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## Legal Anatomy of an Air Pollution Emergency

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# LEGAL ANATOMY OF AN AIR POLLUTION EMERGENCY

By Doug Rendleman\*

## INTRODUCTION

In November 1971 in Birmingham, Alabama the emergency section of the federal Clean Air Act was used for the first time. Particulate emissions had combined with an inversion to raise Birmingham's particulate count over 750. Neither the state nor the local government was able to act. The federal Environmental Protection Agency, early in the morning of November 18, secured a temporary restraining order. Twenty-three major industries, employing a total of about 25,000 production employees, were ordered either to phase down or to curtail production in order to lessen particulate emissions drastically. Less than 36 hours later the temporary restraining order was dissolved on the motion of the Environmental Protection Agency.

This article will discuss the legal aspects of the November crisis. The federal emergency legislation and its legislative history will be examined, and the Environmental Protection Agency's response to the legislation will be summarized, with an emphasis on particulate pollution. With the federal framework thus explained, the article will describe the local background: the setting of Birmingham and its air pollution problem, the then operative state and local controls, and the events of the emergency itself. Attention will then turn to the lawsuit, *United States v. U.S. Steel*, which was the Environmental Protection Agency's solution for the November crisis; an analysis will be made of the temporary restraining order secured therein and its dissolution the next day. Following a summary of the events of the lawsuit, the article will consider the fundamental legal problems attendant to the regulatory process. The lack of notice to the Birmingham defendants and the difficulties that resulted are singled out for extended comment. In addition, hard-

ships arising from the use of "temporary" orders to attain "final" relief are discussed. The writer concludes that the order should have been preceded by notice and by some species of hearing, especially since it might have been foreseen that the order would be effectively final. The writer then explores possible remedies for incorrectly enjoined defendants, finds them wanting, and suggests an amendment to the legislation in order to ameliorate injustices created by incorrect emergency orders.

#### THE LEGISLATION

The serious federal scheme of air pollution control began in 1967.<sup>1</sup> The legislation authorized funds for state and local regulatory programs and required HEW (1) to divide the nation into areas and regions, (2) to promulgate criteria for air quality in each region, and (3) to issue technological documents to the states. The states were to set standards and to establish plans for enforcement. Although the state and local governments had primary responsibility for enforcement, HEW could act to enforce state standards if the state was not enforcing its own standards and if the pollution traveled interstate. In the case of intrastate pollution, HEW could only act upon a request by the governor of the state. HR 9509, the administration bill, contained no emergency powers. S. 780 included emergency powers which became §108(k) of the Air Quality Act of 1967. It provided:

Notwithstanding any other provision of this section, the Secretary, upon receipt of evidence that a particular pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to the health of persons, and finding that appropriate State or local authorities have not acted to abate such sources, may request the Attorney General to bring suit on behalf of the United States in the appropriate United States district court to immediately enjoin any contributor to the alleged pollution to stop the emission of contaminants causing such pollution or to take such other action as may be necessary.<sup>2</sup>

The 1967 Act was unsatisfactory. The procedure to establish standards and attain compliance was cumbersome and time-consuming.<sup>3</sup> For example, as of September, 1970 only one case had proceeded beyond the preliminary conference stage. In that case, it had taken five years——through the conference, to the public hearing and the courts——to shut down a Maryland chicken-processing

factory.<sup>4</sup> There were not enough funds or personnel in either the state or the federal governments. Enforcement, in short, was difficult.<sup>5</sup> There is no indication that any action was taken under the emergency powers in §108(k).<sup>6</sup>

The Clean Air Amendments of 1970<sup>7</sup> were designed to remedy the defects in the earlier legislation. The Environmental Protection Agency was created to assume responsibility under the Act. With respect to establishing criteria and standards the 1970 Amendments do not require the extended procedure required by the earlier legislation. Moreover, the 1970 Amendments delegate to the Administrator of the Environmental Protection Agency substantially more power to intervene in state implementation and enforcement. The emergency provision from the 1967 Act was carried forward by the 1970 Act;<sup>8</sup> it requires both (1) pollution which "is presenting an imminent and substantial endangerment to the health of persons" and (2) state or local inaction. Both the committee reports and testimony before the committees shed light on the language.

When the Clean Air Act was enacted in 1967, the Senate Public Works Committee and the House Committee on Interstate and Foreign Commerce stressed the need for the emergency provision as an interim measure to allow some control while the Secretary of HEW was developing enforceable standards.<sup>9</sup> The emergency exception, the committees felt, was not designed to short circuit the elaborate procedure of the rest of the act for "chronic or generally recurring pollution problems."<sup>10</sup> Rather, it was to be used when "there . . . [was] an unusual atmospheric inversion or other extraordinary grouping of circumstances creating a substantial and imminent danger to public health. . ."<sup>11</sup> Both reports cited as examples: Donora in 1948, London in 1952 and 1962, the Meuse Valley in Belgium in 1930, and New York City in 1953.<sup>12</sup> According to testimony before and material submitted to the House Committee on Interstate and Foreign Commerce, at Donora "an industrial town which, in 1948, normally recorded about one death every 3 days, 17 people died in a single 24-hour period during a 4 day smog."<sup>13</sup> During the London fog of 1952 "4,000 more deaths occurred in that city than would normally have happened during a similar period of time."<sup>14</sup> The cause of these tragedies, according to material submitted to the committee by the Public Health Service, seems to have been sulfuric acid.<sup>15</sup> Such events are in the words of former Surgeon General Dr. Stewart "dramatic and tragic"<sup>16</sup> and emphasize the need for effective emergency remedies.<sup>17</sup> It was ap-

parent after the 1967 legislation that Congress intended the emergency provisions to apply to the serious, the exacerbated and the immediately dangerous pollution hazard.

Section 303 of the 1970 amendments reenacted the emergency provision of the 1967 legislation with some technical changes.<sup>18</sup> Legislative documents reveal a new sense of urgency and purpose. The Senate Report on S. 4348 stated:

The legislation reported by the committee is the result of deep concern for protection of the health of the American people. Air pollution is not only an aesthetic nuisance. The Committee's concern with direct adverse effects upon public health has increased since the publication of air quality criteria documents for five major pollutants (oxides of sulfur, particulates, carbon monoxide, hydrocarbons and oxidants). These documents indicate that the air pollution problem is more severe, more pervasive, and growing at a more rapid rate than was generally believed.<sup>19</sup>

The statement on the federal government's emergency powers reveals a new emphasis and a changed definition of emergency:

The committee believes that this emergency authority is necessary to provide for immediate, effective action whenever air pollution agents reach levels of concentration that are associated with (1) the production of significant health effects, (2) incapacitating body damage, or (3) irreversible body damage in any significant portion of the general population. The term "significant portion" is not intended to exclude sensitive elements of society as asthmatics, but only those groups of particularly susceptible persons for whom other precautionary measures should be taken. Secondly, the emergency situation exists whenever there is any perceptible increase in the mortality rate.

The levels of concentration of air pollution agents or combinations of agents which substantially endanger health are levels which should never be reached in any community. When the prediction can reasonably be made that such elevated levels could be reached even for a short period of time—that is that they are imminent—an emergency action plan should be implemented to reduce emissions of air pollution agents and prevent the occurrence of substantial endangerment.<sup>20</sup>

The Committee felt that vigorous emergency action should be forthcoming from the federal government:

The Committee is not satisfied with existing State and local air

pollution alert strategies. Recommendations that children not run to and from school and that events be suspended are not a substitute for reducing pollution. The Committee believes that air pollution alerts authority should include plans which provide for the immediate reduction of non-essential operations which contribute to an episode situation.<sup>21</sup>

Thus, with a heightened sense of urgency and a broader sense of emergency, Congress handed the Administrator the old legislation in new clothes.<sup>22</sup>

Information and guidelines promulgated by the Environmental Protection Agency in August and October 1971 to assist States in drafting plans also bear on the meaning of emergency. These criteria do not bind the federal administrator's discretion to act under §303. Nevertheless, they are relevant in defining an emergency since the regulations cite §303 and distinctly hold out the possibility that if the quality standards are exceeded and if the state either lacks a plan or fails to act under an existing plan, then the federal administrator will act under the powers granted in §303.<sup>23</sup> Each state plan for a Priority I region must include, as part of a graduated response to a possible pollution episode, a "contingency plan" to decrease emissions in an emergency. An emergency episode is "an immediate and serious threat of significant harm to the health of any significant portion of the general population."<sup>24</sup> The plan must be divided into two stages, warning and emergency. It must be preventative rather than remedial: the local authorities must be prepared to act in anticipation of the actual emergency levels "to prevent ambient pollutant concentrations at any location . . . from reaching such levels which would cause significant harm to the health of persons, . . ."<sup>25</sup> Concentration levels for six pollutants are included in the regulation: only particulate matter will be discussed herein. A preventable emergency is defined as 1,000 particulate micrograms per cubic meter.<sup>26</sup> Accordingly, an emergency may be declared when the particulate count reaches 875 "and meteorological conditions are such that this condition can be expected to remain at the above levels for twelve (12) or more hours."<sup>27</sup> The plan must include "an emergency episode plan." The Regulations set out examples which "reflect generally recognized ways of preventing air pollution from reaching "emergency levels."<sup>28</sup> In an emergency it is suggested that open burning and incineration be forbidden. In addition, almost all employers "shall immediately close operations." There are exceptions for distribu-

tion and sale of medical supplies and food and for vital public services. Motor vehicles may not be used except with police approval. Sources of pollution in general must eliminate pollution "to the extent possible without causing injury to persons or damage to equipment."<sup>29</sup>

