m.L

United States Attorneys

Bulletin

Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.

Vol. 23 June 27, 1975 No. 13

UNITED STATES DEPARTMENT OF JUSTICE

Vol. 23 June 27, 1975 No. 13

TABLE OF CONTENTS

COMMENDATIONS

Assistant United States Attorney Robert C. Bonner, Central District of California, has been commended by Acting Assistant Attorney General John C. Keeney for his able and diligent supervision of the investigation and prosecution of corruption in the Los Angeles meat packing industry.

Former United States Senator, Wallace F. Bennett, a Congressional sponsor of the Professional Standards Review legislation, has commended Assistant United States Attorney Paul Stack, Northern District of Illinois, for his outstanding preparation and argument of the case of the Association of American Physicians and Surgeons v. Weinberger in which a three judge panel unanimously upheld the constitutionality of the legislation.

Vol. 23 June 27, 1975 No. 13

POINTS TO REMEMBER

APPLICATION OF 18 U.S.C. 2114 CONFINED TO CRIMES WITH POSTAL NEXUS

Recently in United States v. Reid and Thomas, __ F.2d__ (2d Cir., Nos. 74-2598, 74-2599, decided Apr. 24, 1975), the Court of Appeals for the Second Circuit found that the legislative history of 18 U.S.C. 2114 restricts its ambit to those crimes with a postal nexus.

This Department had published in the U.S. Attorneys Bulletin, Vol. 21, No. 19, at 33 (September 14, 1973), the position taken by the Solicitor General in Hanahan v. United States, 414 U.S. 807 (1973), that section 2114 is applicable only to postal-related offenses. The Department reiterates that position. The form indictment for 18 U.S.C. §2114 should be annotated to prevent its use of crimes other than those involving a postal nexus.

(Criminal Division)

* * * *

DUAL PROSECUTIONS

The following is the press release and memorandum contained therein referred to in Volume 12 of the Bulletin at 33. The policy enunciated remains the Department's position on dual prosecutions.

FOR RELEASE TO A.M. NEWSPAPERS
MONDAY, APRIL 6, 1959

Ninety four United States Attorneys from as many districts in the states and territories, will convene here Monday for a two-day conference with officials of the Department of Justice. They will discuss problems of Federal law enforcement, with especial reference to the drive on organized crime and racketeering, and intra-departmental administrative matters.

The group will be welcomed Monday morning by Attorney General William P. Rogers and one of the first matters to be presented to them will be the following statement:

MEMORANDUM TO THE UNITED STATES ATTORNEYS

In two decisions on March 30, 1959, the Supreme Court of the United States reaffirmed the existence of a power to prosecute a defendant under both federal and state law for the same act or acts. That power, which the Court held is inherent in our federal system, has been used sparingly by the Department of Justice in the past. The purpose of this memorandum is to insure that in the future we continue that policy. After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling.

In Abbate v. United States and Bartkus v. Illinois the Supreme Court held that there is no violation of the double jeopardy prohibition or of the due process clause of our federal Constitution where there are prosecutions of the defendant, both in the state and in the federal court, based upon the same act or acts.

This ruling reaffirmed the holding in United States v. Lanza, 260 U.S. 377, decided by the Supreme Court in 1922. In that case Chief Justice Taft, speaking for a unanimous Court, said:

> "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."

But the mere existence of a power, of course, does not mean that it should necessarily be exercised. In the Bartkus case the Court said:

Vol. 23 June 27, 1975 No. 13

> "The men who wrote the Constitution as well as the citizens of the member states of the Confederation were fearful of the power of centralized government and sought to limit its power. Mr. Justice Brandeis has written that separation of powers was adopted in the Constitution 'not to promote efficiency but to preclude the exercise of arbitrary power.' Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government. The greatest self-restraint is necessary when the federal system yields results with which a court is in little sympathy." (Emphasis added)

The Court held then that precedent, experience and reason supported the conclusion of separate federal and state offenses.

It is our duty to observe not only the rulings of the Court but the spirit of the rulings as well. In effect, the Court said that although the rule of the Lanza case is sound law, enforcement officers should use care in applying it.

