In Commissioner v. Kowalski, the United States Supreme Court held that a cash meal allowance given by a state to a state police trooper is income excludable from taxation by section 119 of the Internal Revenue Code. Before Congress enacted section 119, courts utilized the “convenience of the employer” test to determine whether benefits given to an employee were taxable income. Because this doctrine led to confusing and inconsistent results, Congress attempted to clarify the requirements for income exclusion in regard to meals and lodging by enacting section 119 in the 1954 recodification of the Internal Revenue Code. However, courts have continued to use the convenience of the employer test. Further, they have inter-

2. Id. at 319-20. I.R.C. § 119 provides:
There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—
(1) in the case of meals, the meals are furnished on the business premises of the employer, or
(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.
In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a state statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.
3. “Convenience of the employer” has been described as a descriptive term applied to varying situations involving the taxability to an employee of benefits furnished to him by an employer as an incident of his employment. Where the benefit in question has been furnished for the convenience of the employer, it has been held not to be includable in the employee’s gross income, and, conversely, where not furnished for the employer’s convenience, it has been held to be includable.
4. See, e.g., Saunders v. Commissioner, 215 F.2d 768, 774 (3d Cir. 1954) (cash allowance was furnished for the convenience of the employer, thus not taxable); Jones v. United States, 60 Ct. Cl. 552, 574 (1925) (benefit conferred was not compensation and thus held not taxable); Van Rosen v. Commissioner, 17 T.C. 834, 837 (1951) (benefit conferred could be used according to own employee’s dictates and thus taxable); Benaglia v. Commissioner, 36 B.T.A. 838, 839 (1937) (benefit conferred was for convenience of employer and held not taxable).
5. See note 4 supra.
6. See note 2 supra.
7. See United States v. Barrett, 321 F.2d 911, 913 (5th Cir. 1963); Boykin v.
preted section 119 in various ways, and therefore have reached inconsistent results. 8

In Kowalski, the Supreme Court clarified both section 119 and the continued validity of the convenience of the employer test. The purpose of this article is to explore the background and the implication of the Kowalski decision.

FACTS AND HOLDING

Robert Kowalski was a New Jersey state police trooper, who in 1970 received a base salary of $8,739.38 and a cash allowance of $1,697.54. 9 Prior to 1949, all troopers were provided with mid-shift meals at various meal stations located throughout the state. This meal station system proved unsatisfactory 10 and as a result, the state closed the system and instituted a cash allowance system. The cash allowance was paid to the trooper in advance with his base salary, although separately stated, and the amount paid varied with the trooper’s rank. The trooper was neither required to spend this allowance on meals, nor to account for how he spent it. Further, there was no reduction in the allowance for periods when the trooper was on vacation or sick leave. 11 However, the trooper remained on call in his assigned patrol area during his mid-shift break.

Commissioner, 260 F.2d 249, 254 (8th Cir. 1958); Diamond v. Sturr, 221 F.2d 264, 268 (2d Cir. 1955).


On whether §119 has an in-kind requirement see Wilson v. United States, 412 F.2d 694, 697 (1st Cir. 1969); United States v. Morelan, 356 F.2d 198, 204 (8th Cir. 1966). See also Jordan, Can Cash Payments to Employees be Excluded as Meals Under Section 119?, 45 J. OF TAX. 310 (1976). On these conflicts, one author has remarked:

Despite the desire of the draftsmen of Section 119 to clarify the conditions under which food and lodging can be excluded, there has been considerable litigation in this area . . . . How various terms used in Section 119 should be interpreted as [sic] the basis for many problems. Just what is meant by the seemingly simple words, “meals,” “lodging,” “on the business premises,” “required,” and “employee”?

9. 98 S.Ct. at 317.
10. Id. The state regarded the system as unsatisfactory because it required troopers to leave their assigned areas of patrol unguarded for extended periods of time.
11. 98 S.Ct. at 317-18. Further consideration included the facts: the cash
On his 1970 income tax return, Kowalski reported his salary, but did not report his meal allowance as income. On audit, the commissioner determined it did constitute income and accordingly he assessed a deficiency. The trooper sought review in the Tax Court which held this amount was income and not exempted by section 119.12 The Third Circuit Court of Appeals reversed, holding that cash payments under the New Jersey meal allowance program were not taxable.13 In so holding, the Third Circuit relied on its earlier decision in Saunders v. Commissioner.14

To resolve conflicting decisions in the various circuit courts of appeals,15 the United States Supreme Court granted certiorari.16 The Court reversed the Third Circuit Court of Appeals' decision. It first stated that the cash meal allowances were taxable income under section 61.17 In addition, the Court concluded that these payments were not excluded from gross income by section 119.18 Relying on legislative and judicial history, the Supreme Court determined that section 119 modified prior law and thus held the convenience of the employer test is no longer the primary determinant of the tax status of meals.19 Consequently, Kowalski was required to report his cash meal allowance as income.

allowance was described on a police recruitment brochure as salary received in addition to the base salary; the amount was a subject of negotiation between the state and the union; and it was included in gross pay for purposes of calculating pension benefits.