There are two other stages of response in the regulation examples. A pollution alert may be declared when the particulate count averages 375 for 24 hours and that level can be predicted to continue for twelve hours. In an alert, open burning is forbidden, the use of incinerators and boiler lancing or soot blowing is limited, and "unnecessary" vehicle use should be eliminated. Pollution sources should diminish or defer production, delay polluting waste disposal, lessen heat loads, and use midday turbulence as much as possible in order to reduce pollution substantially.<sup>30</sup> The second level of response is the pollution warning that is to be declared when the particulate count reaches 625 and can be predicted to continue for twelve hours in the absence of control action.<sup>31</sup> In a pollution warning, emission and activity controls are intensified. For example, in addition to eliminating unnecessary vehicle use, the public is asked to use car pools and public transportation. The suggested classified manufacturing regulations are, for the alert, "substantial" or "maximum" reduction of pollution, and, for the warning, "elimination" of pollutants.<sup>32</sup> The final level of response is the emergency which was discussed above.<sup>33</sup> Under the examples, the classified manufacturing industries will have reached maximum pollution control in the pollution warning, so that nothing further is required in the pollution emergency.<sup>34</sup>

#### THE LOCAL BACKGROUND *Birmingham*<sup>35</sup>

Birmingham is a steel and iron city located between mountains. The mountains supply raw material for several major industries and prevent air circulation that would dispel some of the air's particulates, sulphur oxide and carbon monoxide. A "dark cloud of industrial waste" is endemic in the industrial sections of Birmingham. Federal authorities designate a particulate count of 260 as a critical level which should not be exceeded more than once a year. The downtown Birmingham monitoring station recorded a particulate count in excess of 260 on 67 days in 1970; in April, 1971 the downtown count reached 607. The 1970 average for the



industrial North Birmingham monitoring station was 280. Dr. Russakoff, a Birmingham physician, conducted a study of resident's lung functions and reported that 30% of those tested in North Birmingham had in this regard measurable deterioration.<sup>36</sup> Patients with lung diseases were told by Birmingham doctors, "Leave Birmingham or buy a coffin."

### *State Law*

State and local officials were powerless to control ambient pollution, simply because, until 1971, governmental regulation of air pollution was almost nonexistent. The Alabama Air Pollution Control Commission was required to issue a permit to a violator of its rules if the violator submitted a plan to attain compliance with the rules within seven years. The violator was allowed "a reasonable time" to study the problem and to develop the plan.<sup>37</sup> This legislation had been drafted by industrial representatives; significantly, Alabama was the only state to be refused federal matching funds under the Clean Air Act for air pollution control. Public concern and a dramatic pollution episode in April 1971 led to new legislation. The Governor announced that he would sign the strongest anti-pollution bill the legislature could pass. The legislature acted and much stricter legislation became effective on September 3, 1971.<sup>38</sup> In an air pollution emergency, the Governor almost has the power to declare martial law. He may, for example, by proclamation, "prohibit . . . the burning of any materials whatsoever."<sup>39</sup> The governor may call out the National Guard; and enforcement officials "may use such reasonable force as is required."<sup>40</sup> Yet in November 1971, an emergency could not be declared under the new state legislation since the commission members had been appointed only about a week, the commission director had not yet been selected, and Jefferson County (Birmingham) had no operative emergency regulations. Thus, the local and state officials "were without effective legal authority to abate an . . . emergency situation."<sup>41</sup>

### *November, 1971*

On the 14th and 15th of November, 1971, particulates began to accumulate in Birmingham and Jefferson County.<sup>42</sup> The particulates did not dissipate because of poor atmospheric mixing, or what is frequently called an inversion. On Monday afternoon, November 15, the National Weather Service issued an Air Stagnation Advisory

for central Alabama, and the Bureau of Environmental Health of the Jefferson County Department of Health began additional air sampling at selected monitoring stations. The Department of Health declared an air pollution alert at 10 a.m., November 16 because samples for the 24-hour period ending at 8 a.m. revealed a particulate count of 771 at North Birmingham and 397 in downtown Birmingham. The public was notified by the news media. Twenty-three industrial sources, each estimated by their own data to contribute 100 tons or more of particulates to the air each year, were telephoned and asked to reduce overnight emissions voluntarily. At 4:30 p.m. on November 16, the Department of Health issued an air pollution warning because of a particulate count of 722 in North Birmingham. Notices from Dr. Hardy, a Health Officer of the Department, were delivered to the 23 industries "requesting . . . substantial reductions in particulate emissions as soon as possible." The request was specific: "Due to the seriousness of the situation, this office feels that an overall particulate emission reduction on the order of 60% is justified." In addition, the 23 sources should "maintain said reduction until the warning is terminated." The Health Department also asked for prompt written reports of any emergency action taken and an estimate of particulate reduction. This "pollution warning" had, of course, no legal effect.<sup>43</sup>

At 8 a.m. on November 17 the North Birmingham particulate count was 758; the Weather Service continued the Air Stagnation Advisory for 24 hours. The Health Department called the industrial sources that morning to learn the effect of the pollution warning. Nine of the 23 reported that they were reducing particulate emission 60% or more; 8 reported reductions of 20 to 60% and 6 either could not estimate reductions or were reducing emissions less than 20%. Because, however, the major sources of particulates were among the 6 which could not estimate reductions, the combined efforts to reduce particulates were effective only to the extent of 15%. Written replies were received from 18 of the 23 sources later in the day. On the basis of these replies, it was estimated that total emissions of particulates might be reduced 25 to 30%, about half of the reduction requested on November 16.

Throughout the episode, the Jefferson County Health officials had consulted the Alabama Department of Health and the State Attorney General. The latter, in response to a pollution crisis in April, had a nuisance action pending in Jefferson County Circuit

Court against several of the industrial sources. National and regional offices of the federal Environmental Protection Agency had been in communication; and on the morning of November 17 the Emergency Operations Control Center of the Environmental Protection Agency asked whether their office could come to Birmingham as observers. The county and state health officials, aware of the Environmental Protection Agency's emergency powers under the Clean Air Act,<sup>44</sup> granted the request. The state and local officials met with Environmental Protection Agency representatives and attorneys from the United States Department of Justice on the afternoon of November 17. An Environmental Protection Agency spokesman told a late-afternoon press conference that his agency was reviewing the problem and that recommendations for action would be released later.<sup>45</sup>

The upshot was *United States v. U.S. Steel*.<sup>46</sup> The Environmental Protection Agency's case consisted of a complaint, three affidavits, and a motion for a temporary restraining order. A temporary restraining order was granted by District Judge Pointer at his home on November 18, 1971 at 1:45 a.m. The complaint was dismissed and the temporary restraining order dissolved on the government's motion on the morning of November 19. The next portion of the article will examine the case in depth.

#### UNITED STATES V. U.S. STEEL

The complaint alleged a particulate count of 725, which was caused or contributed to by the 23 named defendants. There were further allegations that the pollution presented "an imminent and substantial endangerment to the health of persons," and that state and local officials had been diligent but unsuccessful in their efforts to abate the pollution crisis. The complaint recited the Environmental Protection Agency's emergency powers under §303 of the Clean Air Act,<sup>47</sup> alleged irreparable harm, and asked for an injunction requiring the 23 defendants to "cease the discharge of particulate matter into the ambient air . . . and not discharge such matter thereafter unless pursuant to instruction to do so from this Court."

The motion for an immediate temporary restraining order alleged that particulate pollution from the defendants' operations combined with "adverse weather conditions" to cause a "present and continuing" health hazard. In addition, the motion alleged

the defendants' lack of response to local attempts to reduce atmospheric contaminations. The court was asked to issue the temporary restraining order *without notice* to the defendants "on the ground that the discharges constitute[d] an imminent and substantial endangerment to the health of persons." The order that was then requested was less drastic than the injunction prayed for in the complaint. Rather than ask the court to require the defendants to "cease" emissions, the government requested that, while action on the complaint was pending, the court restrain the defendants temporarily "from discharging excessive particulate matter into the ambient air."

The motion was supported by three affidavits. Dr. Hammer, an Environmental Protection Agency specialist in general preventative medicine, stated his opinion that "exposure to ambient particulate levels of greater than 700 micrograms per cubic meter per twenty-four hours for two consecutive days would constitute . . . an immediate and serious threat of significant harm to the health of a significant portion of the general population." Robert Kornasiewicz, an Environmental Protection Agency meteorologist, stated that the Birmingham forecast office of the National Weather Service had issued an Air Stagnation Advisory. This meant that "there is limited vertical mixing of pollutants" and "unless emissions of pollutants are curtailed or terminated, the concentrations of such pollutants will increase." There was, according to Mr. Kornasiewicz, a possibility that the stagnation advisory would be suspended because of a frontal system that was moving toward Birmingham from the west. However, it was noted that the frontal system could stop or slow down and that it was not expected to reach Birmingham until 11:00 a.m. November 19; moreover, even if it did reach Birmingham, "dispersion . . . [would] still be poor for some time." Charles Robinson, supervisor of the air pollution control program for the Jefferson County Health Department, provided the pollution count. Sampling between 2 p.m. on November 15 and 2:30 p.m. on November 17 revealed particulate counts of 722, 728, 758 and 771; and the average particulate level for the 45 hours ending at 2:30 p.m. on November 17 was 725.

