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United States Attorneys

Bulletin

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UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

Assistant United States Attorney John P. Berena, Northern District of Ohio, was commended by Clarence M. Kelley, Director, Federal Bureau of Investigation, for his exemplary performance in handling the prosecution of Willie Lee Sanders.

Assistant United States Attorney Robert B. Collings, District of Massachusetts, was commended by Clarence M. Kelley, Director, Federal Bureau of Investigation for his consistently enthusiastic and vigorous prosecution of violations of the Federal Bank Robbery Statute. Since January of 1974, Mr. Collings has devoted much time and effort to these matters with admirable success.

Assistant United States Attorney Tommy Hawk, District of Oregon has been commended by John W. O'Rourke, Special Agent in Charge, Portland, Federal Bureau of Investigation, for his extraordinary assistance in the investigation of several acts of violence which took place in Portland during the early 1970s which fell under Federal jurisdiction.

Assistant United States Attorney George Nielsen, District of Arizona, has been commended by Charles K. Kernan, District Manager/Postmaster, Phoenix, United States Postal Service, for his recent skillful efforts in defending the Service's use of electric vehicles in Arizona against a threatened preliminary injunction.

Assistant United States Attorney Robert D. Krause, Southern District of California, has been commended by Clarence M. Kelley, Director, Federal Bureau of Investigation, for his diligence and excellent professional performance in the successful prosecution of Jack Niles Hill.

Assistant United States Attorney Frederick B. Holoboff and Legal Technician Judith Johnson, Southern District of California, have been commended by Robert E. Larsen, Chief, Criminal Collection Unit, Criminal Division, for their exceptional performance in enforcing the criminal fine imposed against C. Arnhold Smith.

POINTS TO REMEMBER

REQUESTS FOR DISCLOSURE OF ALLEGED ELECTRONIC SURVEILLANCE 18 U.S.C. §3504

The Criminal Division receives a substantial number of requests pursuant to 18 U.S.C. 3504 from Department attorneys and United States Attorneys' offices to verify if electronic surveillance has been conducted on defendants, grand jury witnesses, and/or their attorneys, etc. In order to respond to these requests, seven or more Federal agencies must be solicited in writing to search their files for the relevant data. The entire procedure, from receipt of the request in the Criminal Division to the dispatch of a reply by the Division, normally takes about 4 weeks.

In some instances, replies have taken longer. In order to avoid undue delays, please submit the following information for each individual who is the subject of such a request:

(1) true name and any known aliases;

(2) place and date of birth;

(3) FBI number or Social Security number;

(4) case title and docket number with which the request is associated if appropriate; otherwise, the purpose of the request;

(5) statute citation for charges involved or subject matter of the grand jury investigation;

(6) the time period for which the search is sought, usually the time from opening of investigation to arrest;

(7) home and business address of subject, and telephone numbers of telephones installed at all such locations during the specified time period.

To obtain as much of the above information as possible, it would be appropriate to solicit the assistance of the court at the time the motion is made.

Government attorneys should normally not request the Division to make Section 3504 verifications unless and until ordered to do so by a district judge.

(Criminal Division)

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SAFE HANDLING OF MARKETABLE SECURITIES

In late December 1974, the Department released to the financial community, some Suggestions on the Safe Handling of Marketable Securities. While not directly applicable to your prosecutive role, you might find them valuable in the use of speeches or dialogue with members of the financial community and local and state law enforcement when you discuss the areas of "crime prevention" and "avoidance of victimization." If you would like to receive a copy for your office, please contact Stephan Weglian, Securities Unit, General Crimes Sections, Criminal Division (X2723). Supplies are limited, however. If local bankers, brokers, insurance companies, state and local law enforcement, etc., would be interested in receiving a copy - they should be told to write the Office of Public Information of this Department.