Applied indiscriminately and with bad judgment it, like most rules of law, could cause considerable hardship. Applied wisely it is a rule that is in the public interest. Consequently - as the Court clearly indicated - those of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area.

Cooperation between federal and state prosecutive officers is essential if the gears of the federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise.

In such event I doubt that it is wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop, particularly because a series of related acts are often involved. However, no federal case should be tried when there has already been a state prosecution

for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention.

(Criminal Division)

* * * *

Vol. 23 June 27, 1975 No. 13

ENERGY CONSERVATION: MOVEMENT OF PRISONERS

The United States Marshals Service is attempting to comply with President Ford's directive requiring an optimum effort by all Federal agencies to further reduce the consumption of energy.

Since the movement of prisoners accounts for substantial consumption of energy, the Marshals Service is seeking the cooperation of the Courts and all Federal agencies whose activities impact on this program.

In furtherance of this effort, the Marshals Service has assembled six suggestions which it believes could help alleviate this problem and facilitate the court's business:

1. Avoid all unnecessary prisoner movements
2. Consult with the Marshal prior to issuance of writs involving prisioner movements
3. Utilize depositions whenever possible in prisoner/witness situations
4. Furnish writs to the Marshal as far in advance as possible
5. Avoid establishing movement deadlines except when absolutely necessary
6. Avoid scheduling more prisoner or prisoner/witnesses for court appearance than reasonably may be expected to appear in the time available.

Your efforts in effectuating these suggestions will be most appreciated.

(Executive Office)

MOTIONS TO PROCEED IN FORMA PAUPERIS BY CORPORATIONS OR OTHER ARTIFICIAL PERSONS

The Chief Justice of the United States has informed the Attorney General of several recent instances in which Department attorneys have appeared in cases in which court orders have been entered granting a corporation or other artificial person the right to appeal in forma pauperis. In these cases the Administrative Office of the U. S. Courts, from whose appropriation all the costs of proceeding in forma pauperis are paid, was not notified of the pendency of such motions to appeal in forma pauperis until after the court orders were entered. See, River Valley, Inc. v. Dubuque County, et al, United States and Kirks v. McManus, 507 F.2d 582 (8th Cir. 1974).

The position of the Administrative Office of the U. S. Courts is that corporations and other artificial persons are not qualified under 28 U.S.C. 1915 to proceed in forma pauperis. For this reason that office has requested that any motion by a corporation or other artificial person to proceed in forma pauperis in litigation involving the government be opposed and that the Administrative Office of the U. S. Courts be immediately notified of the filing of such motion.

For information or to make notifications, please contact:

William R. Burchill, Jr.
General Counsel's Office
Administrative Office of the U. S. Courts
FTS Telephone (202)-393-1640 (ext. 457)

(Executive Office for U. S. Attorneys)

Vol. 23 June 27, 1975 No. 13

WITNESS PROTECTION PROGRAM

Department Order OBD 2110.2, dated January 10, 1975, prescribes procedures for securing the admission of witnesses into the Program and places operational authority and responsibility with the United States Marshals Service.

Attorneys and investigative agents are not authorized to make representations to witnesses regarding protection, relocation, or funding and are not authorized to obligate funds for these purposes.

When it appears that an individual is endangered by virtue of his being a witness and requires protection, the attorney should avoid making any representations concerning the Program but should have the local United States Marshals Service Security Specialist explain the Program to the witness.

The United States Marshals Service cannot honor commitments made by other than their own personnel. Commitments made by others are the personal commitments of the maker.

Attorneys applying for witness admission into the Program must provide all the information required by subparagraphs 7a(1) through (13) of OBD 2110.2. Each individual item is an essential ingredient, e.g. the witness' place and date of birth is used to place a "stop" with the FBI.

* * *

For assistance in witness protection matters call the Section in the Criminal Division that would ordinarily be concerned with the matter.

(Criminal Division)

CIVIL DIVISION
Assistant Attorney General Rex E. Lee

COURT OF APPEALS

CLASS ACTIONS

NINTH CIRCUIT GRANTS TWO PETITIONS FOR WRITS OF MANDAMUS ARISING OUT OF PARIS AIR CRASH OF DC-10; DENIES GOVERNMENT LEAVE TO FILE THIRD PETITION.

