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UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

Assistant U. S. Attorney James H. Alesia, Northern Dist. of Illinois, was recently commended by L. Patrick Gray, III for the excellent manner in which he handled a case in trial involving Peter Alexander Makres.

United States Attorney Daniel Bartlett, Jr., Eastern Dist. of Missouri and his staff were commended by Henry E. Petersen, Assistant Attorney General, for the handling of air security matters within his district. In particular, Mr. Petersen commended the dispatch with which defendants in cases involving aircraft hijacking and related offenses are being brought to trial in St. Louis, and the excellent rapport Mr. Bartlett and his staff enjoy with the local press. Also cited were the many well-considered recommendations Mr. Bartlett has made to the Department concerning air security matters.

POINTS TO REMEMBER

Revision of Forms

We have revised Forms DJ-35 and USA 117. New forms DJ-35a and DJ-35b and the revised forms are to be used in the U. S. Attorneys Offices and the Legal Divisions for collection work. A separate memorandum has been sent to each U. S. Attorney's Office and Legal Division enclosing samples and explaining their use.

We wish to extend our thanks to Elden B. Mahon, former U. S. Attorney, Northern District of Texas; John J. Klein, Criminal Division; and Bertram V. Weinberg, Chief, Collection Unit, U. S. Attorney's Office, District of New Jersey for their suggestions and assistance in making these changes which should expedite the collection process.

Management Analysis Section
Office of Management Support
(Administrative Division)

False Personation

C.A. 5 holds that an indictment under part one of 18 U.S.C. 912 requires an allegation of intent to defraud (U. S. v. Michael S. Randolph, No. 71-3314; DJ 47-18-193; 460 F.2d 367). See discussion under Criminal Division heading, this issue of the Bulletin.

Immunity Requests - Compliance With Memo No. 595 and Supplements

During the calendar year 1971 the Criminal Division authorized 970 applications for immunity orders to compel the testimony of witnesses in proceedings within its cognizance and concurred with other divisions in approving 1,821 applications. In the light of the favorable decision by the Supreme Court in Kastigar v. United States (decided May 22, 1972) holding 18 U.S.C. 6002 to be constitutional, we anticipate that the use of immunity orders as a prosecutorial device will be greatly expanded. This anticipated increase will, of course, result in a heavier burden on those who must review the applications from United States Attorneys and field attorneys and make written recommendations to the Assistant Attorney General.

Accordingly, rigorous adherence to the requirements set out in Memo No. 595, Supp. 1, Part 5 is necessary. In emergency cases where

the two-week time requirement cannot be met, it will be particularly important that the required information be supplied in order to permit an expeditious handling of the request. While telephonic emergency requests will be accepted if time does not permit a written request, every effort should be made to submit emergency requests by letter, or GSA teletype connection with the Criminal Division, or commercial teletype No. 710-822-0008 receiver located in the Criminal Division.

But even in circumstances in which adequate time for processing the request has been provided, it is expected that all of the required information will be supplied; and the initial submission of that information will avoid the delays and costs incident to specially requesting it.

While the Criminal Division encourages the use of the immunity provision as a valuable prosecutorial tool and as an essential device in the effective enforcement of many criminal statutes, nevertheless its use is recognized as a serious matter which will be sanctioned only when clearly justified and needed.

The effect of the instructions contained in Memo No. 595 Supp. 1 and Supp. 2, is, intentionally, to place a very heavy burden upon those requesting authority to immunize a prospective witness to coordinate such action with other Federal agencies, and, in appropriate cases, with State agencies. It should be noted, for example, that requests for authority to immunize must contain, inter alia, whether the witness has an FBI or local police number, whether any State or Federal charges are pending against him, an evaluation of his relative importance in the criminal activity locally, and an estimate of the offenses, State and Federal, that might be revealed and possibly excused in granting him immunity. These instructions ordinarily cannot be complied with unless a considerable inquiry has been made.

In those instances where it would be unwise to contact local officials, a statement to that effect should be made in the request, together with the impelling reasons. In any event, however, the local FBI office should be contacted and requested to supply the FBI number, if any, of the witness. It will not be considered sufficient to report that there is no known number. Additionally, the intention to immunize should be communicated to other local Federal agencies which might reasonably be considered to have an interest in the immunization.

In addition to the information specifically required in Memo No. 595, Supp. 1 and Supp. 2, any other background data relating to the witness or to the proceeding in which the witness is to testify which might be of assistance in evaluating the request should be furnished. Your attention is directed to Gelbard v. United States, Supreme Court Docket

No. 71-110, decided June 26, 1972, which holds that a witness called before a grand jury may refuse to testify, even over an immunity order, if the interrogation is based on the illegal interception of the witness' communications. In addition to the information required by Memo 595, Supp. 1 and Supp. 2, your written request should also contain information as to any interception of the witness' communications which your office is aware of.

While it is recognized that all emergency requests cannot be avoided, and that occasions will arise when written requests cannot practically be made, efforts should be made to anticipate to the extent possible those witnesses who will invoke the privilege against self-incrimination, and to secure as to them prospective authority to apply for court orders. In the event of an improper claim of privilege you should request the court to rule on the claim prior to seeking emergency approval of an application for immunity.

Neutron Activation Analysis

Due to its increasingly widespread judicial acceptance, the use of the process should be considered in any appropriate federal prosecution, particularly those involving bombing incidents. This scientific method of examining physical evidence has gradually become an accepted evidentiary tool. Nevertheless, some confusion continues to surround both its employment and admissibility.

The neutron activation process is described in some detail in WATKINS AND WATKINS, IDENTIFICATION OF SUBSTANCES BY NEUTRON ACTIVATION ANALYSIS, 15 Am. Jur. "Proof of Facts" 115, 116-119, (1964). Essentially, neutron activation analysis is a nuclear method to detect traces of an element in minute physical samples thereby establishing an identification of the substance. The process involves the "activation" of the evidentiary material and the measurement of resultant gamma ray radiation emitted by the substance. Although elaborate machinery is required in order to conduct such tests, the Federal Bureau of Investigation, Bureau of Alcohol, Tobacco and Firearms and the Postal Inspection Service all have the capability to conduct these tests at their national headquarters.