(Executive Office)

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AUTHORIZATIONS FOR CIVIL RIGHTS GRAND JURY PROCEEDINGS

Assistant Attorney General J. Stanley Pottinger of the Civil Rights Division recently sent a personal letter to each United States Attorney informing you of a change in policy with respect to authorizations for certain grand jury proceedings. This new policy will also be reflected in the revised United States Attorneys' Manual which will soon be ready for dissemination. Previously, it was necessary for the Civil Rights Division to authorize in advance all grand jury proceedings and all indictments and informations in connection with criminal civil rights matters. Commencing with this notice, prior approval from the Civil Rights Division before presenting a case under the criminal civil rights statutes to a grand jury for investigation is no longer required. However, you must still advise the Chief of the Criminal Section of the Civil Rights Division of your intention to so use the grand jury in advance of any grand jury proceeding. This can be done telephonically. As indicated in Mr. Pottinger's letter, decisions by you to put witnesses before an investigative grand jury should be made carefully and sparingly. In almost every instance, investigative grand juries should not be contemplated until the Federal Bureau of Investigation has investigated the particular matter as fully as possible. This grand jury authority should not be used as a substitute for the FBI. Also, and most importantly, prior approval must be obtained from the Civil Rights Division before an indictment can be presented or an information can be filed in cases involving violations of criminal civil rights statutes. These statutes are cited in the present edition of the United States Attorneys' Manual. All grand jury proceedings which are conducted without the presence of an attorney from the Civil Rights Division must be transcribed. To seek the Division's approval to present an

an indictment or to file an information, you must submit a prosecutive summary outlining and analyzing the relevant facts and applicable law. Grand jury transcripts should be included when that is appropriate. As always, the staff of the Criminal Section of the Civil Rights Division is prepared to assist you in any way possible in fulfilling the Department's responsibility in the criminal civil rights area. Mr. Pottinger thanks each of you again for your continued cooperation in this enforcement effort.

(Executive Office)

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UNAUTHORIZED PROCUREMENTS

The Executive Office for U.S. Attorneys has recently received a memorandum from Mr. Glen E. Pommerening, Assistant Attorney General for Administration, concerning unauthorized purchases or commitments to purchase made by Department of Justice employees. The U.S. Attorney--or those designated by him--has the following procurement authority:

1. Purchases of consumable supplies through GSA, from National Blanket Purchase Agreements, made with a local office supply store through the Procurement Unit.

2. Installation of one to ten telephone lines which do not involve more than six-button phones.

3. Litigative expenses, i.e., those which result directly from actions of the courts or have a direct connection with the prosecution of a case.

4. One-time repairs of equipment.

5. Short-term rental of equipment when required for use in connection with a specific case.

Any other procurement or contractual items must be requested through the Executive Office for U.S. Attorneys. Failure to obtain prior authority "constitute(s) unauthorized procurements from which the employee making such commitments may be held personally liable...The Contracting Officer has been instructed to report, in writing to (Mr. Pommerening) each unauthorized procurement of which he is made aware.

If you have an emergency requirement, please call the Executive Office (X5021) and we will expedite your request.

Please inform your staff of the contents of this notice. Your cooperation is appreciated.

(Executive Office)

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U.S. ATTORNEY LIBRARIES

During fiscal year 1975, the total equipment budget for the U.S. Attorneys, which includes books, was $1,263,000. Of this amount $558,000 was required for upkeep alone (pocket parts, continuing subscriptions, updated volumes) and $75,318 was spent for new books, some of which will also required upkeep. This does not include approximately $16,000 in book requests held until fiscal year 1976, nor the shelving required to hold them. Therefore books alone consumed over 50% of our equipment budget. If this rate of expenditure continues, we may not have funds for other equipment such as desks, chairs, typewriters, dictating equipment for new personnel.

Because of this tremendous expenditure, the Executive Office asks that you take the following steps to try and cut down on library costs:

1. Examine libraries for sets of books which we may have an excess or for which we can at least discontinue upkeep.

2. Consider all requests carefully in relation to other needs you may have.

3. In the case of books required for only one case or on infrequent occasions, consider borrowing from the clerk or some other law library.

4. Please justify all requests specifically, i.e. how will this book be used; are there any other copies of the book already in your library and if so, why are extras required; any other information that will enable us to make a decision and determine priority of your request.

Thank you for your cooperation.

