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UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

Mr. G. Kent Edwards, United States Attorney for the Dist. of Alaska was commended by Henry E. Petersen, Assistant Attorney General for his successful prosecution and handling of publicity in the case against Del Lavon Thomas.

Assistant U. S. Attorney Hugh Smith, Middle Dist. of Florida, was commended by G. T. Register, Jr., Chief, Intelligence Division, Internal Revenue Service, for his thoroughness, dedication, and effectiveness in connection with the recent income tax trials of State Senator Robert F. Brannen.

United States Attorney Duane K. Craske and his Assistant Lloyd Anderson, Dist. of Guam, were commended by Paul E. Pugh, Rear Admiral, U. S. Navy, for their outstanding cooperation and support in representing the interests of the Navy in a recent civil suit brought by the former civilian manager/treasurer of the Navy's multi-million dollar liquor procurement system.

Assistant U. S. Attorney James N. Gabriel and his secretary, Mrs. Ruth Pike, Dist. of Massachusetts, were commended by Anthony C. Liotta, Chief, Land Acquisition Section, Land and Natural Resources Division, U. S. Department of Justice for their excellent handling of condemnation cases.

Assistant U. S. Attorney Birg E. Sergent, Western Dist. of Virginia was commended by William J. Cotter, Assistant Postmaster General, Inspection Service for his skillfull handling of a mail fraud case against Victor Clyde Warren.

POINTS TO REMEMBER

Withholding of Tax from Retirement Contributions

The Department has been advised that a Revenue Ruling in response to numerous inquiries relating to the tax treatment of employees' contributions to the United States Civil Service Retirement and Disability Fund reiterates the long standing IRS position based on court decisions and an earlier Revenue Ruling that retirement fund contributions withheld from a United States Government employee's pay must be included in gross income currently.

The Revenue Ruling 72-250, Internal Revenue Bulletin No. 1972-21, dated May 22, 1972, states:

> The portion of a United States Government employee's compensation that is withheld and contributed to the United States Civil Service Retirement and Disability Fund is a contribution by him to such fund and is includible in his gross income in the same taxable year in which it would have been included if it had been paid to him directly. These contributions were held includible in the employee's gross income in Cecil W. Taylor v. Commissioner, 2 T.C. 267 (1943), affirmed sub nom.; Malcolm D. Miller, et al. v. Commissioner, 144 F.2d 287 (1944); and Isaiah Megibow, et ux. v. Commissioner, 218 F.2d 287 (1955). This position was also reflected in Revenue Ruling 56-473, C.B. 1956-2, 22, relating to the State of Arizona retirement system.

(Administrative Division)

ANTITRUST DIVISION
Acting Assistant Attorney General Walker B. Comegys

DISTRICT COURT

SHERMAN ACT

FIRE PROTECTION EQUIPMENT CORPORATION CHARGED WITH VIOLATING SECTIONS 1 AND 3 OF THE SHERMAN ACT.

United States v. Safety First Products Corporation (Civ. 72-CIV-2233; May 23, 1972; D. J. 60-149-17)

On May 23, 1972, a civil complaint was filed in the United States District Court for the Southern District of New York, charging Safety First Products Corporation of Elmsford, New York with violation of Section 1 and 3 of the Sherman Act (15 U. S. C., Sections 1 and 3).

The complaint charges that Safety First and its more than 260 distributors have engaged in a combination and conspiracy to allocate territories and customers for the sale of Safety First fire protection equipment throughout the United States and Canada.

Safety First is a wholly-owned subsidiary of INA Corporation whose principal subsidiary is the Insurance Company of North America. Safety First manufactures and sells throughout the United States and Canada a wide variety of fire extinguishers, including a line of extinguishers designed for use in automatic fire protection systems covering fixed locations such as hoods and ducts over stoves and grills in restaurants and for industrial uses in boiler rooms, grease closets, engine compartments and similar locations. It is the largest of the three major manufacturers of automatic dry powder fire extinguisher systems for restaurant and industrial uses. Sales in 1970 were about $3. 8 million and are expected to increase dramatically as a result of Fire Insurance Rating Bureau requirements that such extinguisher systems be installed in restaurants and various industrial risks.

Since at least 1967, the suit charged, Safety First and their co-conspirator distributors have agreed that: (1) Each co-conspirator distributor is allocated a certain market territory and confines its sales of Safety First equipment to purchasers within that territory; (2) Customers and classes of customers are allocated by Safety First to co-conspirator distributors in the sale and distribution of Safety First equipment; (3) Co-conspirator distributors are restrained from selling Safety First equipment to certain large national accounts; (4) Co-conspirator distributors submit complimentary bids when requested to bid on accounts outside their assigned territory.

As a result, the suit charged, competition in the sale and distribution of Safety First fire protection equipment has been eliminated. Co-conspirator distributors have refrained from or have been prevented from selling Safety First equipment in territories or to customers of their own choice. Purchasers of Safety First equipment have been deprived of the opportunity of purchasing such equipment from suppliers of their own choice in a free competitive market.

Staff: Noel E. Story and George T. McWhorter (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Harlington Wood, Jr.

SUPREME COURT

FEDERAL TORT CLAIMS ACT - STANDARD OF LIABILITY

LIABILITY UNDER THE TORT CLAIMS ACT CANNOT BE BASED UPON THE DOCTRINE OF ABSOLUTE LIABILITY.