14. 215 F.2d 768 (3d Cir. 1954). The court in Saunders had held that the cash allowance for meals given to a New Jersey state trooper was not regarded as compensation, and was furnished for the convenience of the employer so as not to be taxable. Id. at 774-75.
15. The following decisions held that a cash allowance for meals for a state trooper was not income: Smith v. United States, 543 F.2d 1155 (5th Cir. 1976); United States v. Keeton, 383 F.2d 429 (10th Cir. 1967); United States v. Morelan, 356 F.2d 199 (8th Cir. 1966); United States v. Barrett, 321 F.2d 911 (5th Cir. 1963); Saunders v. Commissioner, 215 F.2d 768 (3d Cir. 1954).
17. 98 S.Ct. at 319. Section 61(a) provides: "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: . . . ." I.R.C. §61(a).
18. 98 S.Ct. at 320.
19. Id. at 320-25.
Mr. Justice Blackmun, in his dissenting opinion, agreed with the conclusion that the payments constituted income within the meaning of section 61. However, he argued that the payments should be excluded from taxation under section 119 since that section lacks an in-kind requirement. Furthermore, he noted the favorable tax treatment given the federal military under similar circumstances and argued that it must be embarrassing to the government to recognize a substantial benefit for the military and to deny the same benefit to the New Jersey state trooper.

HISTORICAL BACKGROUND OF THE CONVENIENCE OF THE EMPLOYER TEST

The phrase “convenience of the employer” first appeared in a 1919 Revenue Ruling which stated that board and lodging furnished to seamen were furnished for the convenience of the employer and hence were not includable in their gross income. The following year the income tax regulations were amended to add a convenience of the employer section which stated:

When living quarters such as camps are furnished to employees for the convenience of the employer, the ratable value need not be added to the cash compensation of the employee, but where a person receives as compensation for services rendered a salary and in addition thereto living quarters, the value to such person

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20. Mr. Chief Justice Burger joined Mr. Justice Blackmun in his dissent. 98 S.Ct. at 326.
21. Id. at 326-27. Mr. Justice Blackmun noted in his dissent that he sat as a Circuit Judge in United States v. Morelan, 356 F.2d 199 (8th Cir. 1966) and agreed with the decision in that case on both grounds. The Morelan court held that a cash subsistence allowance to state patrolmen was excludable from gross income under §119, or in the alternative, that if the allowance was considered income, it was deductible as an ordinary and necessary business expense under §162(a)(2) of the Internal Revenue Code. Since the Morelan decision, the Supreme Court decided United States v. Correll, 389 U.S. 299 (1967) which restricted deductible meal costs under §162(a)(2) to overnight trips. Mr. Justice Blackmun reasoned that this decision overruled the alternative ground for the decision in Morelan and thus precluded the taxpayer from raising this issue in Kowalski. Mr. Justice Blackmun agreed with the Correll dissent and argued that the Court read the word “overnight” into §162(a)(2), a statute which speaks only in geographical terms. Id. For discussion of Morelan see text at notes 52-57 infra.
22. 98 S.Ct. 315, 327 (1977). See Treas. Reg. §1.61-2(b) (1978) at note 35 infra where the federal regulations recognize an exemption granted the federal military. The Kowalski court only made passing reference to the equity argument by noting that Congress has considered it and rejected it in the repeal of §120 of the Internal Revenue Code. 98 S.Ct. 315, 326 (1977). For a discussion of §120 see note 41 infra.
23. 98 S.Ct. at 320 (citing O.D. 265, 1 C.B. 71 (1919)).
of the quarters furnished constitutes income subject to tax.\textsuperscript{24} This doctrine was later extended to cash payments for supper money.\textsuperscript{25}