(Executive Office)

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ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

COURT DENIES MOTION TO DISMISS INDICTMENT OF PARTNERSHIP ON GROUNDS OF IMMUNITY GRANTED A PARTNER BEFORE GRAND JURY AND HOLDS PARTNERSHIP IS SUBJECT TO INDICTMENT.

United States v. W. J. Sheppard and Company, et al., (Cr. S-CR 75-36; October 6, 1975; DJ 60-206-53)

The indictment in the captioned case was returned April 21, 1975, by a grand jury sitting at Springfield, Illinois. It charges the defendant highway construction firms with a combination and conspiracy to suppress and eliminate competition in the construction of a specific portion of a federally assisted highway in the State of Illinois in violation of Section 1 of the Sherman Act. Defendant W. J. Sheppard and Company moved to dismiss the indictment on the ground that it is a partnership and therefore not subject to indictment under the Sherman Act and on the further ground that the grant of use immunity to one of its partners who testified before the grand jury was in effect a grant of immunity to the partnership of which he is a member. On October 6, 1975, Judge Harlington Wood denied this motion to dismiss.

Citing Western Laundry v. United States, 424 F.2d 441 (9th Cir. 1970), cert. den. 400 U.S. 849 (1970) and United States v. Brookman, 229 F. Supp. 862 (N.D. Cal 1964), Judge Wood held in part:

> This partnership is . . . an entity for purposes of criminal prosecution. While size alone does not necessarily confer on a partnership the status of a separate entity for purposes of criminal prosecution, it appears that this partnership is a separate entity. Under the criteria set forth in Bellis v. United States, 417 U.S. 85 (1974) and United States v. Kuta, (7th Cir. slip opinion 74-1920, decided June 30, 1975) Defendant appears

to be a separate entity. Defendant's position is clearly distinguishable from the situation in United States v. Slutsky, 352 F. Supp. 1105 (S.D. N.Y. 1972) which it cites in support of its position.

With respect to the second contention, Judge Wood held in part:

> Finally, the Defendant contends that immunity to a partner extends to the partnership. None of the cases cited by either side reach this exact question. In Bellis, however, the Supreme Court reiterated that privilege against self-incrimination extends only to natural persons and not to the partnership; therefore, the partner could not invoke the 5th Amendment to prevent incriminating the partnership. By analogy it would seem that the immunity granted the partner was purely a personal immunity from criminal prosecution, and would not extend to the partnership.

On October 14, 1975, the day trial was to commence in this case, all defendants plead guilty. Proffered nolo pleas had earlier been rejected. At sentencing on October 23, 1975, Judge Wood imposed the following fines:

W. J. Sheppard and Company	$15,000.
Robert R. Anderson Company	$20,000.
Orr Construction Company	$ 5,000.

Staff: John L. Burley, Edward J. Smith, Loren J. Mallon, Mark S. Prosperi, Richard J. Braun and James W. Ritt

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CIVIL DIVISION
Assistant Attorney General Rex E. Lee

COURTS OF APPEAL

CONSTITUTIONAL LAW -- CONGRESSIONAL IMMUNITY

C.A.D.C. HOLDS THAT CONGRESSIONAL IMMUNITY UNDER THE SPEECH AND DEBATE CLAUSE APPLIES TO ACTS TAKEN IN CONNECTION WITH CONGRESSIONAL INVESTIGATIONS CONCEIVABLY WITHIN THE LEGISLATIVE PROVINCE BUT THAT DISSEMINATION OF INFORMATION BEYOND THE CONGRESS IS NOT IMMUNIZED.

McSurely v. McClellan (C.A.D.C., No. 73-1991, decided October 28, 1975; D.J. 145-11-76).

In this suit against Senator McClellan and various staff members of the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, plaintiffs sought damages for violation of their rights under 42 U.S.C. 1981, 1983 and 1985 and under the First, Fourth, Fifth and Fourteenth Amendments to the Constitution. The complaint alleged that defendants had examined and used documents allegedly illegally seized from the plaintiffs by state agents. The district court denied the federal defendants' motion for summary judgment based on Congressional immunity under the Speech and Debate Clause, and also denied certification of the question for an interlocutory appeal. The defendants nevertheless appealed, and the court of appeals considered the appeal. The C.A.D.C. ruled that the order denying summary judgment was sufficiently final to be appealable under 28 U.S.C. 1291, because defendants' right to be free from questioning about legislative acts would be lost if they were forced to participate in a trial, and an appeal from the final judgment would come too late to give meaningful review of their claim of immunity.