Jim Nick Nelms, et al. v. Melvin Laird, et al. (No. 71-573; June 7, 1972; D. J. 145-14-639)

In this Tort Claims action, the plaintiffs alleged that their North Carolina home had been damaged by sonic booms from military aircraft. The district court granted summary judgment for the Government, but the Fourth Circuit reversed. The Court of Appeals held that although the plaintiffs had not proved negligence, they could recover under the doctrine of absolute liability for ultrahazardous activities, which North Carolina law applied to sonic booms.

After granting the Government's petition for certiorari, the Supreme Court reversed. Relying upon Dalehite v. United States, 346 U.S. 15 (1953), the Court held that the standard of liability under 28 U.S.C. 1346(b), a "negligent or wrongful act or omission of any [Government] employee," does not encompass strict liability, regardless of whether or not state law would have applied that doctrine. The Court also rejected the contention that the alleged damage was actionable because the sonic booms constituted "wrongful" acts or omissions in the nature of a trespass. The Court held that federal law precludes liability for sonic boom damage under a trespass doctrine based upon either the presence of the plane above the plaintiffs' land or on the concussion of the sonic boom on their property. "To permit respondent to proceed on a trespass theory here would be to judicially admit at the back door that which has been legislatively turned away at the front door."

Staff: Robert E. Kopp (Civil Division)

COURTS OF APPEALS

DUE PROCESS - SET OFFS

FIFTH CIRCUIT UPHOLDS RIGHT OF DEPARTMENT OF AGRICULTURE TO WITHHOLD FARM SUBSIDIES UNILATERALLY TO OFFSET PRIOR OVER-PAYMENTS.

Verlon Hilburn, et al. v. Earl L. Butz, et al. (C.A. 5, No. 71-2767; June 2, 1972; D.J. 145-8-880)

The Department of Agriculture determined that it had overpaid the Hilburns between 1964 and 1967 under various farm subsidy programs. To offset these overpayments, the Department halted subsidy payments for 1968 to 1970 to which the Hilburns were otherwise admittedly entitled. The district court issued a writ of mandamus directing payment of $273,000, the amount withheld. It ruled that the procedures followed in effecting the withholding violated due process, the Administrative Procedure Act, and Agriculture regulations because the subsidies had been halted without prior notice or hearing; and when an agency hearing was conducted two years later, it was not before an impartial examiner and the Hilburns had no opportunity to cross-examine adverse witnesses.

On our appeal, the Fifth Circuit reversed, holding that the Department could lawfully withhold sums equal to the amount it had determined had been overpaid, at least until the merits of that determination had been judicially reviewed. The court rejected all attacks on the procedures Agriculture had employed on the ground that judicial review of the overpayment determination would afford the Hilburns all necessary procedural rights. Distinguishing Goldberg v. Kelly, 397 U.S. 254 (1970), the court specifically held that a hearing prior to halting subsidy payments was not required.

Staff: Anthony J. Steinmeyer (Civil Division)

THIRD-PARTY BENEFICIARIES

FOURTH CIRCUIT HOLDS GOVERNMENT CAN RECOVER FOR MEDICAL CARE PROVIDED A RETIRED SERVICEMAN AS THIRD-PARTY BENEFICIARY OF SERVICEMAN'S ACCIDENT INSURANCE POLICY.

United States v. Government Employees Insurance Co. (C.A. 4, No. 71-2036; June 7, 1972; D.J. 77-0-1-1)

A retired serviceman, who had been injured in an automobile accident, was treated at a Government hospital at Government expense. This action was brought by the Government against the serviceman's insurer to recover the value of the medical services provided. The District Court allowed recovery and the Fourth Circuit affirmed. Although the Medical Care Recovery Act, 42 U.S.C. 2651-2653, concededly did not apply, the Court of Appeals held that the Government was nevertheless entitled to recover the value of the services rendered as a third-party beneficiary under the "Expenses and Medical Services" provision of the

insurance policy. That provision obligated the insurer to pay, within the policy limits, "all expenses incurred by or on behalf of" the insured in connection with the accident. To have denied recovery, the court observed, would have resulted in an unconscionable windfall to the insurer.

Staff: Samuel Huntington (Office of the Solicitor General)

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CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURT OF APPEALS

CIVIL DISORDERS, 18 U. S. C. 231(a) (3)
SABOTAGE, 18 U. S. C. 2153(a)

CONVICTIONS FOR CIVIL DISORDERS AFFIRMED; CONVICTION FOR SABOTAGE REVERSED.

United States v. Mechanic, United States v. Kogan (C. A. 8, December 21, 1971, 454 F. 2d 849; D. J. 95-800-42-1); United States v. Achtenberg (C. A. 8, May 10, 1972, 11 CLR 2114; D. J. 146-7-42-292). See also April 30, 1971, issue of United States Attorney Bulletin, pp. 335-6.

United States v. Mechanic, United States v. Kogan, and United States v. Achtenberg arose out of an extended series of civil disorders which occurred on the campus of Washington University, St. Louis, Missouri. All involved the burning or attempted burning of Army and Air Force ROTC buildings.