The basic requirements of the convenience of the employer test were set out by the Internal Revenue Service in a 1940 ruling: "As a general rule, the test of 'convenience of the employer' is satisfied if living quarters or meals are furnished to an employee who is required to accept such quarters and meals in order to perform properly his duties."\textsuperscript{26} Applying this test proved difficult.\textsuperscript{27} A 1950 ruling modified the criteria for applying this test, stating that every person receiving living quarters or meals "as compensation for services rendered" must include in gross income the value to him of such quarters or meals . . . . The "convenience of the employer" rule is simply an administrative test to be applied only in cases in which the compensatory character of such benefits is not otherwise determinable.\textsuperscript{28}

Judicial recognition of this test occurred in Jones v. United States\textsuperscript{29} where an army officer who had been required to live in government quarters was transferred mid-year to a location where government quarters were not available and therefore was paid a cash allowance for housing. The Jones court held that neither the value of the quarters nor the cash allowance was income since neither was intended as additional compensation and both were requisites to proper performance of his duties.\textsuperscript{30} The Jones decision was followed in Benaglia v.
where the employee, a hotel manager, received food and lodging at the hotel as a necessary requirement for the proper performance of his duties. The *Benaglia* court held the value of those benefits was not taxable income. However, in *Van Rosen v. Commissioner*, the court held a cash allowance received by a civilian employee in lieu of subsistence and quarters was taxable income. The *Van Rosen* court differentiated civilian from military personnel and thus distinguished *Van Rosen* from *Jones*.

Prior to enactment of section 119 in 1954, two cases were decided which involved state troopers. In the first, *Hyslope v. Commissioner*, state troopers were paid monthly cash allowances to cover meal expenses. The court relied on the *Van Rosen* case in finding the cash allowance to be income. However, on facts similar to those in *Hyslope*, the Third Circuit Court of Appeals in *Saunders v. Commissioner* utilized the convenience of the employer test in reaching its conclusion that the cash allowance given to state troopers was not taxable income. The *Saunders* court labeled the *Van Rosen* distinction between civilian and military personnel as artificial.

Congress apparently saw the problems occurring in this area and attempted to articulate the criteria for the exclusion

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32. *Id.* at 840.
33. 17 T.C. 834 (1951).
34. *Id.* at 836.
35. "While the *Jones* case is authority for the exclusion from gross income by military personnel of cash allowances made to them for subsistence and quarters, it does not, in our opinion, require or justify an extension of the rule therein to similar allowances made to civilian personnel." *Id.* The court in *Van Rosen* also distinguished *Benaglia* in that there the employee had received subsistence and quarters in kind rather than a cash allowance and thus had nothing he could use according to his own dictates. *Id.* at 836.
36. Treas. Reg. §1.61-2(b) (1978) excludes cash subsistence allowances to military personnel:
   
   - Subsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the
     Armed Forces, Coast and Geodetic Survey, and Public Health Service
     of the United States, and amounts received by them as commutation of
     quarters, are to be excluded from gross income. Similarly, the value of
     quarters or subsistence furnished to such persons is to be excluded from
     gross income.
37. 21 T.C. 131 (1953).
38. *Id.* at 133.
39. 215 F.2d 768 (3d Cir. 1954). In *Saunders*, cash allowances for meals were given to the state troopers.
of meals and lodging from income by enacting section 119 of the Internal Revenue Code.\footnote{I.R.C. §119. For a discussion of 119 see H. R. Rep. No. 1337, 83d Cong., 2d Sess. 18 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 190-91 (1954). See also Hill, Exclusion For Meals And Lodgings Can Make Sizable Addition To Shareholder Income, 7 Tax. For Accountants 244 (1971); Jordan, Can Cash Payments to Employees be Excluded as Meals Under Section 119?, 45 J. of Tax. 310 (1976); Thrasher, Exclusion For Meals And Lodgings—A Tax Sheltered Benefit For Stockholders-Employees, 12 Tax. For Accountants 145 (1975); Note, Are Nondeductible Meal Allowances Wages Subject to Withholding?, 29 Bay. L. Rev. 145 (1977); Note, Federal Income Taxation of Employee Fringe Benefits, 89 Harv. L. R. 1141, 1155 (1976).} Under this section meals are excluded if: (1) the meals are furnished on the business premises of the employer; and (2) they are furnished for the convenience of the employer.\footnote{I.R.C. §119.} Thus, even compensatory meals are excludable under section 119 provided they meet these requirements.\footnote{S. Rep. No. 1622, 83d Cong., 2d Sess. 190-91 (1954). See also Boykin v. Commissioner, 260 F.2d 249, 254 (8th Cir. 1958). Rev. Rul. 59-307, 1959-2 C.B. 48 states: The Internal Revenue Service will follow the decision... in Boykin... In that case, the court held that the rental value of living quarters furnished on business premises by the employer to the employee was properly excludable from the employee's gross income under Section 119 of the Internal Revenue Code of 1954 even though the arrangement between them was such that the rental value of the living quarters was considered a part of the employee's compensation and was deducted from his salary. The facts there considered clearly showed that the employee was required, for the convenience of his employer, to accept such living quarters as a condition of his employment. See cases cited at note 15 supra.} Even under this provision, judicial treatment of cash subsistence allowances given to state troopers has not been consistent.\footnote{See, e.g., United States v. Barrett, 321 F.2d 911, 913 (5th Cir. 1963) where the court held that the convenience of the employer test is the key criterion.}