On the merits, the court of appeals held that immunity under the Speech and Debate Clause applies to acts taken in connection with congressional investigations and hearings which are conceivably within the legislative province, but that dissemination of information beyond the Congress is not immunized. Moreover, citing U.S. v. Calandra, 414 U.S. 338 (1974), the Court held that a congressional investigator's inspection of papers illegally seized by another was not an independent Fourth Amendment violation. Accordingly, the court held that defendants were immune from suit on allegations that plaintiffs' papers were illegally inspected, transported to Washington, and used as the basis for Congressional subpoenas. The court remanded the case for further consideration of allegations that defendants participated in the illegal seizure of documents and that they disseminated the documents outside of Congress.

Staff: Raymond D. Battocchi (Civil Division)

SOCIAL SECURITY ACT

NINTH CIRCUIT HOLDS THAT PRE-RECOUPMENT ORAL HEARING IS REQUIRED IN SOCIAL SECURITY OVERPAYMENT CASES WHERE CREDIBILITY IS IN ISSUE.

Elliot v. Weinberger (C.A. 9, No. 74-1611, decided October 1, 1975; D.J. 137-21-16); Buffington v. Weinberger, (C.A. 9, No. 74-3118, decided October 1, 1975; D.J. 137-82-205).

In these consolidated appeals the Ninth Circuit held that the Secretary of Health, Education and Welfare may not recover overpayments from Social Security beneficiaries -- in cases where credibility is an issue -- until they are provided with a full evidentiary hearing. Where, however, the dispute may be resolved by documentary means no prior oral hearing is required. The court, relying on Goldberg v. Kelly, 397 U.S. 254 (1970) held that the Secretary's current procedures violated due process, insofar as those procedures afforded beneficiaries an oral hearing after the recoupment process had begun. Under the court's order, the Secretary is required to provide oral hearings in these cases throughout the nation.

Staff: Robert S. Greenspan (Civil Division)

TORT CLAIMS ACT

C.A.D.C. HOLDS THE GOVERNMENT'S FAILURE TO FOLLOW PROCUREMENT REGULATIONS IS NOT ACTIONABLE UNDER TORT CLAIMS ACT.

Scanwell Laboratories, Inc. v. Thomas (C.A.D.C., No. 73-1796, decided October 23, 1975; D.J. 88-16-314).

This Tort Claims Act suit was brought by a disappointed bidder who claimed damages for the improper award of a government contract. The district court dismissed the suit, and the court of appeals affirmed. The court of appeals held that the procurement regulations create a duty on the part of procurement officials running to a disappointed bidder as well as to the public. However, the court affirmed the judgment in favor of the government on two grounds. First, the claim was one for negligent misrepresentation which fell within the misrepresentation exception to the Tort Claims Act, 28 U.S.C. 2680(h). Second, the act of awarding a contract was discretionary, and the Tort Claims Act bars recovery for claims based on the performance or failure to perform a discretionary function, 28 U.S.C. 2680(a), even when there has been a gross abuse of discretion.

Staff: Barbara Herwig (Civil Division)

VETERANS

FIFTH CIRCUIT HOLDS GOVERNMENT ENTITLED TO RECOVER FROM INSURER THE COST OF MEDICAL SERVICES PROVIDED TO INSURED VETERAN.

United States v. Automobile Club Insurance Co. (C.A. 5, No. 75-1654, decided October 24, 1975; D.J. 77-0-1-4).

The defendant insurance company issued an automobile insurance policy with medical payments coverage to a military veteran who was subsequently injured in an auto accident. The United States brought suit against the defendant insurance company seeking reimbursement for the cost of medical care provided to the veteran pursuant to 38 U.S.C. 610. The district court granted summary judgment to the insurer on the ground that state law was applicable and it would deny recovery. On appeal we argued that federal law controls and that under the terms of the contract, as well as third-party beneficiary principles, the government is entitled to recover. In addition, we argued the inapplicability of an exclusionary clause in the veteran's policy which provided that the policy does not cover medical expenses paid by workmen's compensation laws or "any similar law."