In United States v. Mechanic and United States v. Kogan, which were consolidated on appeal, the Eighth Circuit upheld convictions of two students arrested for throwing cherry bombs at police and firemen who were engaged in extinguishing a fire in the Air Force ROTC building.

The defense challenged the government's use of 18 U. S. C. 231(a) (3) which prohibits any activity which may impede police and firemen engaged in duties "incident to and during the commission of a civil disorder which in any way or degree obstructs. . . commerce . . . or the conduct or performance of any federally protected function." The court refused to consider whether §231 prohibitions could rationally be based on the Commerce Clause since the activities engaged in by the defendants closely involved a federally protected function.

Defendants argued that the statute was overly broad and therefore infringed upon conduct protected by the First Amendment, because the term "civil disorder" is inadequately defined. The Court rejected these contentions on the grounds that the statute makes no attempt to curtail speech, nor does it apply to mere presence at a civil disorder, which was held to be adequately defined in §232.

Defendants further contended that §231 denies due process because it does not specifically require the government to prove intent, nor does it require the government to prove that the defendants knew the official status

of the targets of their missiles. The Court dismissed these claims without difficulty. It agreed that intent is an essential element but held it to be clearly alleged and proved by the government. Furthermore, since the government proved that the police and firemen involved were in full uniform, knowledge of official status was sufficiently established, although a jury instruction, as was given in the Kogan case, is preferable.

The Mechanic and Kogan cases are significant in that they survived theconstitutional test of 18 U. S. C. 231.

In United States v. Achtenberg, where the defendant was seen carrying a torch into an ROTC building, the Eighth Circuit reversed a lower court conviction for sabotage on several grounds. One of these involved the failure of the government to set out and prove each element of its indictment. The Court of Appeals found error in the trial court's interpretation of 18 U. S. C. 2153(a) and its instructions to the jury:

> We believe the court committed error in classifying the crime as consisting of only two elements and in not adequately explaining such elements to the jury and advising them of the burden of the government to prove each element beyond a reasonable doubt . . .

The Court stresses that defendant's reason to believe that his act might injure and obstruct the United States in its defense activities is a fact issue which must be proven. Failure to advise the jury of that burden is fatal error, according to the court.

United States v. Achtenberg is significant in that it illustrates the difficult burden of proof which must be carried by the government in cases involving the use of the sabotage statute. The government must rely on a national emergency declared in 1950 and never rescinded and then proceed to show that the defendant had reason to believe that his particular action might affect United States defense activities. A far lesser burden of proof is required under 18 U. S. C. 1361 (injury to government property), and that statute should be considered in prosecutions involving an Achtenberg-type factual situation where the intent to injure and obstruct defense activities cannot be clearly proved. In employing this statute, the government must merely prove that the defendant was aware that his target was federal property or was being manufactured for the United States or any of its departments or agencies. Penalties prescribed are similar although §2153 carries a greater maximum term of imprisonment.

Staff: United States Attorney Daniel Bartlett, Jr.
Assistant United States Attorney Jerry Murphy
(E. D. Missouri)

DEMONSTRATIONS AND PAMPHLETEERING IN VIOLATION OF GSA REGULATIONS

FEDERAL LEAFLETTING REGULATION UNCONSTITUTIONAL ON ITS FACE; ANTI-WAR RELIGIOUS CELEBRANTS WERE DISCRIMINATORILY PROSECUTED.

United States v. Clarence E. Crowthers, et al. (C.A. 4, 71-1313, March 20, 1972, 456 F. 2d 1074; D. J. 95-79-223)

The defendants were convicted of violation of GSA regulations 41 C. F. R. 101-19. 304 (disturbances) and 41 C. F. R. 101-19. 307a (distribution of handbills).

Defendants were arrested for staging anti-war demonstrations in the guise of religious services in the Pentagon main concourse on several separate occasions during November of 1969 and June of 1970. The demonstrations occurred on the Pentagon main concourse which, while open to the public, serves primarily as a foyer for the building. However, certain space in this foyer has been used for official ceremonies by the Pentagon management, such as awards and dedications, and for unofficial recreational and religious activities authorized by the Pentagon management for the use and benefit of Pentagon employees. While these various official and unofficial events were primarily "in-house" activities for the benefit of Pentagon employees, they were not closed to the public since the area in question is an open zone of the foyer. The foyer also has several commercial establishments and an Army dispensary.

The arrested demonstrators initially failed to apply for authorization to stage the November 1969 demonstrations. Subsequently, the June 1970 demonstrations were held despite prior notice given to the defendants of available facilities elsewhere on Pentagon grounds and despite notice given that the concourse was forbidden for such demonstrations.

The defendants, 267 in number, were taken before a United States Magistrate and convicted of the offenses charged on April 16, 1970 and November 25, 1970. At a subsequent consolidated appeal, the Magistrate's decisions were affirmed by a United States District Court on February 10, 1971.

The Court of Appeals, in reversing the convictions, held that the government could forbid all ceremonies and meetings anywhere in the Pentagon, but it cannot pick and choose what ideological viewpoints it will allow to be expressed. The Court likewise indicated, without resting its decision on this ground, that when a record strongly suggests selective

application of a regulation such as this, and the government itself has the greatest access to the facts, the burden of proof can be reversed and the government can be required to come forward with evidence to show that its prosecution is not discriminatory. The Court said both the group's claim that its activity was religious and the government's assertion that it was simply stopping political activity was correct, but neither choice of words "affords leverage for decision." The First Amendment prohibits abridgement of the right of peaceable assembly and petition and forbids regulation of meetings when it is directed toward suppressing a particular viewpoint.