United States v. United States District Court for the Central District of California (C. A. 9, Nos. 74-2240, 74-2679 and 75-2043; D.J. 157-12C-752).

As the result of the Paris air crash of a Turkish Airlines DC-10, the Federal Aviation Administration and three other defendants have been sued by the next-of-kin of some of the 350 individuals who died in the accident. Plaintiffs allege that the crash occurred as a result of a faulty rear cargo door, and charge that the F.A.A. was negligent in its airworthiness certification of the aircraft. After all pending suits had been transferred to the Central District of California pursuant to the multi-district procedures, the district court judge stated his intention to send a notice to all potential plaintiffs throughout the world, inviting them to join in the pending proceedings in his court. The defendants filed petitions for writs of mandamus and/or prohibition to restrain the judge from sending the notice. We argued that absent a class action, the district court's proposed action exceeded its Article III jurisdiction and was not authorized by any statute or rule of civil procedure. Before argument could be heard on the petitions, the district court certified the proceeding to be a class action pursuant to Rule 23(b)(1) and (b)(2), F.R.C.P. Defendants filed a second set of petitions for writs of mandamus to have the class action order vacated. We argued that neither Rule 23(b)(1) nor (b)(2) authorized a class action in a mass tort suit.

The Ninth Circuit has just granted both petitions, and given the relief we requested adopting essentially the arguments we proposed. In No. 74-2240, with one Judge dissenting, the Court of Appeals found no authority in the rules for the sending of such notice. A unanimous panel in No. 74-2679 rejected the district court conclusion that a mass tort case can be certified as a class action pursuant to Rule 23(b)(1) or (b)(2). We are informed that petitions for rehearing en banc have just been filed in both cases.

Staff: John K. Villa (Civil Division)

FEDERAL TORT CLAIMS ACT: WORKMEN'S COMPENSATION INSURANCE

NINTH CIRCUIT REJECTS INJURED EMPLOYEE'S CLAIM THAT UNITED STATES IS LIABLE FOR INDEPENDENT CONTRACTOR'S FAILURE TO OBTAIN WORKMEN'S COMPENSATION INSURANCE.

Charles Goodwin v. United States (C.A. 9, No. 74-1311, May 30, 1975; D.J. 157-44-253).

The Department of Agriculture and Perdue Brothers Construction Company entered into a contract for the construction of a road through a national forest. Although required to do so by the terms of the contract, Perdue Brothers failed to carry workmen's compensation insurance. Plaintiff Charles Goodwin, an employee of Perdue Brothers, suffered injury through the negligence of a fellow employee. Unable to obtain workmen's compensation benefits, plaintiff sued his employer in state court on common law negligence principles and obtained a judgment against him; unable to collect from his employer, plaintiff brought this suit against the United States, alleging that employees of the United States were negligent in failing to ensure that the contractor fulfilled all of its obligations under the contract.

The district court entered judgment for plaintiff. The court held that the contracting officer and project engineer were negligent in "failing to insist that the contractor obtain workmen's compensation coverage" and that "the negligent failure to observe a contract term or condition is a tort" for which plaintiff, the third party beneficiary of the contract between the United States and Perdue Brothers "has a direct right of action against the promissor."

On our appeal, the Ninth Circuit reversed. The court noted that "[t]he obligation to provide insurance, breach of which occasioned appellee's loss, was the contractor's, not the United States'." Thus, "the United States did not breach a duty it owed appellee, and the judgment cannot stand."

Staff: Karen K. Siegel (Civil Division)

FREEDOM OF INFORMATION ACT

EIGHTH CIRCUIT HOLDS THAT WITNESS STATEMENTS TO AIR FORCE SAFETY BOARD WAS EXEMPT FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT BY VIRTUE OF EXEMPTION 5.

Brockway v. Department of the Air Force (C.A. 8, No. 74-1268, decided June 6, 1975; D.J. 145-14-835).