The court of appeals reversed. Although the court declined to decide the "thorny choice-of-laws question," it held that under both state and federal law the government, as a third party beneficiary, was entitled to recover. The court noted that the Ninth Circuit in United States v. Nationwide Mutual Insurance Co., 499 F.2d 1355 (1974) held state law controlling, but indicated that precedent in the Fifth Circuit (United States v. United Services Automobile Ass'n, 431 F.2d 735 (1970)) compelled the conclusion that federal law controlled. In addition, the court ruled that the exclusionary clause does not preclude the government from recovery since the statutory obligation to provide health services to veterans is not equivalent to workmen's compensation or any similar law. The court ruled that the rationale of the exclusionary clause is to prevent double recovery by the insured, a circumstance not present in the instant case.

Staff: Judith S. Feigin (Civil Division)

CRIMINAL DIVISION
Assistant Attorney General Richard L. Thornburgh

DISTRICT COURT

CONTROLLED SUBSTANCES ACT

JURISDICTION OVER FOREIGN NARCOTIC TRAFFICKER - UNITED STATES OFFICIAL HELD NOT TO HAVE PARTICIPATED IN ALLEGED FORCIBLE ABDUCTION AND TORTURE OF TRAFFICKER.

United States v. Francisco Toscanino, (E.D. N.Y.)398 F.Supp. 916.

On May 15, 1974, the Second Circuit Court of Appeals remanded a case involving the drug conviction of Francisco Toscanino for a hearing concerning Toscanino's claim of unconscionable conduct by American officials in obtaining his presence for trial in New York. The Toscanino case is reported at 500 F.2d 267, petition for rehearing en banc denied, 504 F.2d 1380 (2d Cir. 1974). Briefly, the case involved the following. Toscanino, an Italian citizen and convicted narcotic trafficker, claimed on appeal that, at the instigation of American officials, he had been kidnapped from his home in Montevideo, Uruguay, brought to Brazil, and later flown to the United States. He contended that, while in Brazil, he was subjected to prolonged questioning and brutal torture by Brazilian authorities (i.e. beatings, kickings, denial of sleep, little food, etc.). He claimed that the United States Attorney for the Eastern District of New York and the Bureau of Narcotics and Dangerous Drugs were aware of and countenanced this inhuman treatment. He further contended that a BNDD agent was present during periods of his Brazilian interrogation and that the agent participated in some of the questioning. Ultimately, according to Toscanino, he was drugged by Brazilian officials, placed on board an airliner, and flown to New York to stand trial on drug charges. Toscanino contended that the barbarous treatment afforded him by Brazilian authorities, with the encouragement and approval of American officials, constituted a violation of his due process rights and deprived federal courts of jurisdiction to try him for his offenses.

The Second Circuit Court of Appeals, in considering Toscanino's claims, adverted to the principle set forth in a line of cases extending from Ker v. Illinois, 119 U.S. 436 (1886) to Frisbie v. Collins, 342 U.S. 519 (1952), viz., that the manner in which a defendant is brought into the United States does not limit a federal court's jurisdiction to try him for criminal offenses. Nevertheless, the Second Circuit went on to hold that the Ker-Frisbie principle does not prevent courts from considering due process claims based on alleged outrageous and

reprehensible conduct by American officials in "kidnapping" cases. Accordingly, the Court remanded the case for a hearing on Toscanino's allegations.

Subsequent to Toscanino, the Second Circuit decided United States ex. rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), in which a Toscanino due process type of argument was made. Lujan claimed he had been lured from Argentina to Bolivia where he was arrested by Bolivia police, acting as agents of American authorities. Shortly thereafter he was placed on a plane and flown to New York City. The Court of Appeals rejected Lujan's due process contentions, stating (510 F.2d at 65-66):

> [I]n recognizing that Ker and Frisbie no longer provided a carte blanche to government agents bringing defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct, we did not intend to suggest that any irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court. . . . [T]he twin pillars of our holding were Rochin v. California, 342 U.S. 165 (1952) and dictum in United States v. Russell, 411 U.S. at 431-432, both of which dealt with government conduct of a most shocking and outrageous character. . . . The cruel, inhuman and outrageous treatment allegedly suffered by Toscanino brought his case within the Rochin principle and demanded that we provide him a remedy. . . . But the same cannot be said of Lujan.