The affidavits supported the allegations of the motion, and pursuant to the emergency power in §303 of the Clean Air Act and the federal rules of civil procedure,<sup>48</sup> the court was empowered to act.<sup>49</sup> The temporary restraining order, which was signed at 1:45 a.m., is specific in its terms and broad in its application.<sup>50</sup> The 27 affected

operations were separately treated. The order was tailored to each operation, and it compromised the limiting or arresting of particulate pollution with concern for the enterprise and production equipment. The order read, in part:

U. S. STEEL CORPORATION—Fairfield Works

Must stop the emission of particulate matter from incineration, scrafling, slag quenching, open burning and *other operations that can be postponed.*

Must increase coking time *to the maximum extent possible* consistent with gas heating requirements.

Must reduce emissions of particulate matter from all open hearth furnaces by *ceasing feed to the open hearth and maintaining the heat.* (Emphasis added.)

In general, the industries were allowed to finish work in progress:

BIRMINGHAM STOVE AND RANGE COMPANY

Must eliminate emissions of particulate matter from all cupolas *adding no new charges and shutting down cupolas after present heat is finished. . . .*

VULCAN MATERIALS COMPANY—Fairfield Works

Must eliminate emissions of particulate matter by phasing down all operations as rapidly as possible *without causing damage to equipment.* (Emphasis added.)

Some operations, however, received a stiffer dose:

W. J. BULLOCK, INC.

Must eliminate emission of particulate matter by *shutting down* all furnaces and smelters and stopping all incineration processes. (Emphasis added.)

A hearing on the preliminary injunction was set for 9 a.m. on November 19, 32 hours after the temporary restraining order was issued. The complaint, affidavits, motion and order were reproduced. Marshalls began serving the papers together with summons early in the morning of November 18. Some of the industries received a telephone call at 5:30 a.m. or 6 a.m. on the 18th.<sup>61</sup>

In the hours between the grant of the temporary restraining order at 1:45 a.m. on the 17th and the hearing on the preliminary injunction at 9 a.m. on the 19th, the pollution crisis ended. Birmingham was blessed with, among other things, an autumn rain that "washed" the particulates out of the air. The North Birming-

ham high volume particulate sampling results for November 16, 17 and 18 were 771, 758 and 410. The particulate count on November 19 was 98. At the 9 a.m. hearing on the 19th which was scheduled to take up the federal government's request for a preliminary injunction, Mr. Mallard, attorney for the United States, made this request:

This order was obtained under the emergency power section of the Clean Air Act, which is designed to give the government the power to control certain emergency conditions. And it is not designed to be permanent or semi-permanent in nature.

Now, the emergency conditions were the conditions of a two-day particulate count of 771 and 758, which did exist when the order was secured. Now, with improved atmospheric conditions, for instance, I understand that the North Birmingham sample for this morning, which was not a 24 hour sample, but a sample from 3 p.m. yesterday to 8 a.m. this morning was 217 micrograms per cubic meter which is unusually good for that area. Based on this and other consideration, our medical and air pollution experts believe the emergency situation has passed. This temporary restraining order has served its purpose and contributed to the easing of the pollution problem here, and we now request it be vacated, that our complaint be dismissed.

We have no further requests.<sup>52</sup>

The defendants, it seems, had been expecting something else. Several had motions to dissolve and vacate the temporary restraining order and some were prepared to contest the preliminary injunction.<sup>53</sup> Judge Pointer dissolved the temporary restraining order<sup>54</sup> and dismissed the complaint.<sup>55</sup> The defendant industries could then resume production; several attorneys left the hearing to call their clients. Judgment was filed the same day.<sup>56</sup>

#### LEGAL PROBLEMS

The remainder of the article will deal with hardships which flow from the nature of the adjudication and with possible remedies. *United States v. U.S. Steel* was hastily conceived. Late in the afternoon of November 17, the Environmental Protection Agency could reveal no concrete plans,<sup>57</sup> yet the lawsuit was started and the order was granted less than two hours into November 18. The reason for the haste was the exigency of doing something to reduce the health endangering particulates in the atmosphere. The major

legal difficulty was the lack of notice to the defendants. In addition, the order, although denominated temporary, was, in practical terms, final because it required an immediate response from the defendants. The emergency was ephemeral and the order was dissolved the next day. Thus the order was secured and the emergency was over before the defendants were heard on the issues. The problems of notice and practical finality are interrelated, as both result from the factual nature of the legal problem. Certain conventional ideas about the litigation process, it may be observed, are ill fitted to an explanation of this case.

### *Notice*

The temporary restraining order, as discussed above, was issued without notice to the defendants. The government's decision to seek an injunction was probably reached late on the 17th; and, in deciding whether to give notice to the defendants, the continuing health hazards to the people of Birmingham were probably balanced against the procedural rights of the defendants. The decision to seek judicial relief under the emergency powers in §303 was, perforce, based on educated estimates. Weather prediction is an aleatory science and particulate sampling is, no doubt, subject to wide variation. Statistical bias and possible error lurk in every figure. The order was granted without notice in the early hours of the morning at Judge Pointer's home and required action from the defendants as soon as they were informed of its terms. The defendants were informed that they were subject to an order of the federal court later in the morning either by a telephone call or by service of the order by a marshall. The defendants were surprised by the order, but the "writing was on the wall" for all to see, and it would be naive to think that they did not know something was about to happen.

The 1970 Amendments to the Clean Air Act, the Alabama legislation, and the legislative history of both, reveal a change in the climate of opinion from apathy to urgency.<sup>58</sup> The definition of an emergency, as the congressional sources show, followed the change.<sup>59</sup> Any definition of emergency must, unless it requires that people be dying on the streets, be an arbitrary point in a continuum of estimated harm. In April 1971, the particulate count in North Birmingham had reached 791, but there were no serious official statements that industry should shut down. In November,

however, when the particulate count passed 700, the stage was set for a different response. Pollution control has to start somewhere; and control started dramatically in Birmingham. Birmingham industry was not, however, prepared for the change in attitude. The new start was a shock in part because of earlier commiseration for industry. The substantive provisions of the November 18th order, although unprecedented, were authorized by the law.<sup>60</sup> Attorneys for the industries were outraged. Some of the outrage should have been anticipated because of the drastic change in enforcement policy. Some of the outrage, however, could have been prevented by sedulous procedural fairness. Failure to extend procedural protection to the defendants exacerbated rather than ameliorated the shock and outrage which was due to the change in the application of the substantive law.

Fair procedure should allow the adversary a reasonable opportunity to present his side of the controversy to the tribunal before it decides. Notice that litigation has been commenced performs this function because the defendant is informed of the time, place and subject matter of the hearing.<sup>61</sup> If the losers have "the feeling that they are being fairly dealt with,"<sup>62</sup> the pill of defeat goes down more easily. Conversely, the moral force and perceived legitimacy of the court's order is reduced if the loser views the decision as a fiat. Mr. Alley, who represented several of the defendants, commented at the November 19th hearing:

It is the federal government that walked in and said y'all step aside, we take it over. But it is the federal government also that had no conversation whatsoever with these industries or their attorneys.<sup>63</sup>

Mr. Johnston said:

I have been a member of this bar I think about 42 years, and this court has, during that time, so far as I know, an ironbound rule, that they would not issue injunctions or temporary injunctions without notice to somebody representing the defendants. This is the first time in my recollection it has ever been done with possible exception of instances of public violence.<sup>64</sup>

and:

The United States Government could have found out who represented these defendants, could have told them this thing was coming up, and I think this action by the EPA and Department of Justice is wholly without precedent in this community, and I want to say



that I hope this court will admonish them in the future. . . . [T]o come in here in the middle of the night and get injunctions without notice to me, is unthinkable.<sup>65</sup>

Some of these imperious statements may be hyperbole or histrionics. There is, however, some legitimacy to the grievance and if notice had been given, this venom would have had much less sting.

Other reasons for notice relate to precision in the litigation process. If the defendant is given notice and is present at a hearing, he can participate in the process of finding facts, applying the law and, in equity cases, formulating the decree.<sup>66</sup> Ex parte procedure may be subject to abuse because, in the absence of the defendant, the facts will be found from either a verified petition or, as was the case in *United States v. U.S. Steel*, affidavits.<sup>67</sup> The defendants in *United States v. U.S. Steel* took the opportunity of the November 19 hearing to object to possible infirmities in the fact-finding process and to argue that their clients had lost an opportunity to exonerate themselves. Mr. Alley argued:

We have unprecedented situations where this court, on the motion of the government, in effect shut down 23 separate defendants' operations with not one bit of evidence that any one of those defendants individually was contributing whatsoever to this cause, to this problem. There was no evidence that there was anything . . . (relating) this emergency to what a particular defendant was doing.<sup>68</sup>

Others were more specific. Some of the industrial defendants were more than 10 miles from the sampling station,<sup>69</sup> others had already installed control equipment<sup>70</sup> or had responded to the Health Department's earlier warning.<sup>71</sup> The industries to be enjoined were selected from a list drawn up in 1969.<sup>72</sup> Thus some of the defendants' points may have been well taken. The argument is as follows: if these defendants had been given notice and a reasonable opportunity to present material to the court, then they could have shown factually that they were not contributing particulates into the atmosphere. Some of the defendants' assertions were captious. For example, it should not take more than 10 minutes of proof to connect any given industrial source to the general pollution problem. Nevertheless, because of the ex parte nature of the procedure, both the government and the defendants lost the opportunity to have an adversary hearing on the facts.