When available, neutron activation analysis can prove extraordinarily beneficial. It can be used to compare hair samples, components of bombs, paint and many other substances. Almost no substance is too small to be subjected to successful testing. In addition, the process makes accurate quantitative measurements possible; for example, neutron

analysis can be used to determine the amount of an inorganic type of poison diluted in a pool of water.

The leading case on the subject of neutron activation analysis has clearly held that the process has gained sufficient acceptance in its field and therefore cannot be excluded on the grounds of reliability. United States v. Stifel, 433 F.2d 431, 441 (6th Cir., 1970) cert. den. 401 U.S. 994 (1971); see also United States v. Kelly, 420 F.2d 26 (2d Cir.; 1969); Frye v. United States, 293 F. 1013 (D.C. Cir., 1923); State v. Coolidge, 109 N.H. 403, 250 A.2d 547 (1969).

Admissibility is not the only important consideration involved in the employment of neutron activation analysis. Cases indicate that a defendant is entitled to pre-trial disclosure of prosecutorial intent to introduce such evidence. Kelly, supra at 28-29; see also F. R. Crim. P. 16(g). Furthermore, in any case where the prosecution intends to introduce such evidence against an indigent defendant, the government must supply the funds necessary to enable the defendant to conduct similar tests. Stifel, supra, at 441.

(Criminal Division)

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

COURT FINDS A GYPSUM COMPANY GUILTY OF CRIMINAL CONTEMPT IN CONNECTION WITH A GRAND JURY INVESTIGATION.

United States v. National Gypsum Co., (Cr. 72-140; July 14, 1972; DJ 60-12-147)

On July 14, 1972, after a seven day trial, the Honorable Rabe F. Marsh, Chief Judge of the District Court for the Western District of Pennsylvania, found National Gypsum Company guilty of criminal contempt for its willful failure to produce documents pursuant to a subpoena duces tecum issued in connection with a grand jury investigation of the gypsum industry. The court levied a fine of $5,000 plus costs. The operative facts giving rise to the conviction are as follows:

On October 28, 1971, a grand jury in Pittsburgh investigating possible criminal antitrust violations in the gypsum products industry issued a subpoena duces tecum to National Gypsum Company which demanded the production, among other documents, of all appointment books, calendars and diaries of its principal executive officers. National declined to produce any desk calendars claiming they were the private papers of its officers.

Subsequently, on January 7, 1972, a second grand jury subpoena duces tecum was issued to Colon Brown, National's Chairman of the Board and Chief Executive Officer, directing him to produce desk calendars which were "used in whole or in part in connection with your duties as an employee of National." On February 3, 1972, Brown's attorney, Ira M. Millstein, Esq., of the law firm of Weil, Gotshal & Manges of New York City, moved to quash the subpoena on the ground that the documents sought were privileged under the Fifth Amendment. In support of the motion, Millstein filed an affidavit of David K. Floyd, Esq., of the law firm of Phillips, Lytle, Hitchcock, Blaine & Huber of Buffalo, New York, National's General Counsel. In the affidavit Floyd represented that the desk calendars were Brown's personal records maintained by him and his personal secretary and that they were not used by National in any fashion in the conduct of its business. He also averred that the calendars were at all times in the personal possession of Brown. In the presence of Floyd, Millstein made these same representations before Chief Judge Marsh in oral argument on the motion. Millstein also stated that National did not know of the existence of the calendars until after the subpoena duces tecum was served on it; that there was only one per year; and that Brown had received most of them from Fortune magazine.

At the urging of Millstein, Chief Judge Marsh agreed to certify the question for appeal to the Third Circuit under the Interlocutory Appeals Act, 28 U.S.C. Section 1292(b). In his petition to the Court of Appeals Millstein repeated substantially all the factual representations with respect to the character, use and origin of the desk calendars that he had made before the district court.

While the petition for permission to appeal was pending before the Third Circuit, the United States learned that Brown's 1964-1967 calendars had earlier been marked as exhibits in Wall Products Co. v. National Gypsum Co., 326 F. Supp. 295 (N.D. Cal. 1971) a private treble damage action in San Francisco, and had been used in that case to establish business meetings that Brown had with competitors, and Brown himself testified in his deposition and at the trial that the calendars were kept in his office by his secretary in the "ordinary course of business." Further inquiry revealed that Brown's desk calendars for the years 1964-1967 had been produced by National as corporate records during pretrial discovery proceedings in that proceeding. These facts concerning the calendars were brought out in the answer of the United States to the petition for permission to appeal. After the answer was filed and served, Millstein sent a telegram to the court withdrawing the petition.

On May 12, 1972, at the request of the United States, Chief Judge Marsh issued an order to show cause why the respondent National Gypsum Co. should not be found in criminal contempt for its failure to comply with a lawful subpoena duces tecum and for its willful and deliberate concealment and misrepresentation of material facts before the district court and the court of appeals for the Third Circuit.

At the trial on the order to show cause, the United States introduced evidence showing that the relevant facts concerning the corporate character, use and origin of desk calendars, and the fact that they had been produced by National in the Wall Products litigation, were known to Brown and Floyd and other individuals in National and the Phillips, Lytle law firm as early as November 3, 1971, the date on which the October 28, 1971, subpoena duces tecum was served on National. It was further established that Millstein and his associates in the law firm of Weil, Gotshal & Manges, had documents within their possession from which the true facts concerning the calendars could have been determined at least as early as December 3, 1971, when that firm was first retained to represent Brown. In addition, the United States demonstrated that the attorneys for National and Brown were greatly concerned about the possible indictment of Brown by the grand jury and therefore that they had a strong motive to withhold his desk calendars from the grand jury in an attempt to use them as a bargaining tool to obtain an order of immunity for him under 18 U.S.C. Section 6001 et seq.

In finding that National was guilty of criminal contempt in refusing to produce Brown's desk calendars pursuant to the subpoena duces tecum to the corporation, Chief Judge Marsh summarily rejected defendant's contention that when Brown testified in Wall Products that the desk calendars were maintained in the "ordinary course of business," Brown had meant in the ordinary course of his personal business rather than the corporate business of National. Judge Marsh also rejected the defendant's claim that the concealment and misrepresentation of the true facts concerning the calendars had been merely an inadvertant oversight and found instead that National had wrongfully, willfully and knowingly refused to produce the calendars.

After the sentence was rendered, National moved for a new trial and announced its intention to appeal if the motion were denied. Judge Marsh reserved ruling on the motion pending the submission of post trial briefs and proposed special findings of fact and conclusions of law.