Thereafter, Chief Judge Jacob Mishler (E.D.N.Y.) held a hearing in the Toscanino case pursuant to the Second Circuit remand order. In a memorandum opinion dated July 10, 1975, Judge Mishler noted that Toscanino, as evidence of his due process allegations, had submitted only an 11 page affidavit. This affidavit, in Judge Mishler's view, failed to show that American officials had participated in Toscanino's alleged abduction or torture. Observing that there was no credible evidence supporting Toscanino's due process claims, Judge Mishler denied Toscanino's motion to vacate his conviction and also denied his motion to dismiss the indictment on jurisdictional grounds.

Staff: United States Attorney David G. Trager (E.D. N.Y.)
Assistant U.S. Attorney Thomas P. Puccio (E.D. N.Y.)

LAND AND NATURAL RESOURCES DIVISION
Acting Assistant Attorney General Walter Kiechel, Jr.

COURTS OF APPEALS

CONSTITUTIONAL LAW

DUE PROCESS; HOUSING; THREE-JUDGE COURT.

Hoffman v. United States Dept. of H.U.D. (C.A. 5, No. 74-1882, Sept. 29, 1975; D.J. 90-1-4-802).

After having sent five monthly notices of mortgage payment delinquency and pending foreclosure to homeowners whose purchase was assisted by HUD under Section 235 of the HUD Act of 1968, 12 U.S.C. sec. 1715z, the private mortgage company, as service agent for GNMA, appointed a substitute trustee, under the deed of trust securing the purchase money note, to post the property for a foreclosure sale in accordance with the deed of trust and the Texas statutes, Art. 3810, Texas Revised Civil Statutes. GNMA purchased the property at the sale, conveyed title to FHA in accordance with insurance commitments by FHA, and FHA prepared the property for public sale.

The former homeowners then brought suit to enjoin the FHA sale and requested a three-judge court under 28 U.S.C. secs. 2281 and 2282 to consider the constitutionality of the foreclosure procedure. Although initially enjoining the sale, the district court denied the three-judge court request as not presenting any substantial constitutional question and dismissed the complaint.

The court of appeals affirmed holding that: (1) Section 2281 did not require convening of a three-judge court since the state statute merely regulates rights among private parties and does not require any action by a state officer; (2) Section 2282 did not mandate a three-judge court because GNMA's foreclosure was authorized by HUD regulations, providing for foreclosure in accordance with state law, not by specific statutory language in the HUD Act and Section 2282 does not require a three-judge court for challenges to federal regulations apart from the statutory authorization for those regulations; (3) jurisdiction did not exist under 42 U.S.C. sec. 1983 because

GNMA is not a "person" within the meaning of that act, but that jurisdiction could have existed under 28 U.S.C. secs. 1331, 1346(f) and 2409a, and perhaps 5 U.S.C. secs. 701-706 (APA) had these been alleged; and, finally (4) the homeowners had clearly waived their constitutional right to be heard by failing to respond to the series of delinquency notices.

Staff: John J. Zimmerman (Land and Natural Resources Division); Assistant United States Attorney William L. Johnson (N.D. Tex.).

ENVIRONMENT; WATER POLLUTION

TOXIC SUBSTANCES; ADMINISTRATIVE RECORD; DISTRICT COURT JURISDICTION UNDER SECTION 509(b)(1) of FWPCA 33 ULS.C. SEC. 1369(b)(1).

Natural Resources Defense Council v. Train (C.A. D.C., No. 74-1538, Sept. 15, 1975; D.J. 90-5-1-5-23.