There may have also been some fundamental legal arguments

that could have been presented to the court before the order was granted. Section 303 had never been used, and at the November 19th hearing the defendants expressed some doubt about the legal standard as applied to the facts. Was there an "emergency"?<sup>73</sup> Were state and local action having an effect?<sup>74</sup> Did the pollution abate because of the order or because of a change in the weather and, if the latter, should the order have been dissolved earlier?<sup>75</sup> There is the additional problem of formulating the decree. The temporary restraining order was less severe than the proposed injunction<sup>76</sup> and seems to have been drafted with a view to avoiding unnecessary harm to the defendants.<sup>77</sup> At the hearing on motion to dissolve, some of the defendants argued serious production losses. Blast furnaces, if stopped, require several days of start-up time before full production is resumed; and Mr. Johnston asserted that "after closing down, it will take them five days to get started."<sup>78</sup> Judge Pointer, whose sedulous concern for the hardships created by the temporary restraining order was evident throughout the November 19 hearing,<sup>79</sup> took the position that there should have been no harm because the order was drafted to allow the mills to maintain blast furnace heat and only required the defendants to cease feeding new material.<sup>80</sup> If the defendants had participated in formulating the order, many of these misunderstandings could have been substantially obviated.

If notice had been given to the defendants, then the adjudication might have been fairer. Notice in advance of adjudication is the almost unexcepted norm, but *ex parte* temporary restraining orders may be lawful and, as a practical matter, at times may be necessary.<sup>81</sup> It is assumed, however, that the *ex parte* procedure will be used only in the exceptional case. Courts of appeals have criticized district courts for granting temporary restraining orders without notice when some notice could have been given.<sup>82</sup> Rule 65(b) was amended in 1966 "to make it plain that informal notice which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all."<sup>83</sup> Notice should be given "if feasible" and the Advisory Committee suggested that "some expedient, such as telephonic notice to the attorney for the adverse party, be resorted to if this can reasonably be done."<sup>84</sup>

In *United States v. U.S. Steel* there must have been a time, after the decision to seek a temporary restraining order and before the order was granted, when the government could have called the defendant industries' executives or their attorneys. Many of the

plants are 24 hour operations and, under the liberal provisions of Rule 65(b), a call to a night foreman could have been acceptable. Attorneys for U.S. Pipe and Foundry had specifically asked the government for advance notice of any anticipated legal action.<sup>85</sup> Nevertheless, no notice was forthcoming. The industries had to be informed of the order before they became bound by it;<sup>86</sup> and, unless the defendants knew of the order, they could not have complied with it. It takes several hours to adjust a complex industrial process; and a telephone call to the defendants after the decision to seek the order might have allowed them to take proper steps and thereby have advanced compliance several hours. The Environmental Protection Agency's purpose was to end the pollution crisis by reducing particulate emissions. This purpose might have been better served if the early morning telephone calls, which informed the defendants of the order *after* it had been granted<sup>87</sup> had been made several hours *before* the order was sought.

It is, on the other hand, possible to view the matter differently. In retrospect, if notice had been given to the defendants by telephone a few hours before the order was sought, they probably would have asked for a continuance to prepare. The crisis which called for action called for immediate action. If a hearing had been scheduled far enough in advance to allow meaningful preparation, there may not have been any need for the order because the particulate pollution might have been dissipated by changes in the weather.<sup>88</sup>

The procedure used by the Environmental Protection Agency followed Rule 65(b), which specifies that "written or oral notice" is unnecessary if:

- (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

The motion and supporting affidavits in the Birmingham case were conclusory and only 8 pages long. Irreparable and immediate harm, the first condition for an *ex parte* temporary restraining order, was "proved" with the affidavits in support of the motion. The possible weaknesses of affidavit proof have been mentioned above.<sup>89</sup>

The second requirement for an *ex parte* temporary restraining order is that the attorney certify the efforts, if any, to give notice and the reasons why notice should not be required.<sup>90</sup> A separate certificate, however, is not to be found in the record. The motion asked that "said temporary restraining order . . . be issued forthwith and without notice, on the ground that the discharges constitute an imminent and substantial endangerment to the health of persons." The government did not assert that they were ignorant of the names of the corporation executives or their counsel or that they could not find the plants. Nor did the United States assert that "the defendant[s], if put on notice that a temporary restraining order was being sought, might be able to accomplish that which it is sought to enjoin before the order could be obtained."<sup>91</sup> The government apparently felt that if harm to the public were serious and presently occurring, procedural niceties could be ignored.

### *Practical Finality*<sup>92</sup>

The difficulties which resulted from the *ex parte* procedure were several. Since the defendants had no opportunity to participate in the fact-finding, law-applying, and decree-formulating process, they were irritated by what they regarded as judicial fiat. If there had been notice, some of the defendants might not have been enjoined and some parts of the decree might have been different. These hardships were exacerbated by the nature of the order. The purpose of a temporary restraining order is to preserve the existing state of affairs until the court can schedule an adversary hearing. Temporary restraining orders are thought to be necessary because they may be "the sole method of preserving a state of affairs in which the court can provide effective final relief."<sup>93</sup> Because of the one-sided procedure and the possibility of abuse, temporary restraining orders are subject to several limitations.<sup>94</sup> It is not meaningful to discuss the order in *United States v. U.S. Steel* in conventional terms; and the conventional protections do not help the defendants. First, the order called for an immediate response: the defendants were required to cease, alter, or inhibit their conduct. Second, rather than laying the foundation for "effective final relief," the order itself was final relief. The pollution episode subsided, although the precise reason therefor is unknown. Hence, the temporary order was at least the *final* relief, even if it is not certain that it was also the *effective* relief. After the crisis ended, there was

nothing left to be done except to dissolve the order and dismiss the complaint. Mr. Mallard, moving to dissolve, stated: “[T]he emergency situation has passed. This temporary restraining order has served its purpose and contributed to the easing of the pollution problem here, and we now request it be vacated, that our complaint be dismissed.”<sup>95</sup> The order, it seems, was designed to end a temporary emergency rather than to lead to future proceedings; if any such order is successful, there is no need for further proceedings.<sup>96</sup> The difficulty with the government’s theory is that, to corrupt a figure of speech, it leaves things up in the air.

The use of *ex parte* temporary orders to obtain final relief is nothing new. Despite the rhetoric about preserving the status quo and about “effective final relief,” the *ex parte* temporary injunction has long been used to grant petitioners final relief, in the form of suppressing dissent,<sup>97</sup> and, before the Norris La Guardia Act, in the form of breaking strikes.<sup>98</sup> Its innovational use in *United States v. U.S. Steel* lies in its application to a new class of defendants. Because of this application, industry has now been treated as labor was treated prior to the Norris La Guardia Act and as Martin Luther King, Jr. was treated in his Birmingham civil rights demonstrations.<sup>99</sup>

### *Hardships*

The effects of the order in *United States v. U.S. Steel* could have been severe. In addition to loss of production and profits, possible damage to equipment and lost wages,<sup>100</sup> corporate images were tarnished. Mr. Wagon stated:

In this day of public awareness of the responsibility of corporations to their communities, it’s economically hurtful when the fact they have been subjected to an injunction, is publicized in the local community and national community and to their boards and to their stockholders . . .<sup>101</sup>

Few would disagree with enjoining the uncooperative polluter in an emergency and most would agree that it is better to do too much than too little to end a pollution episode. Most would also agree that it is better to move with celerity than circumspection. Haste may, however, create injustice. In *United States v. U.S. Steel*, the government’s emission figures were almost two years old.<sup>102</sup> One of the defendants, the W. A. Belcher Lumber Co., was ordered to shut

down its wood-burning boiler. At the hearing on November 19, Mr. Denaburg, Belcher's counsel remonstrated:

It appears to us some time ago somebody made a list of the defendants which included us on it. And my company has taken certain steps over the last year which . . . included shutting down a large percentage of their air operation to such a degree that we take the position that we have not contributed anything to any pollution in over two months. . . . (W)e would like to . . . get off this list if we can.<sup>103</sup>

Mr. Alley commented, "If you ever get on it (the list), there is no way to get off."<sup>104</sup> Any industry which, like Belcher, has been incorrectly required to halt operations because of government error may justly protest. The force of the protest, moreover, is all the more compelling if the error could have been reasonably prevented by giving notice to the industry before the order was secured and by allowing the industry to offer proof to the court. Given the fact that an industry is incorrectly enjoined, the problem then is whether that industry has any tangible remedies.

### *Remedies*

The hardships for an incorrectly enjoined defendant are compounded because they seem to be uncorrectable. Assume that a case arises where the defendants, similar to those in *United States v. U.S. Steel*, are ordered to halt production immediately to abate a pollution emergency. The order is granted without notice to any defendant, even though notice was "feasible." The emission figures upon which the order is based are two years old and, in the interim, new equipment has been installed which reduces the defendants' particulate emissions almost to zero. Assume also that there will be losses because of wage continuations pursuant to a union contract and because of missed deadlines. The defendant, nevertheless, complies with the order. Two days later, upon plaintiff's motion, the order is dissolved and final judgement is entered dismissing the complaint. The defendant resumes production. There has been error: defendants should not have been enjoined; if notice had been given, defendants could have persuaded the court not to enjoin.