Staff: John C. Fricano, Rodney O. Thorson, William G. Kelly, Jr., L. John Schmoll, Hays Gorey, Jr. and Gordon Noe (Antitrust Division)

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CIVIL DIVISION
Assistant Attorney General Harlington Wood, Jr.

COURTS OF APPEAL

CONSUMER CREDIT PROTECTION ACT

CADC UPHOLDS VALIDITY OF 12 C.F.R. 226.9(a) ACCORDING CONSUMER-HOMEOWNER THREE DAY RIGHT TO RESCIND CREDIT TRANSACTIONS INVOLVING BOTH CONSENSUAL AND NON-CONSENSUAL LIENS ON THE CUSTOMER'S HOME.

Gardner and North Roofing and Siding Corp., et al. v. Board of Governors of the Federal Reserve System, et al., (C.A.D.C., No. 71-1089; July 14; D.J. 145-105-43)

Appellants, two home improvement firms, brought this action for a declaratory judgment seeking to hold invalid regulation 12 C.F.R. 226.9(a) promulgated by the Federal Reserve Board under the Truth in Lending Act, Title I of the Consumer Credit Protection Act, 15 U.S.C. 1601 et seq. to implement Section 125(a) of the Act, 15 U.S.C. 1635(a). Sec. 125(a) of the Act provides that " . . . in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended . . . " the consumer shall have the right to rescind the transaction within three days. The challenged regulation, 12 C.F.R. 226.9(a), accords the consumer-homeowner the three-day rescission right of the Act " . . . in the case of any credit transaction in which a security interest is or will be retained or acquired in any real property which is used or expected to be used as the principal residence of the customer . . . ". In addition, the regulation specifically defines "security interest" to include both consensual and non-consensual liens, i.e., mechanic's, materialman's and other lien arising by operation of law (12 C.F.R. 226.2(z).

Appellants argued that Section 125(a) of the Act was enacted solely in response to abuses in the home improvement industry involving second mortgage transactions, and accordingly, by extending the protection of the Act to cover mechanics liens and the like, the Federal Reserve Board exceeded its authority. On cross motions for summary judgment, the District Court upheld the validity of the regulation and dismissed the action, and the Court of Appeals affirmed.

The Court of Appeals accepted the Government's argument that " . . . Congress intended to require disclosure of all the consequences flowing from the signing of a home improvement contract, but also those necessarily inherent therein" and the "[a]ny other construction would expose the homeowner to hidden and perhaps fatal traps; it would lead to precisely the kind of

imposition that Congress intended to prevent." Accordingly, the Court concluded that "[b]eing remedial legislation to protect the homeowner, the Act must be broadly construed to effectuate its purpose."

Staff: Thomas J. Press (Civil Division)

FEDERAL EMPLOYEES -- PERSONAL LIABILITY OF V.A. HOUSING INSPECTORS

Clayton Scyphers v. Stanley Zuk, et al. (C.A. 4, No. 71-2200; July 12, 1972; D.J. 157-67-505)

In this action for indemnification against certain employees of the VA whose duties involve the conduct of various aspects of VA's home loan program, plaintiff alleged that defendants negligently failed to ascertain deficiencies in the construction of a home which plaintiff built under contract to a VA-financed purchaser and, consequently, that defendants must indemnify plaintiff for the $75,000 he paid in settlement of a law suit brought against him by the wife of the home's purchaser, who suffered injuries as a result of the construction defects. The District Court, relying upon Barr v. Matteo, 360 U.S. 564, held that the defendants were immune from suit by virtue of their federal employment, and on that basis granted the Government's motion to dismiss.

On plaintiff's appeal, the Fourth Circuit affirmed per curiam. The Court found it unnecessary to reach the official immunity question, since it held that no duty running to the builder arose from VA's inspections. The Court noted that the inspections "were in no sense 'safety' inspections upon which the builder-vendor might reasonably have expected to rely in delivering occupancy to vendee."

Staff: Joseph Scott (Civil Division)

FOOD STAMP ACT

FOURTH CIRCUIT JOINS SIXTH CIRCUIT IN HOLDING THAT RETAIL FOOD STORE DISQUALIFIED FROM PARTICIPATION IN FOOD STAMP PROGRAM MAY OBTAIN JUDICIAL REVIEW ONLY OF MERITS OF DISQUALIFICATION, NOT OF PERIOD OF DISQUALIFICATION.

Henry L. Welch v. United States (C.A. 4, No. 71-2019, July 11, 1972; D.J. 147-67-18)

Plaintiff's retail food store was disqualified from the Food Stamp Program for sixty days for admitted violations of the Food Stamp Act of 1964 -- exchanging non-food items for food stamps. Section 11 of the Act authorizes disqualification of a food store from the Food Stamp Program for violations of the Act

for such period of time as the Secretary establishes by regulation. The Secretary's regulation provides for disqualification for a reasonable period of time, not to exceed three years, as the Secretary may determine.

Judicial review of a disqualification order is authorized by section 13 of the Act, which provides for "a trial de novo by the court in which the court shall determine the validity of the questioned administration action in issue." Proceeding under this provision, the plaintiff urged that the 60 day disqualification should be reduced or eliminated as too harsh. The District Court reduced the disqualification period to 30 days, and the Government appealed. In the Fourth Circuit, the Government argued that section 13 limits judicial review to a determination of the validity of the administrative action, i.e., of the contested facts of any violations, not of the period of disqualification (so long as that period is within the three-year maximum established by regulation). The Fourth Circuit agreed and reversed the District Court. Following the Sixth Circuit decision in Martin v. United States, 459 F.2d 300, the Court held that the review provisions were limited to a determination whether the disqualification was valid, and since the violations of the Act were admitted, the District Court lacked authority to change a sanction imposed by the Secretary which was within the range of his authority.

Staff: Michael Kimmel (Civil Division)

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT

THIRD CIRCUIT HOLDS THAT A UNION BYLAW ESTABLISHING RACIAL QUALIFICATIONS FOR PARTICULAR UNION OFFICE VIOLATES LMRDA.

Hodgson v. Local 1291, International Longshoremen's Association, (C.A. 3, No. 72-1134; decided July 20, 1972)

A bylaw of Local 1291 perpetually barred members of a specified race from election to particular union offices. Under the bylaw, only black members of the union were eligible for election to the office of union President, and only whites could be elected as Vice-President.