NRDC brought this action under, inter alia, the citizens suit provision of the FWPCA, Section 505 and Section 10 of the APA, to review the Administrator of EPA's initial list of toxic substances to be regulated under Section 3-7(a) of the FWPCA and the selection criteria used to arrive at that list. Following publication of such a list the Administrator is required by Section 307 to propose and promulgate an effluent standard or prohibition on discharge for each of the substances listed. NRDC claimed the Administrator's selection criteria were unlawful because they were too restrictive to comply with the Act's intent. NRDC further claimed the Administrator had also used additional illegal and secret selection criteria. Finally, NRDC specified 25 substances whose omission from the initial list was arbitrary, capricious and in violation of the FWPCA.

The Administrator filed the administrative record and moved for dismissal or summary judgment, arguing that the selection criteria were complete and lawful and that the Administrator's publication of the list was reasoned decision-making within the administrator's discretion and therefore unreviewable. NRDC countered the motion for summary judgment by identifying several documents, including the Administrator's "Briefing Book," which it contended were properly part of the administrative record but had not been filed with the district court. The district Court

granted the motion to dismiss, saying the listing of tocic substances was an ongoing and orderly agency process into which the court would not inject itself. There was no mention of the documents excluded from the administrative record.

The court of appeals, following its decision in NRDC v. Train, 510 F.2d 692 (1974), found district court jurisdiction not under Section 505 of the FWPCA but under 5 U.S.C. sec. 706 (2)(A) to review administrative action not expressly made unreviewable to determine whether the Administrator abused his discretion. The Court, however, refused with one judge dissenting, to undertake this review because it felt that the district court had not reviewed the entire administrative record. In furtherance of sound judicial administration, 28 U.S.C. sec. 2106, the court of appeals remanded the case to the district court for filing of the complete administrative record and limited discovery to assure that the record is complete.

Judge Nichols, dissenting, reasoned that no review of the administrative record, but rather review of the complaint alone, was necessary to dismiss for failure to state a claim upon which relief could be granted. The dissent felt the listing process was an ongoing agency process and that no substance had been finally rejected. Upon such rejection the plaintiffs would have judicial review available. However, Judge Nichols saw little practical difference in the net effect of either the majority or the dissenting approach since remand with the opportunity to amend the complaint or affirmance and the institution of a new suit following final agency action would have the same result.

Staff: John J. Zimmerman; Raymond W. Mushal (Land and Natural Resources Division).

ENVIRONMENT; GRAND JURY; JUDICIAL SUPERVISION; CLEAN AIR ACT; SIMULTANEOUS STATE AND FEDERAL ENFORCEMENT.

In re Grand Jury Proceedings (United States Steel - Clairton Works) (C.A. 3, Nos. 75-1450 and 75-1456, Sept. 2, 1975; D.J. 90-5-2-5-10).

As part of the Pennsylvania Implementation Plan under the Clean Air Act, EPA approved a particulate emissions standard for Allegheny County which included a so-called coke oven door standard applicable to the large coke oven facilities of United States Steel. This coke oven standard had been arrived

at in a consent decree between United States Steel and state and county authorities in a state court proceeding.

Sometime after EPA's approval of the standard, thereby making it federally enforceable under Section 113 of the Clean Air Act, 42 U.S.C. sec. 1857c-8, the agency issued notices of violation of the door standard to United States Steel, its officers and the manager of its Clairton Works. The Government then obtained several subpoenas duces tecum to certain officers and employees of the corporation for testimony before the grand jury.

On the motion of the corporation and subpoenaed individuals, the district court granted a stay of all proceedings before the grand jury until the completion of a civil contempt action by the state and county against United States Steel in state court for violation of the consent decree, including the door standard. The district court, declining to rule on United States Steel's prejudicial publicity and so-called Scholfield issues, determined that the Clean Air Act did not contemplate simultaneous enforcement actions by the Federal Government and by state and local governments. The court based its stay on its general supervisory power over the grand jury.

The Third Circuit reversed, holding that a stay of all grand jury proceedings was an unwarranted encroachment upon the plenary investigative authority of the grand jury. Although not deciding the Clean Air Act issue concerning dual enforcement, the court, in a footnote, indicated that its description of Section 113 in Duquesne Light Co. v. EPA (C.A. 3, No. 72-1542, August 21, 1975), not yet reported, and that in Train v. NRDC, 421 U.S. 60 (1975), gave "considerable guidance" on the subject. Both descriptions in these cases support the view that the Act permits simultaneous enforcement, at least where the federal action is criminal in nature.

