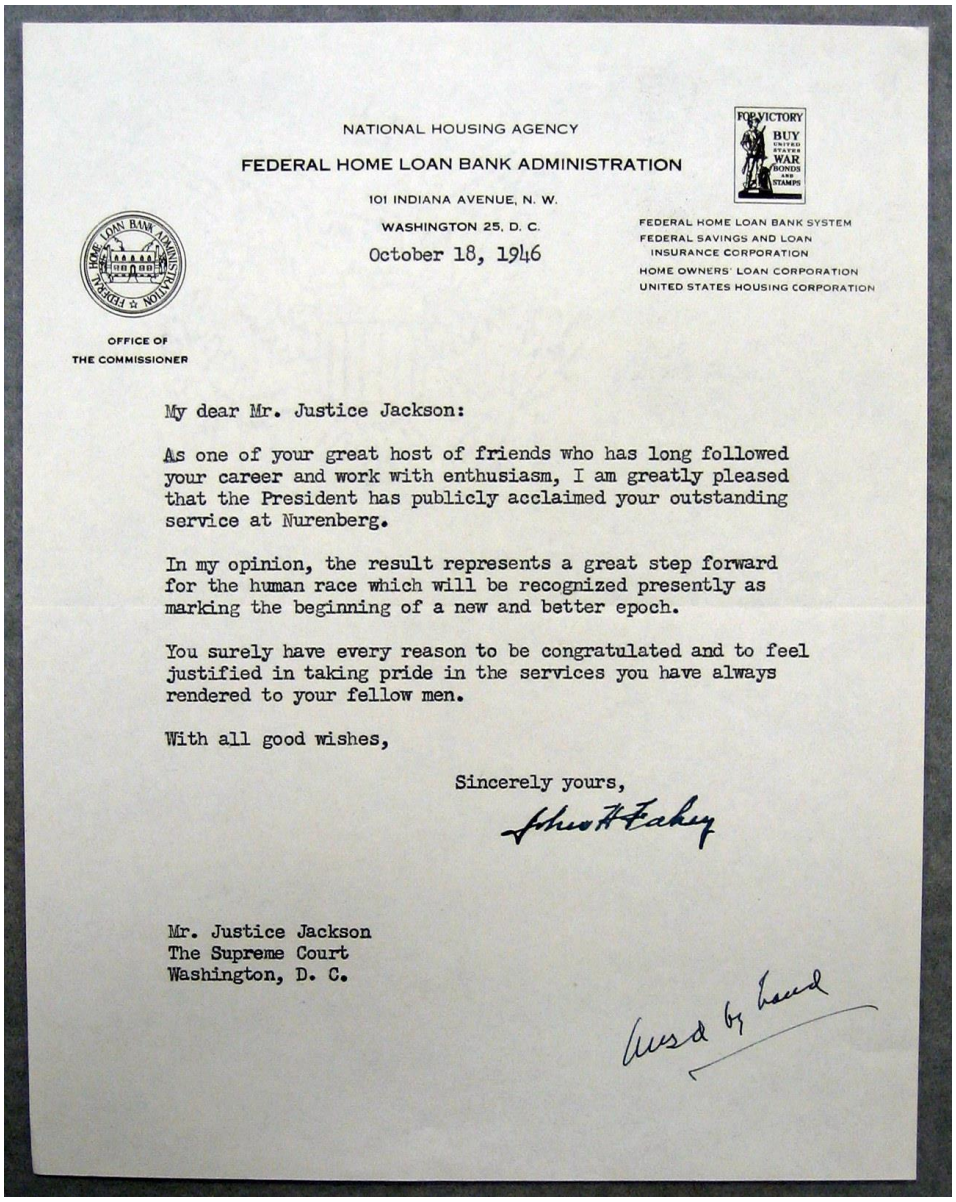
In October 1946, after Jackson had completed his work at Nuremberg as U.S. chief prosecutor of Nazi war criminals and returned to Supreme Court service, Fahey sent Jackson the congratulatory letter that is reproduced below.[10]

Jackson certainly appreciated that—he noted on Fahey's letter that he wrote back to him in longhand.

But of course Robert Jackson's personal regard for John Fahey was irrelevant when, barely half a year later, Justice Jackson considered and rejected Fahey's request for premature and aggressive judicial action against District Judge Peirson Hall.

[9] *Id*. at 258-59.

[10] *See* Letter from John H. Fahey to Robert H. Jackson, Oct. 18, 1946 (original), *in* Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 12, Folder 9 (misfiled with Jackson correspondence with Charles A. Fahy).



NATIONAL HOUSING AGENCY

FEDERAL HOME LOAN BANK ADMINISTRATION

101 INDIANA AVENUE, N. W.

WASHINGTON 25, D. C.

October 18, 1946

FOR VICTORY BUY UNITED STATES WAR BONDS AND STAMPS

FEDERAL HOME LOAN BANK SYSTEM
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HOME OWNERS' LOAN CORPORATION
UNITED STATES HOUSING CORPORATION

OFFICE OF THE COMMISSIONER

My dear Mr. Justice Jackson:

As one of your great host of friends who has long followed your career and work with enthusiasm, I am greatly pleased that the President has publicly acclaimed your outstanding service at Nurenberg.

In my opinion, the result represents a great step forward for the human race which will be recognized presently as marking the beginning of a new and better epoch.

You surely have every reason to be congratulated and to feel justified in taking pride in the services you have always rendered to your fellow men.

With all good wishes,

Sincerely yours,

John H. Fahey

Mr. Justice Jackson
The Supreme Court
Washington, D. C.

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