The Secretary of Labor challenged the validity of the bylaw in the District Court, alleging that racial exclusion from union office constituted an "unreasonable qualification" upon the right of union members to hold office, within the meaning of section 401(e) of the LMRDA, 29 U.S.C. 481(e). The District Court, holding that the bylaw contravened the purpose of the Act to assure free and democratic union elections, set aside the bylaw and ordered a new election. The union appealed.

During the pendency of the appeal, the Secretary brought an action for contempt against certain union officials, alleging that they had refused to comply with the court's order requiring the holding of a new election. After a hearing, the court, upon motion by the union, ordered that the contempt proceedings be continued until certain negotiations with the union's employees were concluded. The Secretary then filed a motion with the Court of Appeals requesting that the order of the District Court continuing the contempt proceedings be vacated, since the order had the effect of staying the new election pending appeal, in violation of section 402(d) of the LMRDA, 29 U.S.C. 482(d).

The Court of Appeals for the Third Circuit affirmed the judgment of the District Court invalidating the bylaw under the LMRDA, and ordering a new election. With regard to the District Court's order continuing the contempt proceedings, the Court of Appeals, rather than acting directly on the Secretary's motion, said that "we expect the district court promptly to vacate its continuance order".

Staff: Robert S. Greenspan (Civil Division)

* * *

CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURTS OF APPEAL

FALSE PERSONATION

C.A. 5 HOLDS THAT AN INDICTMENT UNDER PART ONE OF 18 U.S.C. 912 REQUIRES AN ALLEGATION OF INTENT TO DEFRAUD.

U.S. v. Michael S. Randolph (No. 71-3314; D.J. 47-18-193; 460 F.2d 367)

The defendant was convicted in the District Court, Southern District of Florida, of violating the first part of 18 U.S.C. 912 which provides a sanction against anyone who ". . . falsely assumes or pretends to be an officer or employee acting under the authority of the United States . . . and acts as such . . ." The indictment charged and the evidence at trial demonstrated that Randolph falsely assumed to be a Major in the United States Army, and that Randolph acted as such when he wrote a letter to his son advising that he was missing in action and subscribed the Major's name thereto.

On May 23, 1972, the Court of Appeals reversed the conviction and dismissed the indictment for failure to allege that Randolph acted with an intent to defraud, even though the wording of Section 912 does not require such an allegation. The Court placed primary reliance upon its earlier decision in Honea v. United States, 344 F.2d 798 (5th Cir., 1965), which construed the second part of Section 912 to include an element of intent to defraud. As in Honea the Court looked to the 1948 revision of the criminal law which amended the predecessor to Section 912, 18 U.S.C. 76, 1940 ed., to its present form by deleting, inter alia, the words "with intent to defraud." Pointing both to the Reviser's preface which states that few substantive changes were made and to his explanation that the words were omitted as "meaningless" in view of United States v. Lepowitch, et. al., 318 U.S. 702 (1943)*, the

*In Lepowitch, the Court spoke to the nature and extent to defraud requirement in part one of Section 76 (except for the intent requirement, Section 76 was substantially similar to the present section). It decided that an intent to defraud in regard to part one was established by facts showing that the false personation caused someone" . . . to follow some course he would not have pursued but for the deceitful conduct." Lepowitch, supra 704.

Court concluded that the deletion was not intended as a substantive change, but rather was meant to streamline the wording in conformity with the Lepowitch decision. Having found that an intent to defraud was still an element of the offense under part one, the indictment was dismissed for failure to adequately apprize the defendant of the charges he faced.

The Criminal Division opposes the decision reached in Randolph and subscribes to the views expressed in United States v. Guthrie, 387 F.2d 569 (4th Cir., 1967), cert denied, 392 U.S. 297; United States v. Mitman, 459 F.2d 451 (9th Cir., No. 71-2290; April 20, 1972); and United States v. Harth, 280 F. Supp. 425 (D.C. Okla., 1968). These cases all hold that an intent to defraud is not an essential element of the first part of Section 912. Our position remains that Congress deleted the requirement of an intent to defraud and so intended, as evidenced both by the Reviser's comment and, more persuasively, by the unequivocal language of the Section. Furthermore, even if the Lepowitch statement on intent carries forward, it is our belief that it is not something separate and apart from falsely assuming to be an officer or employee of the United States and acting as such. The Lepowitch definition of intent to defraud in connection with part one of the Section is subsumed in the false personation itself. For that reason the words were indeed meaningless. For a similar statement, see, Honea v. United States, 344 F.2d 802. Although no writ of certiorari was sought to reverse the Randolph decision, that fact is not to be taken as indicating the Criminal Division's acquiescence in that holding. In districts outside the Fifth Circuit, we do not believe it necessary to allege an intent to defraud under part one of Section 912 and therefore advise against it. The General Crimes Section of the Criminal Division has administrative responsibility for overseeing the enforcement of 18 U.S.C. 912, and any inquiries in regard to the statute should be directed to that Section, on telephone number 2346.

NARCOTICS AND DANGEROUS DRUGS

IT IS PERMISSIBLE FOR A JURY TO BE INSTRUCTED THAT THEY MAY FIND A DEFENDANT GUILTY OF INTENT TO DISTRIBUTE MARIHUANA FROM DEFENDANT'S POSSESSION OF 8 POUNDS OF MARIHUANA.

United States v. Harriott H. Childs (C.A. 4, No. 71-1629, July 13, 1972; D.J. 12-017-79)

The defendant was convicted under the Assimilative Crime Act, 18 U.S.C. Section 13, of knowing possession of marihuana with intent to distribute in violation of Section 54-424.101(a) of the Code of Virginia. The marihuana involved here was packed in a trunk in the form of sixteen bricks weighing about a half pound each and had been shipped from Los Angeles to Washington National Airport in Arlington County, Virginia. Officials at National

Airport were aware that the trunk contained marihuana since an Air Freight Supervisor in Los Angeles had previously opened the trunk and discovered the marihuana. He notified federal narcotic officers in Los Angeles and they subsequently notified other federal officers and airport officials in Virginia. The trunk was addressed to "Pamela Feldman." When the trunk arrived at National Airport, the defendant presented the airline with the claim bill for the trunk and, after signing "Pamela Feldman" to the receipt, took possession of the trunk. When defendant placed the trunk in her car, she was arrested.