The order may be said to have been effectively or practically final because it requires an immediate response. If the decree has practical finality, would it then be appealable as of right?<sup>105</sup> After the

order is dissolved, however, the right to an immediate appeal is not too important. First, if there is a final judgement, the defendant may appeal from it. Second, as a practical matter, the question of whether the defendant should respond when informed of the order will almost always be moot before an appeal can be mounted.<sup>106</sup> Where the order requires immediate action, neither a motion to dissolve<sup>107</sup> nor an appeal will eliminate losses, although either may shorten the period of unnecessary compliance.

The defendant could violate the order and argue as a defense to contempt that, because of the lack of notice, it is void. An erroneous temporary restraining order must, however, be obeyed pending dissolution or appeal, since a defendant who breaches an order may be precluded from arguing, as a defense to contempt, that the order was erroneous.<sup>108</sup> Notice defects in temporary orders, while erroneous, do not void the order.<sup>109</sup> Thus, the defendant, oppressed by a temporary restraining order granted without notice, may neither violate it nor appeal.<sup>110</sup> His only choice is to obey or to be held in contempt of court; and the point, if one there be, is that temporary restraining orders are trial court law and depend on the almost uncorrectable good sense of the district judge.

It may be argued, elaborating on the above, that the temporary restraining order is a final judgment because it was *effectively* final. Yet, as a final judgement granted without there first having been personal jurisdiction over the defendant, the judgement should be void.<sup>111</sup> If the order has been violated, voidness could then be argued as a defense to contempt. Avoiding punishment is, however, not relief; and the voidness argument would be risky because it is novel. In addition, non-compliance with court orders is inevitably a treacherous course.<sup>112</sup> Once the order is signed and served, the defendant's safe alternative is to grit his teeth and comply. If the defendant obeys the order, the problem of voidness is about as important as the problem of finality.<sup>113</sup> The defendant needs, but does not have, a quick method of raising his arguments before an appropriate forum. Yet, the Environmental Protection Agency has the initiative and the defendants have Hobson's choice.

If the incorrectly enjoined defendant cannot be relieved from obedience to the order, may he later have compensation for his losses? There are several factual and legal questions left over from *United States v. U.S. Steel* which must be answered by an appropriate tribunal. What was the particulate count and the weather forecast? Does this combination endanger health? Is the affidavit

conclusion, that a particulate count in excess of 700 for 2 consecutive 24 hour periods endangers health, based on a reasonable medical judgement? Were the state's efforts to abate the crisis attaining an adequate response? Which defendants were, at that time, contributing excessive particulates to the atmosphere? Was the danger to health dire enough to constitute an emergency under §303 of the Clean Air Act? If there was an emergency, could a defendant who was not polluting be ordered to shut down and send employees home under the general power to reduce activity in an emergency?<sup>114</sup> None of these questions has been answered in an adversary proceeding.

If these questions are answered favorably to the defendants or to any one defendant, may they or he have compensation for losses suffered because of the order? At the November 19th hearing in *United States v. U.S. Steel*, Judge Pointer wondered whether the district court should retain jurisdiction.<sup>115</sup> Counsel for the defendants protested against retaining supervisory jurisdiction and argued that jurisdiction should be retained only to determine the amount of compensation due their clients.<sup>116</sup> Judge Pointer raised the problem of governmental immunity<sup>117</sup> and, of course, dismissed the case<sup>118</sup> leaving the question of compensation open, as it yet remains.

If the plaintiff had been a private party, the defendants could have adjudicated the issues upon an application against the injunction bond.<sup>119</sup> The United States, however, is specifically exempted from the security requirement.<sup>120</sup> Perhaps, here again, the defendants are without a remedy. Short of a suit for malicious prosecution, the remedy against the bond is the exclusive remedy for an incorrectly enjoined defendant.<sup>121</sup> Because no security is required of the United States, it may be inferred that there may be no recovery if an injunction is wrongfully procured by the United States. In other words, it is the usual case of prosecutorial discretion. Superimposed on this is the sovereign immunity, which bars recovery of damages. The defendants, pursuant to the judgement and statute may recover costs,<sup>122</sup> but that will be far short of full recompense.

The Fifth Amendment declares that the United States may not take private property for public use without paying just compensation. A cause of action, called inverse condemnation, is available to recover the value of property which has been effectively taken by a government defendant, even though there has been no formal



exercise of eminent domain.<sup>123</sup> If the effect of government action is to deprive the owner of all or almost all of his benefit from the property, then there will be a taking in the constitutional sense. The government is not, however, required to compensate for all the economic loss which flows from governmental activity; and the problem is to determine when the burden should be borne by the public as a whole rather than the individual owner.<sup>124</sup> The cases, unfortunately, are in a state of disarray.<sup>125</sup>

Inverse condemnation would be a weak reed for recovery for the defendants in *United States v. U.S. Steel*. The courts have uniformly upheld destruction of private property to enforce regulatory policies.<sup>126</sup> Congress has the power to enact the Clean Air Act, including the emergency provision; and that power includes the power to enforce the act. Property, moreover, was not "destroyed" by the temporary restraining order in *United States v. U.S. Steel*: the defendants were not allowed full economic use of their property for a time and it was "returned" to them intact. As Justice Brandeis stated in a dissenting opinion:

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious,—as it may because of further change in local or social conditions,—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.<sup>127</sup>

Excessive smoke which interferes with another's use and enjoyment of property is an enjoined common law nuisance.<sup>128</sup> The public at large has a statutory right to breathe clean air.<sup>129</sup> If there has been any interference with property, it has been caused by accumulated pollution from the defendants' factories; and it is not reasonable that the public be made to pay (at least directly) for the right to be free from pollution that endangers life and health.

The cases hold that "in times of imminent peril . . . the sovereign could, with immunity, destroy the property of a few that . . . the

lives of many more could be saved."<sup>130</sup> If there is an emergency and imminent peril demands immediate action, the government may act under the police power and not incur any liability.<sup>131</sup> There is an impressive body of medical evidence for the proposition that extended exposure to a high level of particulates in the atmosphere is a definite health hazard; and, although the precise point where particulate count, weather forecast, and health emergency become congruent is somewhat a matter of individual choice, the evidence supports the assertion that a particulate count of 700 for 48 consecutive hours will cause serious problems for vulnerable segments of the population and will even cause some deaths.<sup>132</sup> The economic interests of the defendants must be considered in the context of the health of Jefferson County's people. As Justice Brandeis said in the dissent quoted above:

[T]he right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. . . .<sup>133</sup>

The government, some cases hold, may respond to an emergency with measures which affect those who are not causing the harm. If the circumstances are grave and imminent, and if the measures taken by the government have a reasonable relation to the emergency, then the government will not be said to have acted unconstitutionally. The wartime evacuations of Japanese-Americans are an example. There, a racial classification which certainly included in a dragnet many who were not potential saboteurs (and certainly excluded potential saboteurs), was evoked to impose severe burdens upon those segments of the population. It was, because of an emergency, upheld by the courts.<sup>134</sup> Perhaps, in *United States v. U.S. Steel*, some industries were enjoined which should not have been. The emergency, however, was grave, and the measures had a reasonable relation to the emergency. Inverse condemnation does not seem to provide redress.

#### A PROPOSED AMENDMENT

Thus, the corporate good-citizen who has cooperated, installed controls, and reduced emissions may, due to an informational lag, be swept into the Environmental Protection Agency's wide net. It

may be ordered, at midnight, to cease production, yet, under present law, it has no effective remedy. Few would quarrel with ordering a habitual polluter to close down in an emergency, but the plight of a defendant like W. A. Belcher Lumber Co. evokes sympathy.<sup>185</sup> Congress should consider an amendment to the emergency provisions of the Clean Air Act<sup>186</sup> to provide recompense for those who may be incorrectly enjoined in an emergency.

The amendment should put strict limits on recovery. Either an agency tribunal or the district court should have jurisdiction. Damages should be allowed if, based on information which was available when the order or injunction was granted or could have made available at a hearing, the injunction was either incorrect in general or incorrect as to a certain defendant. Recovery should be limited to actual pecuniary loss, for example, wage continuation or a penalty for failure to meet a deadline. There should be no recovery for intangible injury, such as loss of good will because of bad publicity.

This proposed amendment should not stay the Environmental Protection Agency's hand; and the emergency powers should be as useful as ever. The amendment would encourage certainty before legal action and discourage ex parte procedure. It is always sound policy to exchange information; and enjoining defendants who are neither before the court nor informed of the proceedings has, at best, a marginal utility. The amendment would, in short, allow needed recovery for incorrectly enjoined defendants. It would, however, also provide a forum to litigate questions concerning the Environmental Protection Agency's emergency powers. This forum may be useful, since, as discussed above, there is currently no practical way to question ex parte temporary restraining orders secured in response to a pollution crisis and dissolved when the crisis ends.