The arguments in support of state troopers are that their cash allowances are excludable under section 119,\footnote{See, e.g., Ghastin v. Commissioner, 60 T.C. 264, 268 (1973) where the petitioner contended that amounts he received as a cash subsistence allowance were excluded from income under §119.} or in the alternative, that a specific exemption can be found in the traditional convenience of the employer test.\footnote{See, e.g., United States v. Barrett, 321 F.2d 911, 913 (5th Cir. 1963) where the court held that the convenience of the employer test is the key criterion.} The Internal Revenue Service agreed that section 119 is applicable but contended that...
(1) public restaurants adjacent to the road are not the business premises of the employee; (2) cash allowances which can be used indiscriminately are not for the convenience of the employer; and (3) section 119 has an in-kind requirement which precludes cash payments for meals. 47

One of the early cases to deal with section 119 and state troopers was Magness v. Commissioner. 48 There, the Fifth Circuit held that because the troopers could spend their cash allowances indiscriminately, such sums were taxable income. 49 However, in United States v. Barrett, 50 troopers were reimbursed only for money actually spent for meals. In Barrett, the Fifth Circuit applied the traditional convenience of the employer test, and found the payments were not taxable. 51

The Eighth Circuit followed the Barrett reasoning in United States v. Morelan. 52 In Morelan, Minnesota state troopers received three dollars a day cash subsistence allowance. Although they were not reimbursed for actual expenses, 53 the court noted that there was a correlation between the amount reimbursed and the amount expended. 54 In addition, the court examined the in-kind requirement. The government in its argument cited a House Report which stated in reference to section 119: “This section applies only to meals or lodging furnished in-kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includable in gross income, as under existing law, to the extent that such allowances represent compensation.” 55 The Morelan court stated

47. See Ghastin v. Commissioner, 60 T.C. 264, 269 (1973), where the government argued that United States v. Keeton, 363 F.2d 429 (10th Cir. 1967); United States v. Morelan, 356 F.2d 199 (8th Cir. 1966); and United States v. Barrett, 321 F.2d 911 (5th Cir. 1963), were an incorrect interpretation of §119. 60 T.C. at 269.

Section 119 does not specifically state an in-kind requirement. However, the Treas. Reg. §1.119-1(c)(2) (1978) provides: “The exclusion provided by section 119 applies only to meals and lodging furnished in-kind by an employer to his employee.” 56

48. 247 F.2d 740 (5th Cir. 1957).
49. Id. at 744-45. Georgia state troopers were given $4.50 a day cash subsistence allowance. They were subject to call 24 hours a day and had to keep their headquarters informed of their whereabouts. However, the allowance could be used while on duty, off duty, or on vacation. Id. at 741-44.
50. 321 F.2d 911 (5th Cir. 1963).
51. Id. at 912-13. The decision in Barrett was reaffirmed in 1976 in Smith v. United States, 543 F.2d 1155 (5th Cir. 1976).
52. 356 F.2d 199 (8th Cir. 1966).
53. Id. at 200.
54. Id. at 207.
that the phrase "to the extent that such allowances represent compensation" could easily modify the words "cash allowances" and found that cash allowances which compensate rather than reimburse are taxable. The Eighth Circuit found that this allowance was not compensatory and thus not taxable.

Directly conflicting with the Barrett and Morelan decisions is Wilson v. United States, where the First Circuit held that section 119 applies only to meals or lodging furnished in-kind. The Wilson court found reimbursements to New Hampshire state troopers for meal expenses incurred while on duty to be taxable income. The court further concluded that public restaurants adjacent to public roads are not the business premises of the state. The Wilson decision was later followed by the Fourth Circuit in Koerner v. United States and by the Tax Court in Ghastin v. Commissioner.