The plaintiff filed this Freedom of Information Act suit to obtain reports of an Air Force investigation of an airplane crash. In aircrash cases, the Air Force conducts two investigations, a safety investigation, which is intended solely for accident prevention purposes, and a collateral investigation, which provides information for litigation and disciplinary purposes. The safety investigation board operates with the understanding that information provided to it will be kept confidential and will be used only for safety purposes. The Air Force asserted that without this pledge of confidentiality, many witnesses would not provide information which would reflect adversely upon themselves and the cause of accidents would never be determined.

In this suit, although the Air Force refused to disclose the witness statements, it provided the entire collateral report, substantial portions of the safety report, and offered to make available the witnesses whose statements were involved. The district court, however, held the Air Force had to disclose the statements as well.

On appeal the Eighth Circuit reversed, holding that the statements were exempt from disclosure by virtue of exemption 5 of the FOI Act, 5 U.S.C. 552(b)(5). The court ruled that exemption 5 is not limited to the privilege for governmental deliberative materials, but involved other relevant discovery privileges as well. The court held that the privilege protecting witness statements recognized in Mackin v. Zuckert, 376 F.2d 336, was fully applicable here to protect the witness statements. The court concluded therefore that in some cases exemption 5 authorizes the nondisclosure of factual material.

Staff: Thomas G. Wilson (Civil Division)

CRIMINAL DIVISION
Acting Assistant Attorney General John C. Keeney

COURT OF APPEALS

ATTEMPTED POSSESSION OF NARCOTICS - 21 USC 846

United States v. Gabriel Marin, __ F.2d ___ (2d Cir. No. 736, decided April 15, 1975)

The chief government witness, Jose Manuel Caicedo, was en route from Bogota, Colombia to New York when he was searched in December 1973, while attempting to clear Customs in New Orleans. Customs agents found bags of cocaine and a piece of paper with Marin's name and telephone number on it as a potential buyer of cocaine. Caicedo was arrested and agreed to cooperate with agents of the Drug Enforcement Administration (DEA). In that enterprise, Caicedo went to New York, reached Marin by telephone, and identified himself by referring to the mutual friend who had furnished Marin's number to Caicedo in Bogota. This call, recorded by DEA agents, contained incriminating references to the "merchandise", its quality and the price ($650 per ounce for the entire six ounces Caicedo had brought with him).

Thereafter, Caicedo and Marin met in a bar while undercover agent Raphael Halperin sat outside in a car. Negotiations ensued over whether Marin would have to exhibit the necessary cash first or whether Caicedo would furnish a sample. The latter demand posed a problem because DEA agents had prepared a "dummy" package for delivery to Marin; the package contained four ounces of quinine and starch and a minute amount of cocaine taken from the plastic bags that Caicedo had smuggled in. When Caicedo balked at the request for a sample, Marin complained that such formal treatment ill suited a customer who had dealt with Caicedo's source before in much larger amounts. After further negotiations, Marin and Caicedo met by prearrangement at 11:00 p.m. the next night on the corner of 57th Street and 9th Avenue. Caicedo said he had spoken with their mutual friend in Bogota and she assured him that Marin could be trusted. Therefore, Caicedo explained, he was willing to trust Marin with the four-ounce package. Marin said he would try to pay Caicedo the next day and would then pick up the remaining two ounces. Marin took the dummy package from Caicedo and the two men parted.

Marin was arrested almost immediately by agents who had observed the transaction.

While under arrest, Marin admitted that he had met the mutual friend in Bogota, who he said was supplying rock musicians with cocaine to smuggle into the United States. He also admitted that he had met with Caicedo to discuss a cocaine transaction, that Caicedo had given him a four-ounce package of cocaine the night before and that Caicedo had told him that when these four ounces were paid for, he would give him two more.[1]

During the Government's case, the trial judge pointed out to counsel that there was no substantial evidence that Marin had possessed a legally significant amount of cocaine, since the dummy package contained no detectable amount of the substance.[2] The Government thereupon elected to proceed on a theory of attempt alone.

The Marin court held that under Fed. R. Crim. P. 31(c), a defendant may be found guilty of an attempt to commit a substantive offense, whether or not the attempt was charged in the indictment, provided an attempt is punishable. Here, attempted possession of cocaine is a crime. 21 USC 846. In these circumstances, the trier of fact could properly convict for the attempt for the reasons stated in United States v. Heng Awkak Roman, 356 F. Supp. 434, 436-38 (S.D., N.Y.), aff'd, 484 F. 2d 1271 (2d Cir. 1973), cert. denied, 415 U.S. 978 (1974).