#### CONCLUSION

In November, 1971, the Environmental Protection Agency's emergency power was used for the first time. As has happened to other lawsuits in Alabama which have involved federal-state relations, *United States v. U.S. Steel* was reported in the national press.<sup>187</sup> Several aspects of the lawsuit are subject to criticism. The particulate count was high, but Birmingham had come to expect that. The Environmental Protection Agency defined, and the court

accepted, a particulate count of over 700 for 2 consecutive days as a preventable emergency. While this may be commensurate with the generalized intent of Congress,<sup>138</sup> it is less stringent than the Environmental Protection Agency's own guidelines for state emergency plans.<sup>139</sup> The Environmental Protection Agency failed to give notice to the defendants before seeking the order and did not file a certificate to excuse notice. This violates both the letter and the spirit of federal rule 65(b). These defects created hardship and ill will both of which might have been reduced or eliminated by better procedure. The governmental litigant has more responsibilities than has a private party.<sup>140</sup> It should not only *be* fair, but *appear* fair. The writer questions whether the Environmental Protection Agency met its responsibilities in *United States v. U.S. Steel*. The order in *United States v. U.S. Steel* can be seen as a dragnet, obtained at midnight by arbitrary government bureaucrats. Present law unfortunately provides neither a forum to litigate these issues nor a means of redress for a defendant who may have been abused. Environmental protection and clean air are popular issues, but the Environmental Protection Agency should be mindful of George Bernard Shaw's statement: "There is no more dangerous mistake than the mistake of supposing that we cannot have too much of a good thing."

There are, on the other hand, several factors which may have justified the order. The Environmental Protection Agency, after all, was not making a profit by poisoning Birmingham's air. The defendants' behavior in the past had been callous and refractory, and it was necessary to convince them that the government meant business. At the hearing on November 19, many of the industries proclaimed their desire to cooperate and be reasonable.<sup>141</sup> Perhaps it will be even easier to gain their cooperation in the future. In addition, if the order could have been issued before the 7 a.m. shift began, there might have been substantial wage savings to the defendants. There was a need to move with dispatch because of the imminent hazard to the health of several hundred thousand people. Notice there was none, but the crisis obviates the need; and the defendants must have known that something serious was about to happen. The order was tailored to industrial needs and based on the best information available. It was, finally, dissolved as soon as possible. *United States v. U.S. Steel* is cloaked in an overwhelmingly opaque ambiance, much like an atmosphere full of suspended particulates. Nothing is very clear. Part of the shroud is due to the

clamoring compulsion of the emergency. Much is due to the Environmental Protection Agency's unfortunate failure to act in the open.

The November 1971 crisis and the case of *United States v. U.S. Steel* came in the hiatus between inchoate concern and operative, effective administrative regulation. There had been very little of the planning and coordination which could have eliminated many of the hardships.<sup>142</sup> The public was alert, the legislation had been passed, and the standards were available, but the machinery to deal with the crisis was not functioning. If the Environmental Protection Agency had not acted, no one could have. In this sense, the action taken was exactly what Congress intended.<sup>143</sup> State emergency plans should, in the future, eliminate the need for federal emergency action. These plans will provide some certainty because they will be keyed to specific particulate counts and promulgated in advance by a regulatory body with expertise and continuing responsibility.<sup>144</sup> Proposed control plans which require sources to eliminate or reduce particulate sources<sup>145</sup> could clean up the air over a period of years, and thereby eliminate the need for any emergency plan.<sup>146</sup>

The final results are not in. Despite the furor of November, on December 3, 1971 the particulate count in North Birmingham was 487. Not long after the November crisis, on the other hand, U.S. Steel announced plans for a new steel manufacturing process at the Fairfield works. This, it is estimated, will remove 99% of the pollution.<sup>147</sup> Much has been done and more plans have been made, but a great deal remains to be done. Emergency powers, in the meantime, should be held in ready reserve. The real solution lies not through the drama of a shutdown order, but through united effort and hard work over a long period of time.



#### FOOTNOTES

\* J. D. University of Iowa (1968), LL.M. University of Michigan (1970); Member Iowa Bar; Assistant Professor of Law, The University of Alabama.

The willing cooperation of several others should be mentioned. Mr. Robinson and Mr. Grusnick of the Jefferson County Department of Health furnished documentation and provided other assistance. Dr. Hammer of the EPA also provided documents and assistance. Mr. Charles Matthews, counsel for U.S. Pipe and Foundary, discussed the

case at length. Judge Sam Pointer read the article in draft and made several useful suggestions. Mr. John Coggin, second year law student at the University of Alabama and my research assistant, read the article, provided useful suggestions and dissented from the conclusions. Miss G. Burns, Documents Librarian at the University of Alabama Law School, and her staff assistants were diligent and very helpful. The author thanks the above for their help but, as is usual in these cases, takes sole responsibility for errors and miscalculations in the article.

My faculty associate Associate Professor J. W. Futrell, member of the Sierra Club Board of Directors and teacher of Environmental Law at the University of Alabama Law School, did not have anything to do with this paper.

<sup>1</sup> Air Quality Act of 1967, Pub. L. No. 90-148; the following is summarized from Greco, *The Clean Air Amendments of 1970: Better Automotive Ideas From Congress*, 1 ENVIRONMENTAL AFFAIRS 384, 386-89 (1971), 12 BOSTON COLLEGE IND. & COM. L. REV. 571, 574-93 (1971).

<sup>2</sup> 42 U.S.C.A. §1857d(k) (1969).

<sup>3</sup> *Hearings on S. 3229, S. 3466, and S. 3546 Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works* 91st Cong. 2nd Sess. 1234 (1970).

<sup>4</sup> 116 CONG. REC. 16, 104 (Daily ed. September 21, 1970); J. Esposito, VANISHING AIR 114-18 (1970).

<sup>5</sup> S. REP. NO. 91-1196, 91st Cong., 2nd Sess. 21 (1970).

<sup>6</sup> *Hearings on S. 3229, S. 3466 and S. 3546 Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 91st Cong. 2nd Sess. 1596-1600 (1970).

<sup>7</sup> Pub. L. No. 91-604, 84 Stat. 1676 (1970).

<sup>8</sup> Pub. L. No. 91-604 §303; 84 Stat. 1676 (1970). "Administrator" (of Environmental Protection Agency) was substituted for "Secretary" as the official with responsibility and the section was placed in a new part of the Act. CONFERENCE REPORT 91-1783, 91st Cong., 2d Sess. at 55 (1970); §303 is now codified 42 U.S.C. §1857h-1 (1970).

<sup>9</sup> S. REP. NO. 90-403, 90th Cong., 1st Sess. 31 (1967) [hereinafter cited as S. REP. NO. 90-403]; H. R. REP. NO. 90-728, 90th Cong., 1st Sess. 19 (1967) [hereinafter cited as H. R. REP. NO. 90-728].

<sup>10</sup> H. R. REP. NO. 90-728 at 19; *See also* S. REP. NO. 90-403 at 31.

<sup>11</sup> H. R. REP. NO. 90-728 at 19.

<sup>12</sup> H. R. REP. NO. 90-728 at 19; S. REP. NO. 90-403 at 31.

<sup>13</sup> *Hearings on H.R. 9509 and S780 Before the House Committee on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 35 (1967) [hereinafter cited as *House Hearings* (1967)] (Testimony of Rep. Ryan). *See also* Dr. Stewart, Surgeon General, *id.* at 47, *Interstate Air Pollution Study* prepared by Public Health Service, *id.* at 76.

<sup>14</sup> *House Hearings id.* at 35; *See also House Hearings id.* at 47, 76 (1967).

<sup>15</sup> *House Hearings id.* at 78 (1967).

<sup>16</sup> *House Hearings id.* at 47 (1967).

<sup>17</sup> J. Esposito VANISHING AIR 1-5 (1970); *See also Hearings on S.780 before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 90th Cong., 1st Sess. 1361, 1513 (1967).

<sup>18</sup> *See note 8 supra.*

<sup>19</sup> S. REP. No. 91-1196, 91st Cong., 2nd Sess. 1 (1970).

<sup>20</sup> S. REP. No. 91-1196, 91st Cong., 2nd Sess. 36 (1970).

<sup>21</sup> *Id.*

<sup>22</sup> CONFERENCE REPORT ON CLEAN AIR AMENDMENT OF 1970, No. 91-1783, 91st Cong., 2d Sess. at 55 (1970).

<sup>23</sup> 36 Fed. Reg. 20513 (1971), prefatory comments to amendments to Part 420 §420.16; *Requirements for Preparation, Adoption and Submittal of Implementation Plans*, 36 Fed. Reg. 15486, 15491 (1971).

<sup>24</sup> Prefatory remarks to amendments to §420.16(a), 36 Fed. Reg. 20513 (1971).

<sup>25</sup> Revised §420.16(a), 36 Fed. Reg. 20513 (1971).

<sup>26</sup> Hereinafter, micrograms per cubic meter will be referred to as particulate count.

<sup>27</sup> Appendix L to Part 420, §1.5.1(d), as revised 36 Fed. Reg. 20513 (1971).

<sup>28</sup> Appendix L to Part 420, 36 Fed. Reg. 15486, 15503 (1971).

<sup>29</sup> Appendix L. to Part 420, Table III, 36 Fed. Reg. 15486, 15505-06 (1971).

<sup>30</sup> Appendix L. to Part 420, §1.5.1(b); Table I, 36 Fed. Reg. 15503-05 (1971).

<sup>31</sup> Appendix L to Part 420 §1.5.1(c) as revised, 36 Fed. Reg. 20513 (1971).

<sup>32</sup> Appendix L to Part 420, Tables I & II, 36 Fed. Reg. 15504-05 (1971).