Finally, the leafletting regulation under which some of the group's members were convicted was held unconstitutional on its face. The regulation allows distribution of only that material which an official has approved, and it supplies no objective standards for approval.

The Criminal Division does not disagree with the Court of Appeals decision as to the convictions of those demonstrators charged with violation of the anti-leafletting regulation. In this connection the GSA has informed us that they are making substantial changes in those regulations which will remove the objections found by the Court in this case. The Solicitor General did not authorize review of the Court's holding regarding the legality of the demonstrations. Whether decided rightly or wrongly, we conclude that the Court's decision on that issue has very limited application and depends solely upon an interpretation of the facts found in this particular case.

The Criminal Division has come concern, however, that efforts may be made to extend the Crowthers decision to other factual situations and will resist such efforts when they occur. In one case, the defense already has attempted to raise an issue of "selective prosecution" based upon language used in the Crowthers decision. In attempting to raise this issue the defense has tried to force the Government Counsel to testify and reveal judgment factors involved in the decision to prosecute that case and other similar cases. Moreover, the defense has asserted that they are entitled to peruse the entire government prosecutive file to establish that there was selective prosecution.

So that we may watch closely future efforts made to extend the Crowthers decision or to otherwise advance a defense of "selective prosecution," it is requested that you notify us immediately in all instances where efforts are being made by individuals or their counsel to take

advantage of the Crowthers decision, and to use it as a predicate for a defense or to justify their activities.

Staff: United States Attorney Brian Gettings
Assistant United States Attorney
David Hopkins (E. D. Va.)

IMMIGRATION AND NATIONALITY ACT

ISSUANCE OF CERTIFICATE SETTING ASIDE CONVICTION UNDER FEDERAL YOUTH CORRECTIONS ACT MAKES CONVICTION FOR FEDERAL DRUG VIOLATION UNAVAILABLE AS BASIS FOR DEPORTATION UNDER 8 U. S. C. 1251(a) (11).

Morera v. Immigration and Naturalization Service (C. A. 1, No. 72-1006; May 19, 1972; D. J. 39-36-388)

The alien was admitted to the United States in 1961. On June 25, 1969, he was convicted in the United States District Court for the Southern District of New York for conspiring to possess marihuana known to be unlawfully imported in violation of 21 U.S. C. 176a. He was subsequently sentenced as a youth offender pursuant to 18 U. S. C. 5010(b).

After formal notice to the alien, a hearing was held on December 16, 1969, and on August 14, 1970, the Special Inquiry Officer found the alien to be deportable under Section 241(a) (11) of the Immigration and Nationality Act, 8 U. S. C. 1251 (a) (11), based upon the above conviction. On February 12, 1971, the Board of Immigration Appeals affirmed the decision of the Special Inquiry Officer and reaffirmed this decision on July 23, 1971.

On January 7, 1972, the alien filed a petition for review in the United States Court of Appeals for the First Circuit and subsequently, on November 2, 1971, the Youth Correction Division of the Board of Parole issued to the alien a Certificate Setting Aside Conviction. On May 19, 1972, the Court of Appeals reversed the decision of the Board of Immigration Appeals, holding that the issuance of an expunction certificate under 18 U. S. C. 5021 rendered petitioner's drug violation conviction unavailable as a basis for deportation under 8 U. S. C. 1251(a) (11).

Several states have provisions for expunction of conviction similar to the provisions found in 18 U. S.C. 5021. Numerous cases have arisen wherein an individual's conviction for state drug violation has been expunged pursuant to state law and the question has arisen as to whether or not the state conviction provides a viable basis for deportation under 8 U. S. C. 1251(a) (11), despite the fact that it has been expunged.

The courts have uniformly held that such convictions do provide a basis for deportation, even where expunction certificates have been issued. In Hernandez-Valensuela v. Rosenberg, 304 F. 2d 639 (9th Cir. 1962), the only prior case involving expunction under the Youth Corrections Act of a Federal drug violation as this relates to deportability, no Certificate Setting Aside Conviction had been issued. In affirming the deportation order, the Court recognized the possibility of future expunction under 18 U. S. C. 5021, but held that "such a possibility of future grace in no respect affects the present fact of guilt." 304 F. 2d at 640. The Court concluded that the possibility that a youth offender's conviction might be set aside does not, in drug cases, deprive that conviction of the finality necessary to warrant deportation.

The First Circuit rejected the rationale adopted by the Ninth Circuit in Hernandez-Valensuela, supra. The Court stated that the clear purpose of the expunction provision is to not only relieve a youth offender of the usual disabilities of a criminal conviction, but also to give him a second chance, free of a record tainted by a conviction. The Court stated that it could not imagine a more complete deprivation of a second chance than deportation and concluded that it was unable to presume that Congress meant in Section 5021 to provide for setting aside a conviction for some purposes but not for others.