There, as in this case, government agents faked the existence of drugs over which the defendants exercised dominion. The court there held that an attempt was established when "the defendants' actions would have constituted the completed crime if the surrounding circumstances were as they believed them to

---

1. All of these facts came from government witnesses. Marin neither testified nor presented evidence.

2. A DEA agent testified that when the dummy package was prepared, an attempt was made to put some cocaine in it by dipping the end of a paper clip in one of the bags of nearly pure cocaine Caicedo had carried and then touching the dummy substance with the clip. Upon chemical analysis, no identifiable quantity of cocaine was found.

be." 356 F. Supp. at 434. The judge made clear in his charge that the theory of the Government's case was only attempted possession. The variance between an attempt to possess four ounces and an attempt to possess one gram did not "affect the substantial rights" of Marin. See Berger v. United States, 295 78, 82-83 (1935); United States v. D'Anna, 450 F. 2d 1201, 1204 (2d Cir. 1971); Calderon v. United States, 269 F.2d 416, 418-19 (10th Cir. 1959). There was no surprise here that prejudiced Marin in any way. There was proof that Marin had "formed" a belief as to what was in the package; Marin stated after his arrest that Caicedo had given him a package containing four ounces of cocaine.

STAFF: United States Attorney
Paul J. Curran
Southern District of New York

Assistant U.S. Attorneys
T. Gorman Reilly and John D. Gordon, III

EVIDENCE - ADMISSIBILITY

ADMISSIBILITY OF APPELLANT'S INTERCEPTED LETTER TO JAILED GOVERNMENT WITNESS AS WELL AS TESTIMONY AND EXHIBITS GOING BEYOND SCOPE OF INDICTMENT UPHELD.

United States v. Martin L. Baumgarten, __ F.2d __ (8th Cir. No. 74-1493, decided May 1, 1975; D. J. No. 146-1-43-541)

On May 1, 1975, the Eighth Circuit Court of Appeals in the case of United States v. Martin L. Baumgarten, a combined appeal of three defendants, held that it was not error for the trial Court to admit into evidence a defendant's letter which had been written to a jailed Government witness and had been intercepted by prison officials, wherein the defendant displayed feelings of hatred toward police and the Governmental system, and expressed a desire to see those institutions destroyed by violence. In addition, while holding that a 21 month delay did not deny the appellants their right to a speedy trial, the Eighth Circuit Court held that evidence concerning the history and philosophy of the Students for a Demoratic Society and the overall radical movement as well as other evidence going beyond the scope of the indictment, was relevant and admissible.

The appellants were charged with conspiracy to make destructive devices without paying the required tax, interstate transportation of destructive devices, and possession of unregistered firearms. In varying combinations they were also charged with aiding and abetting in the making of illegal pipe bombs. During the course of the trial a letter written by appellant Gould to a coconspirator, Stead (not a defendant in this case), was admitted into evidence. The letter was written to Stead, a Government witness, while he was being held as a Federal prisoner. The letter, admitted over defense claims of prejudice and unlawful search and seizure, had been screened pursuant to prison regulations and contained strong language regarding Gould's hatred of police and Government, and expressed his desire to see those institutions destroyed.

Noting that the letter was written after the conspiracy had concluded, the Court found that it was not introduced as evidence of the conspiracy, but rather as an admission by Gould reflecting his motive, state of mind and friendship toward Stead as well as their common cause. As such it was admissible regardless of when written.

Answering the claim that both Gould and Stead had their expectations of privacy violated in contravention of the Fourth Amendment when the prison warden read, copied and disseminated the letter to law enforcement officials, the Court found the prison mail scanning procedures to be reasonable and in furtherance of "a substantial Governmental interest unrelated to the suppression." Since the initial opening of the letter did not violate constitutional guidelines, the copying and dissemination were justified under the "plain view" doctrine.