<sup>33</sup> *See text at notes 26-29 supra.*

<sup>34</sup> *Compare* Table II with Table III, Appendix L to Part 420, 36 Fed. Reg. 15504-06 (1971).

<sup>35</sup> *See generally*, NATIONAL AIR POLLUTION CONTROL ADMINISTRATION, REPORT FOR CONSULTATION ON THE METROPOLITAN BIRMINGHAM INTRASTATE AIR QUALITY CONTROL REGION (1969).

<sup>36</sup> Birmingham Post Herald, Dec. 30, 1971, at 4, col. 6.

<sup>37</sup> Code of Ala. Title 8, §295(c), Recompiled 1958, Supp. 1969; repealed by Act No. 769, Regular Session 1971, §20.

<sup>38</sup> Alabama Air Pollution Control Act of 1971, Act. No. 769, Regular Session 1971.

<sup>39</sup> Act No. 769, §11(d)(5); *See also* §11(g)(4).

<sup>40</sup> Act No. 769, §11(g).

<sup>41</sup> Testimony of George E. Hardy, Jr., M.D., M.P.H., Health Officer, Jefferson County Department of Health, Before the House Subcommittee on Health and the Environment of the House Committee on Interstate and Foreign Commerce, U.S. House of Representatives; Convened in Birmingham, Alabama on Saturday, November 20, 1971 [Hereinafter cited as *November 20 Hearings*].

<sup>42</sup> This paragraph and the two following are summarized from Dr. Hardy's testimony at the *November 20th Hearings*.

<sup>43</sup> See text at note 37 *supra*.

<sup>44</sup> 42 U.S.C. §1857h-(1) (1970).

<sup>45</sup> End of summary of Dr. Hardy's testimony, note 42 *supra*.

<sup>46</sup> CA 71-1041 (N.D. Ala. November 19, 1971). This paragraph and the three paragraphs following are summarized from documents in the court file.

<sup>47</sup> Notwithstanding any other provision of this chapter, the Administrator, upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to the health of persons, and that appropriate State or local authorities have not acted to abate such sources, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. 42 U.S.C. §1857h-(1) (1970).

<sup>48</sup> FED. R. CIV. P. 65(b).

<sup>49</sup> See also 28 U.S.C. §1345, 42 U.S.C. §1857h-(3) (1970).

<sup>50</sup> See generally, *Developments in the Law: Injunctions*, 78 HARV. L. REV. 994, 1064-67 (1965).

<sup>51</sup> United States v. U.S. Steel, CA 71-1041 (N.D. Ala., Nov. 19, 1971), Transcript of Hearing before Judge Pointer at 22, 33 (hereinafter cited as *November 19th Transcript*).

<sup>52</sup> *November 19th Transcript* at 2-3. Quotations from the hearing transcript have been edited only by correcting what seemed to me to be obvious stenographic mistakes. Extemporaneous speech, the reader should bear in mind, may read poorly. The compensating virtues are the flavor and spontaneity which, I hope, are retained.

<sup>53</sup> See e.g. *November 19th Transcript* at 6-7 (Mr. Wagnon).

<sup>54</sup> *November 19th Transcript* at 3.

<sup>55</sup> *November 19th Transcript* at 37; See FED. R. CIV. P. 41(a)(1).

<sup>56</sup> United States v. U.S. Steel, CA 71-1041 (N.D. Ala., Nov. 19, 1971).

<sup>57</sup> See text at note 45 *supra*.

<sup>58</sup> See text at notes 7, 19-22, 38-40 *supra*.

<sup>59</sup> See text at notes 19-22 *supra*.



<sup>60</sup> *November 19th Transcript* at 20.

<sup>61</sup> *Cf. Sims v. Green*, 161 F.2d 187 (3d Cir. 1947).

<sup>62</sup> F. James, Jr., *CIVIL PROCEDURE 2* (1965); *see also* Rosenberg, *Devising Procedures That Are Civilized to Promote Justice That is Civilized*, 69 MICH. L. REV. 797, 797-803 (1971).

<sup>63</sup> *November 19th Transcript* at 28.

<sup>64</sup> *Id.* at 14-15.

<sup>65</sup> *Id.* at 16 (Mr. Johnston). *See also id.* at 24 (Mr. Alley).

<sup>66</sup> *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183 (1968); *cf. Sims v. Green*, 161 F.2d 87 (3d Cir. 1947).

<sup>67</sup> *Carroll v. Princess Anne*, 393 U.S. 175, 183 n.10 (1968); *Developments in the Law: Injunctions*, 78 HARV. L. REV. 994, 1060 (1965).

<sup>68</sup> *November 19th Transcript* at 11.

<sup>69</sup> *Id.* at 25.

<sup>70</sup> *Id.* at 27, 35-36.

<sup>71</sup> *Id.* at 31-32, 33. Those companies which had already cut back were not tangibly affected by the order. The public relations effect does not seem too serious.

<sup>72</sup> *November 20th Hearing* at 1.

<sup>73</sup> *November 19th Transcript* at 5, 15.

<sup>74</sup> *Id.* at 7, 19, 20, 29, 31, 34.

<sup>75</sup> *Id.* at 20, 28-31.

<sup>76</sup> *See* p. 22-23 *supra*.

<sup>77</sup> *See* p. 22-23 *supra*.

<sup>78</sup> *November 19th Transcript* at 15-16, 20.

<sup>79</sup> *Id.* at 17, 22, 25-26.

<sup>80</sup> *Id.* at 20, 26.

<sup>81</sup> FED. R. CIV. P. 65(b); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 180 (1968).

<sup>82</sup> *Pennsylvania R.R. Co. v. Transport Workers Union*, 278 F.2d 693, 694 (3d Cir. 1960); *Arvida Corp. v. Sugarman*, 259 F.2d 428, 429 (2d Cir. 1958).

<sup>83</sup> 39 F.R.D. 69, 124-25 (1966), Advisory Committee Notes to Amendments to Rule 65, effective July 1, 1966.

<sup>84</sup> *Id.* *See also* *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968), which required a strict standard for notice in first amendment cases.

<sup>85</sup> *November 19th Transcript* at 22 (Mr. Matthews).

<sup>86</sup> FED. R. CIV. P. 65(d); *Backo v. Carpenters Local 281*, 438 F.2d 176, 180 (1970); *In re Herndon*, 325 F. Supp. 779, 780 (M.D. Ala. 1971); *Reihe v. District Court of Crawford County*, 184 N.W.2d 701 (Iowa 1971).

<sup>87</sup> *November 19th Transcript* at 22.

<sup>88</sup> *Id.* at 23 (Mr. Matthews).

<sup>89</sup> *Marshall Durbin Farms v. NFO*, 446 F.2d 353 (5th Cir. 1971); *Great Northern R.R. v. Brosseau*, 286 F. 414, 416 (1923); F. FRANKFURTER & N. GREEN, *THE LABOR INJUNCTION* 65, 188-89 (1930).

<sup>90</sup> *Emery Air Freight Corp. v. Local 295*, 449 F.2d 586, 591 (2d Cir. 1971). 39 F.R.D. 69, 125 (1966); the Advisory Committee's notes on Amendments to Rule 65(b), effective July 1, 1966 state: "This certificate is in addition to the requirement of an affidavit or verified complaint setting forth the facts as to the irreparable injury which would result before the opposition could be heard." See also 4 WEST'S FEDERAL FORMS §§5084, 5085 (1952). In a recent case, counsel deposed as follows in an affidavit in support of plaintiff's motion for a temporary restraining order:

I am William M. Dawson, Jr., an attorney for Annie Lavender, Plaintiff in the above-styled cause. Since she first came to my office on March 8, 1972, with the complaint that she faced eviction from her apartment by Defendant Housing Authority, I have contacted Defendant Florin White, and on several occasions the Honorable L. M. Northington, the attorney for Defendant Housing Authority. Although we had discussed the matter previously, on April 18, 1972, I informed Mr. Northington of the fact that this suit would be filed and that preliminary relief would be sought.

Today, I again contacted Mr. Northington and mentioned that the suit would be filed today and that I would attempt to have a temporary restraining order granted enjoining Defendants from evicting Plaintiff. He declined to accompany me when I approached this Court with my request for immediate relief. I also personally served him with a copy of the Complaint and all exhibits and motions filed in this cause, by leaving a copy of same with his secretary at one o'clock P.M. today. *Lavender v. Housing Authority of the City of Northport, Alabama*, CA 70-965 (1972).

<sup>91</sup> C. A. WRIGHT & F. W. ELLIOT, 1971 Pocket Part to 3 BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE*, §1432 (1972).

<sup>92</sup> The concept of practical finality is developed at length in an article entitled *More on Void Orders* which was written by the present author and will appear in an early issue of the *GEORGIA LAW REVIEW*.

<sup>93</sup> *Developments in law: Injunctions*, 78 HARV. L. REV. 994, 1060 (1965).

<sup>94</sup> FED. R. CIV. P. 65(d) provides in part that, "Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown,

is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period."

<sup>95</sup> *November 19th Transcript* at 3, *see also id.* at 8-9; *see p. 25 and note 51 supra.*

<sup>96</sup> *Id.* at 20-21 (Mr. Mallard).

<sup>97</sup> *See Carroll v. President and Commissioner of Princess Anne*, 393 U.S. 175 (1968); *Walker v. Birmingham*, 388 U.S. 307 (1967).