The Third Circuit also held that the Government was entitled to appeal the stay as final under 28 U.S.C. sec. 1291 since the stay had the practical effect of a dismissal and would effectively preclude investigation and possible prosecution of criminal violations of the Clean Air Act. Although not necessary considering its holding that the stay was appealable, the court noted that review by mandamus would be available even if the lower court's action was not appealable.

Staff: John J. Zimmerman and Bradford F. Whitman (Land and Natural Resources Division); Assistant United States Attorney Craig R. McKay (W.D. Pa.)

CONDEMNATION

GOVERNMENT-CREATED VALUE; SCOPE OF THE PROJECT; EXCLUSION OF SALES TO THE GOVERNMENT.

United States v. 46,672.96 Acres, Dona Ana, Sierra, Otero and Socorro Counties, New Mexico, et al. (C.A. 10, Nos. 74-1602, 74-1603, 74-1604 and 74-1605, August 8, 1975; D.J. 33-32-181-54, 33-32-181-57, 33-32-181-58).

In these test cases, the Government condemned annual exclusive use leaseholds on isolated tracts located within the White Sands Missile Range. These tracts had first been acquired by the Government from the private owners by long-term leases negotiated during and after World War II when the missile range replaced the Alamogordo Bombing Range.

Before the Commission empowered to determine just compensation, the landowners, over the Government's objections, were permitted to show the highest and best use to be for overflight, impact, and launching of missiles and introduced evidence of co-use leases between the Government and private ranchers in northern extension of the missile range. Although the Commission's report asserted that it was not valuing the property based on any value created by the Government's project, the Commission found the highest and best use to be that advanced by the landowners and merely discounted the landowners' lease evidence from the extension area slightly to arrive at a valuation figure. The district court approved the report and entered judgment accordingly.

On appeal, the Tenth Circuit reviewed the decisions on government-created value and held that the commission had erred. The Court pointed to the fact that there was no evidence that anyone other than the Government could or would use the land for a missile range and therefore the Commission's highest and best use determination had to have been based on value created by the government. The Court also rejected the landowner's theory that changing from negotiated leases to condemned leases made this a new undertaking outside the original scope of the project, holding that the extension of the project in time added no value.

On the admissibility of the evidence of co-use leases in the extension area, the court followed the established rule that sales to a condemnor are not generally admissible and further rejected the evidence because of the great dissimilarity

of the two types of land and the Government's and rancher's relative rights under the two types of leases.

Finally the court recognized that there was very little value to the interest taken and therefore suggested alternative methods of valuation such as reproduction costs, capitalization of net income, or some other reasonable approach.

Staff: John J. Zimmerman, Max Findley, Don Strouse (Land and Natural Resources Division).

INDIANS

LEASING RESERVATION LANDS; CASE OR CONTROVERSY; STATE JURISDICTION OVER NON-INDIAN ACTIVITIES ON RESERVATION LANDS.

Norvell v. Sangre DeCristo Development Co., et al. (C.A. 10, Nos. 74-1365, 74-1366, 74-1367, June 30, 1975; D.J. 90-2-5-385).

The State of New Mexico brought this action seeking a declaratory judgment that several state tax and regulatory statutes are applicable to a planned residential development, primarily for non-Indian residents, on Indian reservation land under a 99-year lease between the tribe, the Federal Government, and the private non-Indian development company. The district court issued an opinion in accordance with the state's request.

The Tenth Circuit reversed, deciding that there was no case or controversy within the meaning of Art. III, Cl. 2, of the Constitution. The court pointed to its injunction in Davis v. Morton, 469 F.2d 593, halting all further activity with respect to this lease until the Secretary of the Interior had completed an adequate environmental impact statement required by NEPA, and to the Government's assurance that the Secretary would reevaluate his lease approval in light of the completed impact statement. The court held the declaratory judgment improper since ongoing activity might radically change the factual situation.

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