In a dissenting opinion Judge Bright voted to reverse on the ground that the appellants were denied a speedy trial.

Staff: United States Attorney Bert C. Hurn, Western District of Missouri

Neal J. Shulman, Criminal Division

DISTRICT COURT

POSSE COMITATUS - RECENT DEVELOPMENTS

DISTRICT COURTS CONSIDER SCOPE OF 18 U.S.C. 1385

Three recent District Court cases: United States v. Banks, 383 F.Supp. 368 (D. South Dakota, 1974); United States v. Jarmillo, 380 F.Supp. 1375 (D. Neb. 1974); and United States v. Geneva Red Feather, 43 U.S.L.W. 2446 (D.S.D. April 7,1975) have examined the scope of 18 U.S.C. 1385, the Posse Comitatus Act.

Prior to 1974, there was very little case law on the meaning and scope of the Posse Comitatus Act. In that year, however, because of the peculiar wording of 18 U.S.C. 231(a)(3), the civil disorder statute, the Posse Comitatus Act arose as a broad defense in cases arising out of the 1973 Wounded Knee, South Dakota takeover in three Federal District Courts in South Dakota and Nebraska. In United States v. Banks, supra, the defense raised the issue in a motion to dismiss two counts charging the defendants Russell Means and Dennis Banks with violations of 18 U.S.C. 231(a)(3). This code section makes it unlawful to interfere with a Federal officer "lawfully engaged in the lawful performance of his official duties" during a civil disorder. The defense argued that because of the large amount of military equipment (weapons, ammunition, Armored Personnel Carriers, flares, helmets, etc.) and the presence of military advisors and support personnel, the Federal officers present at Wounded Knee in 1973 were not "lawfully engaged" in their duties since 18 U.S.C. 1385 makes it unlawful to use "the Army or Air Force as posse comitatus or otherwise." Judge Fred Nichol, after an evidentiary hearing outside the presence of the jury, granted the defendant's motion on the grounds that the government had failed to put on sufficient evidence of lawful engagement to offset the evidence heard during the hearing. The court held that the presumption of regularity and lawfulness attached to a law enforcement officer's duties had been rebutted by evidence of the use of military equipment and the use of advice and expertise of the military personnel by Department of Justice officials. This evidence supported a finding that the Federal officers had used the military as a "posse comitatus or otherwise."

Judge Warren Urbom, sitting as a fact finder in a Wounded Knee non-leadership case, United States v. Jaramillo,

supra, granted an acquittal of two defendants charged with violations of 231(a)(3) on essentially the same grounds six days prior to Judge Nichol's formal opinion. Judge Urbom found that although the use of military equipment by Federal officers was not within the scope of §1385, the possible use of the advice and expertise of certain Army and National Guard personnel was enough to offset the presumption of lawfulness attached to the actions of the Federal officers. Therefore, according to Judge Urbom, the prosecution failed to prove that the actions of the officers were lawful. This decision was subsequently appealed with the Eighth Circuit Court of Appeals deciding it did not have jurisdiction because of the Fifth Amendment Double Jeopardy Clause. United States v. Jarmillo (8th Cir. April 1 , 1975).

On April 1, 1975, the government, in United States v. Geneva Red Feather, supra, (a Wounded Knee non-leadership case) filed a motion in limine to prohibit the defense from introducing any evidence concerning the Department of Defense involvement at Wounded Knee in 1973. On April 7, 1975, Judge Andrew Bogue ruled that the defense could only introduce evidence of a direct active role in the execution of the law at Wounded Knee by military personnel such as investigation, search, arrest, pursuit and other like activities. Judge Bogue specifically found that aerial photographic flights, maintenance personnel for loaned equipment, training by military personnel, advice or recommendations by military personnel, and other similiar activities were not unlawful under 18 U.S.C. 1385. The court found that such indirect passive roles by military personnel were not intended to be within the scope of the Posse Comitatus Act. See also, United States v. Walden, 490 F.2d 372 (4th Cir. 1974).

It appears that Judge Bogue's decision has sufficiently narrowed the scope of the Posse Comitatus Act so as to permit the Department of Defense to continue to lend effective assistance to civilian law enforcement agencies. If, however, on appeal, Judge Bogue's opinion is overturned or broadened to the scope of the opinions of Judges Urbom or Nichol, consideration will be given torecommending corrective legislation.