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56. 356 F.2d at 204.
57. Id. at 204. Accord United States v. Keeton, 383 F.2d 429 (10th Cir. 1967).

In rejecting the government's argument that all cash payments are compensatory, the court in Saunders v. Commissioner, 215 F.2d 768, 771 (3d Cir. 1954) stated:

[The rationale of the rule should make it applicable to determine the extent of gross income either when quarters and meals are furnished in kind or cash is paid in lieu thereof . . . . Admittedly, the payment of cash to an employee is normally compensatory and probably more obviously so than a payment in kind. Nevertheless, just as an employee is often furnished tangible property which cannot be regarded as compensation, an employee may be furnished cash which is not compensation.

Id.

58. 412 F.2d 694 (1st Cir. 1969).
59. Id. at 696. The court explained:

"[M]eals . . . furnished to him by his employer" is a far more restrictive concept than meals purchased by him from a third party, the cost of which is ultimately repaid by the employer. What the statute speaks of as furnished is the meals, not the cost; furnishing means supplying, or serving, not paying.

Id.

60. Id. "The term 'business premises' is one of great specificity . . . . The statute does not say 'at some convenient or reasonably accessible place.' It says 'on the business premises of the employer'. The state conducted no business in the public restaurant." 

61. 550 F.2d 1362 (4th Cir. 1977). The Koerner court held that a cash subsistence allowance paid to state troopers did not satisfy the requirement that such meals be furnished on the business premises of the employer. Accordingly, the cash payment was not excluded by §119. Id. at 1364.

62. 60 T.C. 264 (1973). The Ghastin court held that the absence of restrictions on the way that the troopers could spend their cash allowances demonstrated that such sums were not provided "for the convenience of the employer." Additionally, the court held that §119 excludes only meals furnished in-kind. Id. at 270-71.
ANALYSIS

In Kowalski there were no restrictions on the way in which the troopers could spend their allowances. This would have easily justified the Court's holding such allowances as compensatory, and thus income. However, the Court went beyond the facts of Kowalski and discussed the concept of income, resolved the "cash payment" - "in-kind" controversy, and focused on the history and continued validity of the traditional doctrine of convenience of the employer as a determinant of the tax-status of meals.

In defining the scope of gross income, the Court noted that Congress intended both "to use the full measure of its taxing power" and to "tax all gains except those specifically exempted." The Court found that the meal allowance payments made to Kowalski were clearly income within the meaning of section 61 since they were "undeniable accessions to wealth, clearly realized, and over which [Kowalski] has complete dominion." Therefore, in order for Kowalski to have prevailed, the payments would have had to necessarily be exempted from taxation by either section 119 or by the traditional convenience of the employer test.

In addressing the cash-payment - in-kind distinction, the Court noted that both Treasury Regulation 1.119-1 and the legislative history of section 119 state that "[s]ection 119 applies only to meals or lodging furnished in kind." Respondent argued that cash payments for the convenience of the employer are nevertheless excluded. The Court found that cash payments could not satisfy the convenience of the employer test, notwith-

63. In Magness v. Commissioner, 247 F.2d 740 (5th Cir. 1957) and in Ghastin v. Commissioner, 60 T.C. 264 (1973), there were no restrictions on the use of the cash payments by the trooper leading the court to determine that the payments were taxable income.
64. 98 S.Ct. at 319-25.
65. Id. at 319 (quoting Helvering v. Clifford, 309 U.S. 331, 334 (1940)).
69. 98 S.Ct. at 319-25. See note 47 supra.
70. 98 S.Ct. at 325. This issue was discussed in United States v. Morelan, 356 F.2d 199, 204 (8th Cir. 1966). See accompanying text at notes 52-57 supra.
standing the employer's characterization of the payment as non-compensatory. This finding was based upon the language of both section 119 and the Senate Report.\textsuperscript{71} The Court stated that the language "cash allowances . . . will continue to be includable in gross income to the extent that such allowances constitute compensation"\textsuperscript{72} indicates that section 119 does not affect the deductibility of meal payments under section 162(a)(2).\textsuperscript{73} No further explanation of this statement was offered by the Court.