The particular Virginia statute violated here had a subsidiary provision which allowed any conviction under the substantive section of the statute, possession with intent to distribute, to be based "solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed." In instructing the jury the trial judge first read the statute in its entirety, including the subsidiary provision, and then instructed the jury that they could find an intent to distribute from other facts and circumstances in the case and that they were not required to infer from all the relevant evidence that the defendant intended to distribute the marihuana. On appeal to the Circuit Court of Appeals for the Fourth Circuit the defendant contended: (1) that the provision allowing a conviction to be based solely on the quantity of the drug possessed was unconstitutionally vague, (2) that her conviction was not based on sufficient evidence, and (3) that the trial judge gave an improper jury instruction. The Court affirmed the conviction on all three counts.

1. The Court summarily dismissed appellant's first two contentions concerning the vagueness of the subsidiary provision and the sufficiency of the evidence. With regard to the former the Court pointed out that even if the provision was vague (a point which the Court did not decide either way) that would not render the earlier substantive section unconstitutional. The relevance of the subsidiary provision would only attach to the sufficiency of the evidence and the jury instructions. With regard to sufficiency of the evidence claim, the Court ruled that "intent" could be proved by circumstantial evidence and that the circumstances here were sufficient to support a jury finding of guilt beyond a reasonable doubt.

2. On the jury instruction issue the Court pointed out that the trial judge did not instruct the jury solely on the basis of the subsidiary provision, but rather the District Court used a much broader instruction which allowed the jury to consider "other facts and circumstances: in determining whether the defendant had an intent to distribute. This broader instruction was, in essence, the normal instruction employed in the absence of a statutorily authorized inference, and was a permissible instruction.

Further, since the trial judge had stated in his instructions that the jury was "not required" to infer an intent to distribute from the evidence presented, there was no violation of the ruling announced in Turner v. United States, 396 U.S. 398 (1969). In particular, the Court of Appeals pointed to Mr. Justice Marshall's concurring opinion in Turner in which Justice Marshall stated that evidence of possession of 275 bags of heroin "proved beyond a reasonable doubt" that the defendant was guilty of distributing heroin. Since the appellant here did not question the Virginia statutory provision on the sufficiency of the evidence to convict, the Court found it unnecessary to decide that question and it affirmed the conviction.

Staff: United States Attorney Brian P. Gettings; James J. Tansey (Criminal Division) (E.D. Va.)

THE PUBLIC AND DEFENDANT MAY BE EXCLUDED FROM PRETRIAL HEARINGS UNDER CERTAIN CIRCUMSTANCES. SEARCH AND SEIZURE AT AIRPORT HELD REASONABLE.

United States v. Henry Bell (C.A. 2, No. 72-1322, July 5, 1972); D.J. 12-51-1906)

The defendant entered LaGuardia Airport and purchased a ticket on Eastern Airlines to Atlanta, Georgia. The defendant and the circumstances of the ticket purchase caused the ticket seller who was familiar with an anti-hijacking system developed by the Federal Aviation Administration to designate the defendant as a "selectee". Therefore defendant was given a ticket which would identify him at the flight gate as a person who fell within the category of a potential hijacker. As the passengers left the lounge for the plane they all had to pass through a device known as a magnetometer, designed to detect the presence of metal objects on persons. When the defendant walked through the magnetometer, it was activated, indicating the presence of a metal object. The defendant was asked to walk through the device a second time which produced the same result. A United States Marshal assigned to the air piracy program requested defendant's ticket and identification. Defendant responded that he had just been released from the Tombs and that he was out on bail for attempted murder and narcotic charges. The defendant consented to be "patted down" by the marshal. The marshal felt hard objects in the defendant's raincoat pockets which defendant described as candy for his mother, but upon further investigation the marshal discovered that the hard objects were brown paper bags containing glassine envelopes filled with heroin. The defendant was arrested and subsequently convicted of failure to pay tax on narcotics in violation of 26 U.S.C. Section 4724(c).

The defendant first argued that his fifth and sixth amendment constitutional rights were infringed at the pretrial suppression

hearing where the judge granted the government's motion to hear the testimony of the ticket agent at an in camera proceeding from which the defendant and the public were excluded while only the defendant's counsel was permitted to remain and take part in the proceedings. The government's justification for the barring of the public and the defendant was based upon the urgency of protecting the confidentiality of the method devised to reduce the threat of hijackings. The Court ruled that the exclusion of the public has been found constitutionally acceptable where it was deemed necessary to protect the defendant, where there has been harassment of witnesses, or to preserve order. The justification for the limited exclusion for the protection of the air travelling public presents at least as substantial a consideration as those which prompted the previously recognized exceptions. The Court further found that the defendant's claim that he was denied his sixth amendment right to be confronted with the witness against him is not supportable, since the ticket seller was the only witness examined out of the presence of the defendant and such testimony was heard under oath by the trial judge, as well as by defendant's counsel who also had the opportunity to cross-examine. The Court, in noting that the exclusion of the defendant was made during the suppression hearing and not the trial, stated that the accused is not affored many of the safeguards at the preliminary hearing which are given him at the trial. McCray v. Illinois, 383 U.S. 300 (1967)

Defendant's second contention was that he was the victim of an unlawful search and seizure when he was stopped and frisked at the airport. The Court, disagreeing with the defendant's argument, ruled that under the test of Terry v. Ohio, 392 U.S. 1 (1968), the search was eminently sensible and reasonable and the pat down did not offend any of the fourth amendment rights of the defendant, since at that point the U.S. Marshal was aware that the defendant was designated as a "selectee," he had activated the magnetometer, he had no personal identification, and he freely admitted that he was out on bail facing narcotic and attempted murder charges. The Court also rejected defendant's argument that the magnetometer constituted an unreasonable search by concluding that the use of the device was a reasonable caution in view of the magnitude of skyjacking and the exigencies of time which precluded the obtaining of a warrant, United States v. Epperson, 454 F.2d 769 (4th Cir., 1972). Nor did the Court find that the frisk was excessive in scope. The weapon of the skyjacker is not limited to the conventional weaponry of the burglar. His arsenal may include explosives. Therefore, when the U.S. Marshal felt hard lumps in the defendant's coat pockets, he was clearly correct in requesting defendant to remove the objects and inspecting them. Since it was contraband, it could be seized even though it was not the object of the search. Abel v. United States, 362 U.S. 217 (1960); Chimel v. California, 395 U.S. 752 (1969).