Staff: Allen L. Donelson,
United States Attorney (S.D. Iowa)

Keith Uhl, Assistant U.S. Attorney

Kenneth L. Fields, Criminal Division

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Wallace H. Johnson

COURTS OF APPEALS

CLEAN AIR ACT

NEW SOURCE STANDARDS, PROMULGATED PURSUANT TO SECTION 111 OF THE CLEAN AIR ACT (43 U.S.C. 1857c-6) FOR PORTLAND CEMENT PLANTS UPHELD.

Portland Cement Association v. Train (C.A. D.C. No. 72-1073, May 22, 1975; D.J. 90-5-2-4-4).

Cement manufacturers sought to invalidate the mass emission and opacity standards for new and modified portland cement plants promulgated by the Environmental Protection Agency pursuant to Section 111 of the Clean Air Act. As grounds for their challenge, petitioners alleged: (1) EPA did not comply with NEPA; (2) economic costs were not adequately taken into account and the standards unfairly discriminate against portland cement plants; and (3) the achievability of the standards was not adequately demonstrated.

In an opinion of June 29, 1973, 486 F.2d 375 (1973), the D.C. Court of Appeals remanded the case to the Administrator for further proceedings. The court held that a NEPA impact statement was not required because Section 111, properly construed, requires a functional equivalent. EPA was directed to respond to environmental questions raised in petitioners' briefs.

The court found generally that EPA had met the statutory requirement of "taking into account the cost of achieving such reduction." The court held that it was not necessary for EPA to prepare cost-benefit studies because they conflict with the time constraints of the Act and because of the difficulty, if not impossibility, of quantifying benefit to the air. EPA was directed, however, to consider on remand whether economic considerations unduly preclude the supply of certain types of cement.

Inter-industry comparisons were said by the court not to be "generally required, or even productive" unless the compared industries produce substitute or alternative

products. "The essential question is whether the mandated standards can be met by a particular industry for which they are set * * *."

The court held that the statutory requirement that the standard be based on an "adequately demonstrated" system of emission reduction does not necessarily mean that any cement plant now in existence be able to meet the proposed standard. Because the Act looks toward "what may fairly be projected for the regulated future," the Administrator may make a reasoned projection based on existing technology.

EPA was required to respond to a number of technical criticisms of its testing and methodology which formed the basis of the promulgation either because the criticisms were significant or because EPA had not disclosed the information soon enough for timely comment.

After noting that certain HEW tests had the thrust of indicating that opacity measurements are inherently inadequate, the court directed EPA to show on the record that opacity measurements can be made within reasonable accuracy.

In a per curiam decision of May 22, 1975, following EPA's remand proceedings, the court upheld the new source standards for the portland cement industry. The court found that proof of discrimination was lacking. The court upheld EPA's criteria taking economics into account: technically feasible standards would not be required if the survival of the industry were threatened, or if there was a gross disproportion between achievable reduction in emission and cost of the control technique.

The court held that the seven tests showing that the emission standard is achievable adequately respond to the court's remand on this issue. The court rejected petitioners' argument that water pollution would be aggravated as a result of the larger piles of kiln dust caused by tight emission controls.

The court upheld the opacity standard, noting that the Administrator had made a detailed analysis of numerous factors involved in the use of plume opacity. Further, the court stated, "His conclusions in resolving

the opacity problem and the achievability of the prescribed opacity standard are well reasoned. The court finds no sound basis for rejecting them, remembering the tempered review we exercise in these matters of non-judicial expertise * * *."

Staff: James R. Walpole (formerly of the Land and Natural Resources Division, initial decision); William L. Want (Land and Natural Resources Division, remand decision).

CONDEMNATION

RIGHT TO TAKE; CORPS HAS AUTHORITY TO CONDEMN LANDS FOR RECREATIONAL PURPOSES INCIDENT TO A FLOOD CONTROL PROJECT.

United States v. 412.93 Acres, Carbon Co., Pa. (C.A. 3, No. 73-1857, June 4, 1975; D.J. 33-39-921-23).