The Government took the position that Congress had expressed a special concern for violations of the drug laws which outweighed the interests reflected in the Youth Corrections Act in that executive pardons and judicial recommendations against deportation, which would prevent deportation under other provisions of the Immigration and Nationality Act, were by statute made unavailable for consideration in cases of deportability based on drug convictions. The Court of Appeals rejected this argument and held that the Youth Corrections Act expresses a Congressional concern at least as strong as its concern with narcotics that juvenile offenders be afforded an opportunity to atone for their youthful misconduct.

Staff: John L. Murphy, Chief
Administrative Regulations Section;
Donald B. Nicholson (Criminal Division)

IMMIGRATION AND NATIONALITY ACT

WHEN A PREVIOUSLY DEPORTED ALIEN IS CHARGED WITH BEING "FOUND IN" THE UNITED STATES WITHOUT FIRST HAVING RECEIVED THE PERMISSION OF THE ATTORNEY GENERAL TO REENTER (IN VIOLATION OF 8 U. S. C. 1326), STATUTE OF LIMITATIONS RUNS FROM DATE WHEN ALIEN IS ACTUALLY FOUND RATHER THAN FROM DATE OF HIS ILLEGAL REENTRY.

United States v. Chong Yuk Wah (C. A. 1, No. 72-1045; April 26, 1972; D. J. 39-16-548)

On December 10, 1971, the alien was indicted for being "found in" the United States after deportation in violation of 8 U. S. C. 1326, which makes it a felony for any previously deported alien to enter, attempt to enter, or be found in the United States, unless prior to his reembarkation at a place outside the United States the Attorney General has consented to the alien's reapplying for admission. According to the stipulated facts at trial, the alien was deported in 1962 and then reentered within 30 days of that deportation.

The alien moved to dismiss, contending that since more than five years elapsed since his reentry in 1962, prosecution was barred in 1971 because of the applicable statute of limitations (18 U. S. C. 3282). The Government's response was that the defendant had been charged not with entering or attempting to enter but rather with being "found in" the United States and that this part of the statute sets forth a continuing offense, so that the applicable statute of limitations did not begin to run until September 29, 1970, the day the alien was actually found. The motion to dismiss was denied and the alien was convicted of the offense charged.

On appeal, the First Circuit held that the legislative history of the statute shows that the Congress intended the "found in" portion of the statute to constitute a continuing offense. The Court held that if an alien is deported and returns illegally it is unreasonable to allow him to remain permanently simply because the Government failed to discover and indict him within a five-year period after he reentered the country. The Court expressed the view that the Congress had chosen precisely the correct language to achieve its clearly intended purpose. The Court of Appeals then affirmed the judgment of the district court.

Two district court cases (United States v. Bruno, 328 F. Supp. 815 (W. D. Mo., 1971) and United States v. Alvard-Soto, 120 F. Supp. 848 (S. D. Cal., 1954)), had previously held that the offense of being found in the United States is a continuing offense and that the statute of limitations begins to run only after the alien is found. It is believed that this is the first Court of Appeals to rule on the matter.

Staff: United States Attorney Joseph L. Tauro
Assistant United States Attorney Lawrence H. Cohen
(D. Mass.)

NARCOTIC AND DANGEROUS DRUG SECTION

CONTROLLED SUBSTANCES ACT OF 1970 HELD CONSTITUTIONAL BY FIFTH CIRCUIT

United States v. Amado Lopez and Thomas Lleren (C.A. 5, 71-3248, decided May 11, 1972; D. J. 12-18-421)

The defendants were charged with conspiring to possess with intent to distribute approximately 2 kilograms of cocaine in violation of 21 U. S. C. §841 (a) (1) and 846. The defendant Lopez was also charged with the distribution of cocaine and heroin in violation of 21 U. S. C., §841 (a) (1). They were convicted of all counts and appealed challenging, inter alia, the constitutionality of the Controlled Substances Act of 1970, 21 U. S.C. §801 et seq. The defendants claimed (1) that Congress exceeded the power granted to it by the Commerce Clause, U. S. Const. Art. I, §8, by prohibiting and making unlawful certain activities with respect to controlled substances without requiring allegation and proof that the particular activity has affected interstate commerce, and (2) that the Act violates the Tenth Amendment.

The Court of Appeals for the Fifth Circuit rejected these arguments and affirmed the convictions. The Court first held that the commerce power extends to intrastate activities which are so related to or commingled with interstate activities that all must be regulated if there is to be an effective exercise of the commerce power. Where it appears that an attempt to separate interstate activities from intrastate activities would be a futile exercise substantially interfering with and obstructing the exercise of the power of Congress to regulate interstate commerce, such an attempt is not required.

The court further held that the question of determining this issue, namely, whether interstate commerce is affected by particular intrastate activities or whether an attempt to separate interstate activities from intrastate activities would be futile, has been decided by Congress itself when it included detailed findings of fact in the Controlled Substances Act. 21 U. S. C. 801. Relying on Perez v. United States, 402 U. S. 146 (1971), the court held that Congress has the power to make such a determination and to take this action. The Court found that the findings of Congress with respect to controlled substances had a rational basis and that the Congress could therefore reasonably assume that an attempt to separate interstate activities with respect to controlled substances from intrastate activities would be a futile exercise substantially interfering with its power to regulate interstate commerce with regard to Controlled Substances.