Finally, the Court held that there was no obligation to give the Miranda warnings to the defendant prior to his initial questions.

Staff: United States Attorney Robert A. Morse
Assistant United States Attorneys Paul B. Bergman and David G. Trager (E.D.N.Y.)

THERE IS NO REQUIREMENT THAT THE HEROIN USED TO CONVICT A DEFENDANT OF SELLING HEROIN BE ACTUALLY INTRODUCED AT TRIAL WHERE OTHER RELIABLE EVIDENCE IS OFFERED WHICH ESTABLISHES THE NATURE OF THE HEROIN.

United States v. Annette Graham and John Lonnie Jerkins (C.A. 5, No. 71-2792, July 18, 1972; D.J. 12-017-17)

Defendants were convinced at a joint trial on three counts of selling heroin to government undercover agents in violation of 26 U.S.C. Section 4705(a). In order to prove its case, the government had to show that the substance sold to the agents was in fact a "narcotic drug", i.e., heroin. At the trial the government's expert witness testified that the government's exhibit number one, an envelope with two vials in it, actually contained heroin. The vials were allegedly purchased from the defendants on two separate occasions. However, the witness only testified as to the contents of one vial and not to the other, which had been purchased on an earlier date and was the basis for count one of the indictment. Further, the alleged heroin from count three of the indictment had been misplaced and was not introduced into evidence at all. In its place the government introduced a form that had been filled out in the laboratory of the Bureau of Narcotics and Dangerous Drugs. The form stated that the laboratory had received 14 foil packets which contained varying amounts of heroin.

On appeal to the Circuit Court of Appeals for the Fifth Circuit appeallants contended that count one of the indictment had not been proved since the expert had not testified that heroin was in the second vial and that the trial court committed error by allowing the government to introduce the report stating that the substance examined was heroin instead of requiring the introduction of the heroin itself. The Court of Appeals reversed and remanded in part, and affirmed in part. The Court agreed with appellants' first contention about the testimony of the expert witness, but dismissed the second claim, along with other contentions of the appellants, as being without merit.

1. The statute involved here specifically covered the unlawful sale of "narcotic drugs." Thus, there had to be some evidence that the second vial in the envelope also contained heroin. Since there was no other evidence introduced which tended to show that the vial contained heroin, the government

had failed to prove an essential element of the offense as defined by the statute. Even though the appellants had not moved for a judgment of acquittal on this count, their convictions could not stand under these circumstances.

2. With regard tc the introduction of the BNDD lab report instead of the actual evidence, the Court rejected the appellants' claim that they were prejudiced in that they could not examine the evidence to determine whether it had been tampered with. The Court held that there is no requirement that the prosecution introduce the contraband itself when there is other reliable evidence proffered which establishes the nature of the contraband. Since the government form gave a detailed description of the physical appearance of the evidence, it was not error to fail to introduce the heroin.

Staff: United States Attorney William H. Stafford
Assistant United States Attorney Clinton Ashmore
(N.D. Fla.)

* * *

INTERNAL SECURITY DIVISION
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 USC 611) which requires persons with the Attorney General by certain persons who engage within the United States in defined categories of activity on behalf of foreign principals.

AUGUST 1972

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

International Sino-American Association (ISATA), Washington, D. C. registered as a trade association. Registrant's initial funding is provided by the Board of Foreign Trade, Ministry of Economic Affairs, Republic of China to cover expenses during 1972 totalling $58,750.00. That principal will continue to fund the registrant until such time as its membership dues are adequate to support registrant's activity. Registrant will, on behalf of its members both American and Chinese, provide services intended to promote the expansion of trade and investment between the United States and the Republic of China. This activity may include collection and dissemination of information, appearances before official bodies, participation in regulatory proceedings and similar general activities. Myron W. Solter filed a short-form registration statement as Executive Director with a salary of $36,000 per year and Sally Hart filed as Secretary-Treasurer and reported no compensation for her services.

Kenyon & Eckhardt, Inc. of New York City registered as advertising agency for the French West Indies Tourist Board, Guadeloupe. Registrant will prepare and place advertisements promoting tourism to the French West Indies and for such services will receive the standard 15% to 17.65% agency commission plus production expenses. Alan Levenstein filed a short-form registration statement as Advertising Executive working directly on the FWI account. Mr. Levenstein is a regular salaried employee of the registrant corporation.

Arnold & Palmer & Noble of San Francisco registered as public relations counsel to the Japan Trade Center. Registrant's contract covers the period July 1, 1972 through March 31, 1973. Registrant is to receive a fee of $15,750 plus out-of-pocket expenses. Registrant is to conduct a public relations program including the preparation and release of news stories, feature articles,

newsletters, brochures, paid advertising in all media and report to the principal on public opinion and media reaction as well as submit monthly Trade Climate Reports. The following persons filed short-form registration statements as persons working directly on the Japanese account: Richard A. Diespecker, Richard K. Arnold, Gerald S. Noble, Sam Meblin and William Jacob. All are regular salaried employees of the registrant corporation.

French Industrial Development Agency of New York City registered as agent of the French Government, Paris. Registrant represents the French Government in the United States in the encouragement of United States investment in France, and in particular industrial investment capable of increasing employment. Registrant seeks out potential investors, provides them with information and facilitates contacts between the investors and the French Government. Registrant receives a yearly allowance of $62,216 for salaries, entertainment, travel and miscellaneous and its annual budget for operating expenses is directly managed by the French Embassy in Washington, D. C. Marie Monique Steckel filed a short-form registration as Director with an annual salary of $18,600.

Donald J. Sauermann, d/b/a Sauermann Productions of Dallas, Texas, registered advertising and public relations counsel to the Japan National Tourist Organization. Registrant's agreement covers the period August 1, 1972 through March 31, 1973 and provides for a public relations budget of $1,200 and an advertising budget of $2,011.76. Registrant will promote tourism to Japan travel advertisments, news releases, films and will handle the press coverage in connection with visiting Japanese officials, travel seminars and shows.

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

COURTS OF APPEAL

CONDEMNATION

COSTS; 28 U.S.C. SEC. 2412; POWER OF COURT TO TAX LANDOWNER'S TRIAL COSTS AGAINST GOVERNMENT; JURISDICTION OF COURT OF APPEALS TO CONSIDER CHALLENGE TO AWARD OF COSTS.