In his dissent, Mr. Justice Blackmun argued that the Court's in-cash - in-kind distinction was unwarranted by the statute. He contended that the statute referred only to meals furnished on the business premises of the employer.\textsuperscript{74} He failed to mention, however, that Treasury Regulation 1.119-1(c)(2) and section 119's legislative history both refer only to meals in-kind.\textsuperscript{75}

Since the Court found that the cash payments were not excluded by section 119, it was necessary to determine whether the traditional convenience of the employer test still applied.\textsuperscript{76} By adopting section 119, Congress intended to end the confusion which had developed regarding the tax status of meals and lodging furnished by an employer.\textsuperscript{77} The majority opinion of the Court concluded that section 119 did not abrogate the convenience of the employer test, but rather, relegated it to the status of

\begin{itemize}
\item[\textsuperscript{71}] 98 S.Ct. at 325 (1977). See I.R.C. §119 which provides: "In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a state statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation." See also S. REP. NO. 1622, 83d Cong., 2d Sess. 190, reprinted in [1954] U.S. CODE CONG. & AD. NEWS 4621, 4825 which states: "Under Section 119 as amended by your committee, there is excluded from the gross income of an employee the value of meals or lodging furnished to him for the convenience of his employer whether or not such meals or lodging are furnished as compensation."
\item[\textsuperscript{72}] S. REP. NO. 1622, 83d Cong., 2d Sess. 190-91. See also Treas. Reg. §1.119-1(c)(2) (1978).
\item[\textsuperscript{73}] 98 S.Ct. 315, 325 (1977). I.R.C. §162 provides:
\begin{itemize}
\item[(a)] In general.

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
\begin{itemize}
\item[(2)] Traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade of business . . . .
\end{itemize}
\item[\textsuperscript{74}] 98 S.Ct. at 326-27.
\item[\textsuperscript{75}] See note 47 and text at note 55 supra.
\item[\textsuperscript{76}] Id. at 320-24.
\item[\textsuperscript{77}] Id. at 323 (citing U.S. CODE CONG. & AD. NEWS 4042 (1954)).
\end{itemize}
only one of the requirements for exclusion. Moreover, the Court declared that the meaning of the convenience test has been limited to those instances where "[an] employee must accept . . . meals or lodging in order properly to perform his duties;" in other words, it must be a condition of employment. Section 119 rejects the idea that the employer's characterization of the payments as noncompensatory can satisfy this test. The Supreme Court concluded that section 119 modifies and supersedes prior law, adds a business premises requirement, and restricts the application of the employer convenience test.

One issue which the Court did not address was the business premises requirement of section 119. The Court apparently felt this was unnecessary, as it disposed of Kowalski on other grounds. Because the Court did not clarify this requirement, potential conflicts still remain under section 119. For example, if the state should contract with a public restaurant to furnish meals to state troopers, would the restaurant satisfy the business premises requirement? In the context of defining the business premises of state troopers, one court stated that "[t]he major 'business' of [a] state law enforcement agency is obviously not confined to isolated station houses; rather, it covers every road and highway in the state twenty-four hours a day every day." On the other hand, other courts have stated that "the term 'business premises' is one of great specificity" and the state does not conduct business in a public restaurant. The

78. 98 S.Ct. 315, 324 (1977). Section 119 requires that meals and lodging be furnished for the convenience of the employer in order to be excluded from taxation. I.R.C. §119(a).
80. 98 S.Ct. 315, 324 (1977). This theory was developed in O.D. 514, 2 C.B. 90 (1920) and Mim. 6472, 1950-1 C.B. 15. See notes 25, 28 supra. Section 119 applies even if the benefits are compensatory if all its requirements are met. I.R.C. §119.
82. Section 119 requires meals to be furnished on the business premises of the employer. I.R.C. §119. "Business premises" has been defined as "a place where the employer performs a significant portion of his duties or on the premises where the employer conducts a significant portion of his business." Commissioner v. Anderson, 371 F.2d 59, 67 (6th Cir. 1966).
Kowalski court noted that the business premises factor is a requirement of section 119. This term has yet to be definitively construed.

CONCLUSION

The significance of Kowalski lies in its clarification of several aspects of section 119 which have caused conflicts in the past. First, the Court held that "meals furnished by an employer" means meals in-kind and excludes cash allowances or reimbursements. Secondly, the Court relegated the convenience of the employer test to simply one of the requirements of section 119 and held that test to be no longer determinative. However, the Court chose not to address the problem of construing the phrase "business premises." Thus, the application of section 119 to state troopers may continue to be a source of conflict for the courts.

Patricia Lamberty—'79

To Professor Michael J. O'Reilly in recognition of his contribution to the community, the University, and the School of Law, we respectfully dedicate this issue of the Creighton Law Review.

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