Since the Tenth Amendment does not operate upon the valid exercise of powers delegated to Congress by the Commerce Clause and since the passage of the Controlled Substances Act was a valid exercise of this power, the Court held that there was no violation of the Tenth Amendment.

Finally, the court held that the defendant's reliance upon United States v. Bass, 404 U.S. 336 (1971) was misplaced. Neither 21 U.S.C. 841(a)(1) nor 846 contains language analogous to that in Bass which would require that the activity in controlled substances be shown to have an effect on interstate commerce.

Accordingly, the court found that both 21 U.S.C. 841(a)(1) and 21 U.S.C. 846 were valid under the Commerce Clause.

Staff: United States Attorney Robert W. Rust
Assistant United States Attorney Harold Keefe
(S.D. Florida)

* * *

INTERNAL SECURITY DIVISION

Acting Assistant Attorney General A. William Olson

FOREIGN AGENTS REGISTRATION ACT

OF 1938, AS AMENDED

The Registration Section of the Internal Security Division administers the Foreign Agents Registration Act of 1938, as amended, (22 U.S. C 611) which requires registration with the Attorney General by certain persons who engage in defined categories of activity on behalf of foreign principals within the United States.

June 1972

During the first half of this month the following new registrations were filed with the Attorney General pursuant to the provisions of the Act:

Richter & Mracky-Bates, Inc. of Los Angeles registered as advertising agency for Consejo Nacional de Turismo, Mexico City. Registrant controls an authorized advertising budget of $1, 000, 000. Registrant's agreement with the foreign principal covers 1972 and registrant will engage in advertising and related matters pertaining to the promotion of the principal's objectives in tourism, including the development of promotions that increase the number of tourists to Mexico. Ralph L. Richter, Jr. filed a shortform registration statement as Executive Vice President of the registrant and states that he is compensated for his services to the foreign principal by a fee based on total dollar amount of media placed.

Oficina Nacional Espanola De Turismo, San Juan, Puerto Rico registered as an official branch of the Ministry of Information and Tourism, Madrid. Registrant is to promote tourism to Spain by means of advertising, newspaper articles, private and televised film projections and to supply tourist information to travel agencies, air lines and the general public. Registrant receives $31, 200 per year from the foreign principal for the operation of its office. Roman Arango Lopez filed a short-form registration statement as Director of the registrant with a salary of $1, 200 per month.

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

COURT OF APPEALS

ENVIRONMENT; ADMINISTRATIVE LAW

NATIONAL ENVIRONMENTAL POLICY ACT; ADEQUACY OF ENVIRONMENTAL IMPACT STATEMENT; STATUTORY CONSTRUCTION; "MAJOR FEDERAL ACTION;" AGENCY RESPONSIBLE FOR IMPACT STATEMENT IN MULTI-AGENCY PROJECT; SCOPE OF JUDICIAL REVIEW; PROPRIETY OF REMAND.

Hanly, et al. v. Mitchell, Kunzig, et al. (C.A. 2, No. 72-1354, May 17, 1972; D.J. 90-1-4-465)

The Court of Appeals affirmed denial of a preliminary injunction as to construction of a 9-story federal office building in the Foley Square area, on GSA's conclusory statement that the project, while major, will not significantly affect the human environment and hence, a detailed environmental statement is not necessary. But the court reversed as to the construction of the adjacent 9-story federal jail until GSA determines, after considering all relevant factors, whether the proposed jail will significantly affect the quality of the human environment, as required by NEPA. The court suggested a 30-day stay, to permit the requisite determination and preliminary construction to continue.

The court stated that the NEPA is "a statute whose meaning is more uncertain than most, not merely because it is relatively new, but also because of the generality of its phrasing." In cases founded on NEPA, the court said that the issue is not whether the project should be built, but whether the NEPA requirements have been met. The court agreed that not every "major Federal action" will necessarily have a significant effect on the quality of the human environment and call for preparation of an impact statement. The court also agreed that here, the agency responsible for ascertaining the need for a statement and for its preparation was not the Department of Justice or the Bureau of Prisons but GSA -- the agency responsible for acquisition, design, construction, and operation. The "mini-impact" statement regarding the proposed jail was faulted because it "contains no hard look at the peculiar environmental impact of squeezing a jail into a narrow area directly across the street from two large apartment houses." As to the proper scope of judicial review, the court said its holding would result from either the "arbitrary or capricious" or "some more liberal" standard. The arguments -- that remand to GSA for compliance is now barred and that

remand would be pure ritual -- were rejected, the court assuming that the environmental determination will be made in good faith after full consideration.

Staff: Assistant United States Attorney Milton Sherman (S. D. N. Y.)

COURTS OF APPEALS

INTERVENTION; ENVIRONMENT

INTERVENTION OF RIGHT BY NON-UNITED STATES CITIZENS ASSERTING DIFFERENT INTERESTS REGARDING TRANS-ALASKA OIL PIPELINE.

The Wilderness Society, et al. v. Morton, et al. (C. A. D. C., No. 72-1090, May 11, 1972; D. J. 90-1-4-210)

A nonresident member of the Canadian Parliament and the Canadian Wildlife Federation sought to intervene in this suit by three United States environmental groups to enjoin the Secretary of the Interior from issuing a permit for an oil pipeline across federal land in Alaska pending determination whether Interior has complied with the National Environmental Policy Act. The applicants claimed that the trans-Alaska, Valdez, supertanker, Cherry Point, Wash., alternative would inevitably result in oil spills affecting British Columbia commercial and recreation interests and that their interest in a trans-Canada pipeline alternative is different from the interests of the existing parties. The district court denied the application to intervene.