United States v. 2,186.63 Acres in Wasatch County, Utah (H. Clay Cummings Estate), et al. (C.A. 10, No. 71-1749, July 24, 1972; D.J. 33-46-249-70)

This appeal involved the power of the trial court to tax, against the United States, the costs incurred by the landowner in a condemnation action. After trial, the jury returned an award of just compensation above the amount deposited by the Government as estimated just compensation. Thereafter, the District Court entered a deficiency judgment for the balance due to the landowner together with a provision providing for the payment of "any allowable costs."

The Government's objection to the taxation of costs, in a motion to amend the judgment by deleting that portion, was denied by the District Court. An appeal was taken from that order.

The Court of Appeals first rejected the landowner's argument that it lacked jurisdiction because the order from which the appeal was taken was not final. The Court held that when, as here, the power of the Court to assess any costs is an issue, an order granting or denying costs is final and appealable under 28 U.S.C. sec. 1291.

The Tenth Circuit then determined that 28 U.S.C. sec. 2412 does not require or permit the taxation of costs in condemnation actions. It stated that the legislative history of the 1966 amendment of that section, sponsored by the Department of Justice, revealed that it was intended to eliminate the disparity existing in litigation between private parties and the Government. Previously, the Government could recover costs if it prevailed but the private party could not. However, the Court noted that this disparity did not exist in condemnation cases where neither party traditionally obtained costs from the other.

Furthermore, the Court of Appeals found that subsequent legislation which provides for the allowance of condemnation costs in very limited situations, 42 U.S.C. sec. 4654(a), reinforces the conclusion that the 1966 amendment to 28 U.S.C. sec. 2412 did not provide authority for such taxation of costs.

Thus, this decision of the Tenth Circuit is in full accord with a similar holding of the Sixth Circuit in United States v. An Easement, etc., 452 F.2d 729 (1971), and also United States v. 23.94 Acres of Land, 325 F.Supp. 330 (W.D. Va. 1970).

Staff: Max Findley and Peter R. Steenland (Land and Natural Resources Division)

CONTRACTS; EVIDENCE

BURDEN OF PROOF ON A MOTION FOR RELIEF FROM JUDGMENT; RULE 60, F.R.CIV.P.; FAILURE TO PROVE PORTION OF BEACH NOT PUBLIC; CLEARLY ERRONEOUS.

United States v. Harrison County, Mississippi and Eldon L. Bolton, Jr., et al. (C.A. 5, No. 71-2881, Jul. 31, 1972; D.J. 144-41-336)

This is the third appeal in this extended litigation. Previously, the United States had obtained injuctive relief to enforce its contract with the County to maintain for public use a 26-mile artificially constructed beach near Biloxi, Miss. 399 F.2d 485, reh. den., 414 F.2d 784, cert. den., 397 U.S. 918; see also 445 F.2d 276. The Boltons then sought exception from the final judgment, claiming that the beach fronting their property had never been under the waters of the Mississippi Sound and thus could not have become the property of the State subject to public dedication upon reclamation. The District Court ruled that the Boltons had failed to carry their burden of proof.

The Court of Appeals affirmed. Characterizing the Boltons' petition as a Rule 60, F.R.Civ.P., motion for relief from judgment, it held that the District Court had correctly placed the burden of proof upon the Boltons and, on the basis of the record, it could not be said that the District Court's findings were clearly erroneous.

Staff: John D. Helm (Land and Natural Resources Division); Assistant United States Attorney Robert E. Hauberg (S.D. Miss.)

DISTRICT COURT

ENVIRONMENT; INJUNCTIONS

CLEAN AIR ACT; FEDERAL INSTALLATIONS NEED NOT APPLY FOR STATE PERMITS; PERMANENT INJUNCTION DENIED.

California v. Stastny, et al. (C.D. Cal., No. 72-112-WPG Civil, Jul. 18, 1972; D.J. 90-5-2-3-6)

The Los Angeles County Air Pollution Control District (the District) filed an action in the Superior Court of California against the United States Navy and certain officers of the Navy. The complaint alleged that the defendants are under a mandatory duty to comply with certain rules and regulations of the District which require the owner of equipment that emits pollutants into the air to obtain operating permits for such equipment. The complaint also alleged certain violations of local air pollution emission standards. The action was removed to the Federal District Court in Los Angeles.

The two issues involved in this case were (1) whether Section 118 of the Clean Air Act, 42 U.S.C. Sec. 1857f, requires federal facilities to apply for and obtain local operating permits, and (2) whether Section 118 of the Clean Air Act requires federal facilities to comply with local emission standards.

Section 118 of the Clean Air Act states in part:

> Each department, agency and instrumentality of the executive, legislative and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in a discharge of air pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements . . .

The defendants contended that Section 118 of the Clean Air Act does not require federal facilities to apply for and obtain local operating permits. The defendants filed a motion for partial summary judgment based on this contention. The motion did not involve the issue of whether the local emission standards had been violated. Briefs and oral arguments were presented to the Court and the defendant's motion was granted. The judgment (partial) handed down states in part:

* * * * *

> 1. Injunctive relief. Plaintiff is not entitled to either a preliminary or a permanent injunction enjoining the defendants from refraining to comply with those provisions or parts of Rule 10 of the Rules and Regulations of the Los Angeles County Air Pollution Control District which pertain to the application for and obtaining of permits from the Air Pollution Control officer of said district.
>
> 2. Declaratory relief. The Clean Air Act (42 U.S.C. 1857 et seq.) as amended by the Clean Air Amendments of the 1970, Public Law 91-604, 84 Stat. 1676, does

not require either the defendant, United States Navy or the individual defendants, to comply with Rule 10 of the Rules and Regulations of the Los Angeles County Air Pollution Control District to the extent that said Rule 10 requires the defendants apply for and obtain permits prior to the operation and use of any machines or equipment at the naval base at Long Beach, California.

The issue of whether the defendants violated local emission standards is still pending.

Staff: James R. Walpole (Land and Natural Resources Division); Assistant United States Attorney Donald J. Merriman (C.D. Cal.)

REFUSE ACT

ELEMENTS CONSIDERED BY COURT IN AWARDING BOUNTY PURSUANT TO 33 U.S.C. SEC. 407.