The U.S. Army Corps of Engineers condemned certain lands for a projected recreational project associated with a Corps of Engineers flood control project. The landowners argued that the Corps lacked statutory authority to condemn their lands for recreational purposes and that, in any event, the taking was arbitrary and capricious because the lands were allegedly not essential to the contemplated recreational development. After a hearing, the district court ruled that the lands were properly acquired by the Government. The court of appeals affirmed without oral argument or an opinion.

Staff: Robert L. Klarquist (Land and Natural Resources Division); Assistant United States Attorney James W. Walker (M.D. Pa.).

HIGHWAYS

DENIAL OF PRELIMINARY INJUNCTION UPHELD.

Public Interest Research Group of Michigan v. Brinegar (C.A. 6, No. 74-2329, June 2, 1975; D.J. 90-1-4-697).

Plaintiffs sought to enjoin construction on a highway intersection modification project in Michigan, alleging violation of NEPA and the Federal Highway Act. On June 21, 1973, their motion for preliminary injunction was denied.

No action was taken until August 12, 1974, when the preliminary injunction was again sought. It was denied September 29, 1974, and this appeal was taken. The court of appeals affirmed, per curiam, without intimating any view on the underlying merits, stating that the project was substantially completed, the adverse effects would be negligible, and ultimate success on the merits was uncertain.

Staff: Edward J. Shawaker (Land and Natural Resources Division); United States Attorney Frank Spies (W.D. Mich.).

DISTRICT COURTS

PUBLIC LANDS

SURVEY OF PUBLIC LANDS; ESTOPPEL.

Snake River Ranch v. United States (Civil No. 74-91, D. Wyo., May 19, 1975; D.J. 90-1-5-1411).

Snake River Ranch brought this action under 28 U.S.C. 2409a to quiet title to certain lands along the Snake River near Jackson Hole, Wyoming. The Department of the Interior, after an investigation of the original 1893 survey, concluded that the original survey was "erroneous" and therefore the lands in dispute were "omitted," and title thereto remained in the United States. A trial was held concerning the history of the movements of the river and the manner in which the original survey was conducted. The court concluded that an error in a survey must be shown with respect to each segment of the meander line and cannot be imputed from error in other places; that the Government had not sustained its burden of showing that the meander line did not approximate the sinuosities of the river at the time of the survey; that the discrepancy in the meander line was not sufficient to constitute gross error or fraud; and that the United States, in view of the long periods of time that elapsed between the time of the survey and the time of patent, "cannot now be heard to attack" plaintiff's title, which was quieted against the United States.

Staff: John E. Lindskold (Land and Natural Resources Division).

ENVIRONMENT

STANDING; NEPA STATEMENT HELD ADEQUATE.

Cummington Preservation Council v. Federal Aviation Administration (Civil No. 74-4958-F, D. Mass., May 19, 1975; D.J. 90-1-5-1405).

Plaintiff, an association of environmentalists, farmers and town citizens, filed suit challenging the adequacy of a final environmental impact statement prepared by the Federal Aviation Administration on the establishment of an air route surveillance radar facility and paved access road on Bryant Mountain, Cummington, Massachusetts.

The district court noted that plaintiff's alleged injury was solely to the economic interests of its members and as such found them to be outside the zone of interests to be protected or regulated by NEPA. Accordingly, the court determined plaintiff lacked standing to bring the action.

Admitting, however, that plaintiff could amend its complaint to successfully allege, for purposes of standing, environmental injuries to its members, the court proceeded to decide the merits of the case. Citing Silva v. Lynn, 482 F.2d 1282 (C.A. 1, 1973), the district court, in finding the EIS adequate, held: (1) that only reasonable alternatives need be considered; (2) that the treatment of such alternatives in the EIS is subject to a test of reasonableness; (3) that the rule of reason applies likewise to the discussion of secondary effects; and (4) that the Supremacy Clause precludes compelling the FAA to comply with a Massachusetts conservation statute or a town zoning bylaw.

Staff: Assistant United States Attorney James J. O'Leary (D. Mass.); Gary B. Randall (Land and Natural Resources Division).

* * *