The Court of Appeals reversed, citing Rule 24(a)(2), F. R. C. P., and stating, "the interests of the United States and the Canadian environmental groups are sufficiently antagonistic in this litigation to require granting of the application for intervention." The court rejected the pipeline appellee's contention "that claims of the kind asserted by appellants, when made by non-United States citizens, are non-justiciable under the doctrine of separation of powers." Noting that the applicants, along with the existing parties, participated in the administrative proceedings, the court concluded there was no reason for not permitting their participation in the judicial review of those proceedings.

Staff: Edmund B. Clark and Herbert Pittle (Land and Natural Resources Division); Robert S. Lynch (formerly of the Land and Natural Resources Division)

ENVIRONMENT; HIGHWAYS

NATIONAL ENVIRONMENTAL POLICY ACT; FEDERAL-AID HIGHWAYS; NON-RETROACTIVITY; ENVIRONMENTAL IMPACT STATEMENT NOT REQUIRED FOR UNBUILT 4-MILE SEGMENT OF 20-MILE INTERSTATE HIGHWAY WHERE REMAINING 16 MILES ALREADY BUILT AT NEPA'S PASSAGE.

Ragland v. Mueller, et al. (C.A. 5, No. 71-2430, May 31, 1972; D.J. 90-1-4-278)

Interstate 295 in Duval County, Florida, is a 20-mile federal-aid highway. Part of one four-mile segment cut through 50 acres belonging to a landowner. Florida acquired the landowner's self-styled "wildlife refuge" for highway purposes in a state condemnation proceeding. Having lost his challenge in state court to the condemnation's legality, the landowner sued in federal court the Secretaries of Transportation of the United States and of Florida (Mueller) and the Federal Highway Administrator, to enjoin further construction of I-295. The district court, without opinion, granted the motions of the federal defendants to dismiss for failure "to state a cause of action and for lack of jurisdiction over the subject matter."

The Court of Appeals affirmed. In its brief opinion of five paragraphs, the Court of Appeals treated the absence of an environmental impact statement required by section 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. sec. 4332(2)(c), as the only live issue in the case. On this issue, the court held:

> Analysis of the facts reveals that when NEPA became effective January 1, 1970, sixteen of the twenty miles of the disputed highway had already been fully completed and the right of way for the remaining four miles had been acquired. It is simply unreasonable to assume that Congress intended that at this point in time, construction should halt, an environmental impact study should be made, and the highway possibly rerouted. * * *

The court held that these facts distinguish this case from Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (C.A. 5, 1971), and Arlington Coalition on Transportation v. Volpe (C.A. 4, No. 71-2109, Apr. 4, 1972), where

NEPA has been applied retroactively. Accordingly, the alleged NEPA violation did not state a claim upon which relief could be granted in this case.

Staff: Dirk D. Snel (Land and Natural Resources Division); Assistant United States Attorney John D. Roberts (M.D. Fla.)

INDIANS

NINTH CIRCUIT RULES THAT THE SNYDER ACT REQUIRES THAT INDIAN WELFARE BENEFITS BE PAID TO OFF-RESERVATION INDIANS AS WELL AS THOSE ON THE RESERVATION OR ON TRUST LANDS; STATUTORY CONSTRUCTION.

Ruiz v. Morton (C.A. 9, No. 25568, May 31, 1972; D.J. 90-2-4-131)

Mr. Ruiz left the Papago Reservation and had resided some fifteen miles away for thirty years. The copper mine where he was employed was then shut by a strike. Ruiz was unable to obtain Arizona welfare benefits as such are unavailable to strikers. He sought General Assistance benefits from the Bureau of Indian Affairs which denied them on the basis that Ruiz did not reside on the reservation. The District Court upheld the denial.

Despite legislative history showing that Indian appropriation acts had never been thought to contain funds for general assistance to Indians in the Ruiz position, the Ninth Circuit ruled that the language of the Snyder Act of 1921, 42 Stat. 208, 250 U.S.C. sec. 13, required that such assistance be available to Indians everywhere. The Snyder Act authorized BIA to expend "such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States * * *." The majority reasoned that statutes enacted for the benefit of Indians are to be liberally construed and that other benefits are available to off-reservation Indians. One judge dissented on the ground that considering the limited amount of funds available to the BIA, and the additional problems of reservation Indians, the distinction made by BIA was a reasonable one. In the light of the importance of the case, a petition for rehearing is being considered.

Staff: Carl Strass (Land and Natural Resources Division); Assistant United States Attorney Richard S. Allemann (D. Ariz.)

MINES AND MINERALS; ADMINISTRATIVE LAW

CONGRESSIONAL DELEGATION TO INTERIOR TO DETERMINE VALIDITY OF MINING CLAIMS; EXHAUSTION OF ADMINISTRATIVE REMEDIES; INVALIDITY OF FLAGSTONE LOCATIONS UNDER THE MULTIPLE USE MINING ACT OF 1955.