United States v. Anaconda Wire and Cable Co. (S.D.N.Y., No. 71-Cr. 1020, May 22, 1972; D.J. 62-51-434)

The Anaconda Wire and Cable Company was indicted, pursuant to the Refuse Act, 33 U.S.C. Sec. 407, for 100 counts of discharging refuse into navigable waters of the United States. The defendant pleaded guilty as charged to all 100 counts. The sentence was a fine of $200,000. Thereafter, the Hudson River Fishermen's Association (H.R.F.A.) notified the United States Attorney for the Southern District of New York that it was entitled to a statutory reward for information given which led to the conviction of the defendant. The reward provision is set out in 33 U.S.C. Sec. 411 as follows:

> Every person and every corporation that shall violate * * * the provisions of Section 407 . . . shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2500 nor less than $500, or by imprisonment . . . for not less than 30 days nor more than one year, or both such fine and imprisonment, in the discretion of the Court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. [Emphasis supplied.]

The United States Attorney sought an order from the Court fixing an award to H.R.F.A. Initially, the claimant sought one-half of the entire fine. Subsequently, the claimant and the United States compromised this figure and agreed that the value of the information was $25,000.

The agreement between the claimant and the Government did not settle all the issues. The Court stated:

> Several substantial questions remain for resolution by the court. The first concerns the determination of the proper statutory role of the court in passing upon any claim to an informer's reward. After the nature of that judicial function is defined, H.R.F.A.'s activities must be evaluated. Finally, if an award is determined to be mandated or appropriate, a dollar figure must be arrived at. The $25,000 agreement would not necessarily be binding even there. [Unpublished opinion, p. 3.]

Regarding the first issue, the Court stated that the statute provides the informer with an affirmative right to the reward and there is nothing in the statute which would permit a discretionary refusal to withhold the reward altogether from a qualified informer. The Court then examined the issue of whether or not H.R.F.A. qualified as an informer. The Court said:

> The preferable method for determining whether a claimant is entitled to an informer's award would appear to be to require of the claimant proof only of collection and transmittal of information which could have provided an adequate basis for the decision to initiate a criminal investigation. [Unpublished opinion, p. 19.]

If the United States contested the reward, it would have to persuade the Court that the prosecution was independent of information provided by a claimant; if the United States did not contest the reward, it should substantiate the claimant's allegations in so far as the proof was in the Government's possession. Regarding the H.R.F.A., the Court stated:

> Its activities did unquestionably lead to conviction, not because it provided expert reports of detailed chemical analysis of particular effluent discharged on each or any of the days mentioned in the various counts of indictment, nor even because it was the first to discover the fact of an unlawful discharge. Rather, H.R.F.A. persistently challenged the bureaucratic inertia which characteristically prevents effective governmental action on controversial matters. [Unpublished opinion, pp. 22-23.]

The Court rejected the agreement between the claimant and the United States which valued H.R.F.A.'s activities at $25,000. Instead, the Court awarded the claimant $20,000 and stated that it considered this figure equitable to all.

Staff: United States Attorney Whitney North Seymour, Jr.; Assistant United States Attorney Ross Sandler (S.D.N.Y.)

REFUSE ACT; INJUNCTIONS

PERMANENT INJUNCTION AGAINST DISCHARGING SEWAGE SLUDGE INTO ATLANTIC OCEAN; SEWAGE SLUDGE NOT INCLUDED IN "STREETS AND SEWERS" EXCEPTION; ATLANTIC OCEAN IS NAVIGABLE WATER OF UNITED STATES WITHIN MEANING OF REFUSE ACT.

United States v. City of Asbury Park, et al. (D. N.J., No. CA 84-72, Feb. 17, 1972; D.J. 90-5-1-1-242)

The United States filed this action seeking a preliminary and a permanent injunction to restrain 16 coastal communities in New Jersey from discharging large amounts of sewage sludge into the Atlantic Ocean. The Government contended that the practice of discharging sludge into the Atlantic Ocean is a violation of the Refuse Act, 33 U.S.C. Sec. 407.

All the defendants operated primary sewage treatment plants in New Jersey. The defendants received raw sewage and divided it into two components: sludge (which consists of solids which settle out from the sewage) and liquid effluent. Both the sludge and the effluent were pumped into the Atlantic Ocean through outfall pipes. Immediately after the action was filed, the Court issued a temporary restraining order which ordered the defendants to refrain from pumping sludge into the ocean until the matter was resolved.

The Refuse Act, 33 U.S.C. Sec. 407, states in part:

> It shall not be lawful to throw, discharge or deposit . . . from the shore, wharf, manufacturing establishment or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States . . .

The defendants' first contention was that the Atlantic Ocean is not a navigable water of the United States. The Court rejected this argument and stated, "There can be no question that the Atlantic Ocean is a navigable water of the United States within the meaning of the Rivers and Harbors Act of 1899." 3 ERC 1718. The defendants also contended that sludge falls within the "streets and sewers" exception set forth in the Refuse Act in that it is a by-product of sewage and, when discharged into the ocean, is flowing in a liquid state. The Court rejected this argument:

> . . . the circumstantial evidence indicates that while the consistency of sludge may vary amongst the plants of the various defendants--and, indeed in the plants themselves--the characteristics of the sludge in all

> the defendants' plants are essentially the same. Sludge, then, is not sewage and is not, by composition, its equivalent. Accordingly, sludge is not "refuse . . . flowing from streets and sewers and passing therefrom in a liquid state . . .," within the exception contained in the Act.

Finally, the defendants contended that the Government had not established that the discharge of sludge would cause immediate and irreparable harm and, therefore, injunctive relief was not appropriate. The Court also rejected this argument:

> The discharge of sludge into the Atlantic Ocean, in the circumstances here, constitutes immediate and irreparable harm and produces a destructive impact upon marine life and upon the environment generally. More importantly, the sludge disposal practice of the defendants here presents a dangerous health hazard, that is both immediate and continuing, to those many thousands of human beings who utilize the coastal waters along the New Jersey beaches for year-round recreation.

The Court permanently enjoined the defendants from discharging sludge into the waters of the Atlantic Ocean.

Staff: James R. Walpole (Land and Natural Resources Division); United States Attorney Herbert J. Stern, and Assistant United States Attorneys Richard W. Hill, Z. Lance Samay, and Carl W. Woodward (D. N.J.)

* * *