Rawls v. Morton (C.A. 9, No. 71-2845, May 4, 1972; D.J. 90-1-18-918)

This dispute concerned the validity of two placer mining locations on land in the Kaibab National Forest, Arizona. The claims were located in 1964 for building stone, the claimant asserting that the flagstone deposits were of "distinct and special value." In 1966, the Forest Service of the Department of Agriculture concluded that the claims were invalid because flagstone was not a material subject to locations under the mining law since the Multiple Use Mining Act of 1955. A contest was initiated and a hearing was held. The claimant appeared and on "constitutional grounds," objected to all proceedings, leaving the hearing before evidence was presented. The examiner found the claims invalid because the lands were non-mineral. No administrative appeal was taken to Interior's Board of Land Appeals by the claimant. On cross-motions, the district court granted summary judgment for the Secretary of the Interior and the hearing examiner.

In affirming, the Ninth Circuit declared that Congress had delegated the responsibility of determining the validity of mining claims to the Secretary and that no constitutional rights of the claimant had been infringed. The claimant, the court continued, had been afforded full opportunity to support the validity of his claims but instead, had resorted to the courts which were not available because he had failed to exhaust his administrative remedies. The court distinguished United States v. Consolidated Mines and Smelting Co., 455 F.2d 432 (C.A. 9, 1971) specifying that Interior's regulations in effect at the date of this hearing required exhaustion.

Staff: Thomas L. Adams, Jr. (Land and Natural Resources Division); Assistant United States Attorney Richard S. Allemann (D. Ariz.)

STATE COURT

MINES AND MINERALS; ADMINISTRATIVE LAW

STATE LAW APPLICABILITY TO FEDERAL MINERAL LEASEHOLDS; APPROVAL OF SECRETARY OF THE INTERIOR ESSENTIAL

TO POOLING OF FEDERAL LANDS BY STATE; RETROACTIVITY OF STATE POOLING ORDER; CONCLUSIVENESS OF ADMINISTRATIVE DETERMINATION.

In re Application, Ohmart v. Dennis (Neb. S.Ct., No. 38133, April 7, 1972; D.J. 90-1-18-665 and 90-1-18-795)

The Nebraska Supreme Court affirmed a decision of the District Court for Scotts Bluff County, Nebraska, sustaining an order of the Nebraska Oil and Gas Conservation Commission pooling the interests of S. E. Dennis and his lessee, Banner Oil Company, and the United States of America and its lessee, Walter A. Ohmart, in a 40-acre oil-producing tract of land in the county.

Previously, Ohmart had obtained a pooling order from the Commission. That order was vacated by the District Court after the United States, an indispensable party, had asserted sovereign immunity. Here, both Ohmart and the United States sought a pooling order. The Nebraska Supreme Court determined that state law applies to leasehold interests, like Ohmart's, under the Mineral Leasing Act for Acquired Land, 30 U.S.C. secs. 351-359, where no important threat to any identifiable federal policy or interest appears. However, the Court concluded, citing 30 U.S.C. secs. 226(j) and 351-359, that a favorable determination by the Secretary of the Interior is essential to inclusion of federal lands with non-federal lands in a state pooling order. Therefore, it held that the judgment of the district court in the first proceeding did not preclude the United States or Ohmart from subsequently applying for a pooling order.

Because the legislature has empowered the Commission to suspend the operation of the state conservation act to federal lands in certain situations, it upheld the pooling order notwithstanding strong doubts on the equity of its retroactivity to June 5, 1963, the date the well was completed.

Appellants unsuccessfully litigated the validity of the lease to Ohmart in proceedings within the Department of the Interior and failed to perfect an appeal to the Secretary of the Interior. The Court, while holding that the administrative decision here was preclusive, noted that the effect of an administrative decision depends upon many factors. These include that the fact-finding process of the administrative body approximate that of a court, that the body observe fair standards of evidence, that the facts be adjudicative, and that the process not deprive a party of his right to a jury trial.

Staff: Larry G. Gutterridge (Land and Natural Resources Division); Assistant United States Attorney Robert J. Becker (D. Neb.)

* * *

APPENDIX

FEDERAL RULES OF CRIMINAL PROCEDURE

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RULE 5(a). Proceedings Before the Commissioner; Appearance Before the Commissioner

Rule 5(a), F. R. Cr. P., requiring that an arrested person be taken before the nearest available Commissioner, which applies only to federal officials, cannot be violated until the accused is taken into federal custody. Hence, where accused was arrested for a state offense by local authorities on December 12, but was not charged with federal violation until December 15, when he was arrested and taken before a United States Commissioner, there was no unnecessary delay within the purview of Rule 5(a). Moreover, it was not improper for Secret Service agent to interview him concerning a federal charge while he was in state custody and before he was arrested on a federal warrant.

Appellant's contention that the court should have heard testimony about the presence or absence of any interaction between the federal and state arresting officers was rejected by reviewing court where no evidence of any interaction was offered at trial. A bare suspicion that there was cooperation between the two agencies designed to deny fundamental rights was not sufficient, and would not justify reversing the trial judge who had the benefit of hearing the testimony and observing the demeanor of the witnesses.

United States v. Floyd Edward Ireland (C. A. 10, February 22, 1972, 456 F. 2d 74; D. J. 55-017-13)