<sup>98</sup> F. FRANKFURTER & N. GREEN, *THE LABOR INJUNCTION*, 63-65 (1930).

<sup>99</sup> *See F. FRANKFURTER & N. GREEN THE LABOR INJUNCTION*, 63-65 (1930); *Walker v. Birmingham*, *supra* note 97. There are many differences. There was no similar howl of execration from the Birmingham Bar when King's 1963 Easter March was enjoined without notice. Also enjoining strikes was said to have created a "communistic spirit" in union circles. (FRANKFURTER & GREEN, *id.* at 188, n.212). If that has happened in industrial circles, I haven't noticed it.

<sup>100</sup> *November 19th Transcript* at 15, 19. The loss of wages will probably be minimized in the future. Union officials have indicated that in future contracts they will seek clauses providing for pay continuation during pollution shutdowns (*Tuscaloosa News*, December 8, 1971 at 19, Col. 8). Another proposed solution is to compensate employees laid off because of pollution emergencies through the unemployment insurance system. *Birmingham Post Herald*, Jan. 13, 1972 at 3, col. 1-5. This amelioration for employees will, however, add to industry's loss.

<sup>101</sup> *November 19th Transcript* at 31; *see also id.* at 15.

<sup>102</sup> *November 20th Hearings* at 4.

<sup>103</sup> *November 19th Transcript* at 35-36.

<sup>104</sup> *Id.* at 36.

<sup>105</sup> *See United States v. Wood*, 295 F.2d 772 (5th Cir. 1961).

<sup>106</sup> *But cf. United States Servicemen's Fund v. Shands*, 440 F.2d 44 (4th Cir. 1970); *Application of President and Directors of Georgetown College*, 331 F.2d 1000 (D.D.C. 1964); *petition for rehearing denied*, 331 F.2d 1010 (D.D.C. 1964); *cert. denied* 377 U.S. 978 (1964).

<sup>107</sup> FED R. Civ. P. 65(b) provides in part that, "In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may

prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.”

<sup>108</sup> Walker v. Birmingham, *supra* note 97. Emery Air Freight Corp. v. Local Union 295, 449 F.2d 586, 592 (2d Cir. 1971).

<sup>109</sup> Emery Air Freight Corp. v. Local Union 295, *supra* note 108; Pennsylvania R.R. Co. v. Transport Workers Union, *supra* note 81, which held that although no notice was given, and that telephone notice was possible, the issue was “regrettable” but not “jurisdictional” for purposes of mandamus. *But see* Mar-Pak Michigan, Inc. v. Pointer, 226 Ga. 189, 173 S.E.2d 206 (1970).

<sup>110</sup> Smith v. Jackson State College, 441 F.2d 278 (5th Cir. 1971); *cf.* United States v. Wood, *supra* note 105; Sims v. Greene, 160 F.2d 512, 517 (3d Cir. 1947).

<sup>111</sup> Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

<sup>112</sup> *See* United States v. United Mine Workers, 330 U.S. 258, 308–309 (1947) (Frankfurter, concurring).

<sup>113</sup> *See* text at note 106 *supra*.

<sup>114</sup> *Cf.* 36 Fed. Reg. 15486, Appendix L, Tables II and III at 15505–06 (1971).

<sup>115</sup> *November 19th Transcript* at 14, 17, 23, 37.

<sup>116</sup> *Id.* at 10, 12, 17.

<sup>117</sup> *Id.* at 12.

<sup>118</sup> *Id.* at 36. FED. R. CIV. P. 41(a)(1).

<sup>119</sup> FED. R. CIV. P. 65.1; *November 19th Transcript* at 34. Private plaintiffs in environmental litigation against the government have had marked success in holding down security. For example, a \$387,000,000 project was temporarily enjoined and the security was \$1. Environmental Defense Fund, Inc. v. Corps of Engineers, 331 F.Supp. 925, 927 (D.D.C. 1971). In an unreported case brought by environmental groups to enjoin an oil and gas lease for alleged violation of the National Environmental Policy Act, the Department of Interior asked an initial bond of \$750,000 and monthly bonds of \$2,500,000. After the preliminary injunction was granted, Interior asked \$500,000.00. Judge Richey set the bond at \$100. Birmingham Post Herald, Dec. 20, 1971 at 4. The large bond would, of course, preclude suit. The implications of the small bond are considered *infra* at note 121. *See also* Union Springs Telephone Company v. Green, Ala. App. , 255 S.2d 896 (1971).

<sup>120</sup> FED. R. CIV. P. 65(c).

<sup>121</sup> *See* Northeast Airlines, Inc. v. World Airways, Inc., 262 F.Supp. 316, 319 (D.Mass. 1966); Alabama Mills v. Mitchell, 159 F.Supp. 637, 639, (D.D.C. 1958); Monolith Portland Midwest Co. v. Reconstruction

Finance Corp., 128 F.Supp. 824, 877-78 (S.D. Calif. 1955); *cf.* I.L.G.W.U. v. Donnelly Garment Co., 147 F.2d 246, 252-54 (8th Cir. 1945), *cert. denied* 325 U.S. 852 (1945); Note, *Interlocutory Injunctions and the Injunction Bond*, 73 HARV. L. REV. 333, 337, 339, 342 (1959).

<sup>122</sup> 28 U.S.C. §§1920, 2408, 2412 (1964).

<sup>123</sup> *Thornburg v. The Port of Portland*, 233 Ore. 178, 180, 376 P.2d 100, 101 (1962); *November 19th Transcript* at 12 (Remarks of Mr. Alley). *See generally*, Rosenthal, *The Federal Power to Protect the Environment: Available Devices to Compel or Induce Desired Conduct*, 45 S. CAL. L. REV. 397, 407-09 (1972).

<sup>124</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>125</sup> *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 156 (1952).

<sup>126</sup> *Van Oster v. Kansas*, 272 U.S. 465 (1926); *Samuels v. McCurdy*, 267 U.S. 188 (1925).

<sup>127</sup> *Pennsylvania Coal Co. v. Mahan*, 260 U.S. 393, 417 (1922).

<sup>128</sup> *Miller v. Schoene*, 276 U.S. 272 (1928); W. PROSSER, TORTS, §§89-90 (4th ed. 1971).

<sup>129</sup> Alabama Air Pollution Control Act of 1971, Act. No. 769, Regular Session, 1971, §2(a).

<sup>130</sup> *United States v. Caltex (Philippines), Inc.*, *supra* note 125, at 1540. Moreover, in emergency situations the government can act without notice. *Fahey v. Mallonee*, 332 U.S. 245 (1947).

<sup>131</sup> *See House v. Los Angeles County Flood Control District*, 25 Cal. 2d 384, 391, 153 P.2d 950, 953 (1944).

<sup>132</sup> *See Williams, Maddox, Harris, Copeley, Von Dokkenberg*, Interstate Air Pollution Study Phase II Project Report IV, Effects of Air Pollution, HEW, PHS, Bureau of Disease Prevention and Environmental Control (1966) found in *Hearings on H9509 and S. 780 Before the House Committee on Interstate and Foreign Commerce* 90th Cong., 1st Sess. 66 at 87-89, 119-20 (1967); Statement of Hon. William Stewart, Surgeon General found in *Hearings on S. 780 Before the Subcommittee on Air and Water Pollution of Senate Committee on Public Works*, 90th Cong., 1st Sess. 1118 at 1147-49 (1967); Council of the City of New York, *Air Pollution in New York City*, *id.* at 1578-84, 1591-92; National Air Pollution Control Administration Publication No. A.P.-49; *Air Quality Criteria for Particulate Matter*, ch. 11, at 152, 153, 154, 168, 170, 175, Summary at 183-184, 188 (1969); U.S. Dept. of HEW, Public Health Service, Consumer Protection and Environmental Health Service, *Air Quality Criteria for Particulate Matter: Summary and Conclusions* at 12-6, 12-18 (undated); there are difficulties in this inquiry. High particulate counts are rare. The Environmental Health Service did not chart particulate counts in excess of 500 in *Character-*

*istics of Particulate Patterns 1957-1966*. R. Spertas & Levin, *Characteristics of Particulate Patterns 1957-1966*, at 3 (1970). Air pollution emergencies are, perforce, not possible to simulate, the variables are numerous and the effects may be apparent only after long periods of time. Research, nevertheless, is in progress which should provide some measure of certainty. *See also* Riggan, Hammer, Finklea, Hasselblad, Sharp, Burton and Shy, *CHESS: A Community Health and Environmental Surveillance System*, unpublished paper presented at the Sixth Berkeley Symposium on Mathematical Statistics and Probability Biology, July 19, 1971 (to be published in symposium proceedings); Cohen, Bromberg, Buechley, Heiderscheit and Shy, *Asthma and Air Pollution From a Coal-Fueled Power Plant* (accepted for publication in the American Journal of Public Health); Cohen, Nelson, Bromberg, Pravda, Ferrand and Leone, *Symptom Reporting During Recent Publicized and Unpublicized Air Pollution Episodes*, paper for presentation at the American Public Health Association, October 1971 (Community Research Branch, Environmental Protection Agency); Finklea, Nelson, Hayes and Ireson, *Irritation Symptoms During the April 1971 Air Pollution Episode in Birmingham, Alabama Characterized by Elevated Suspended Particulates (Interim Analysis)* (In-House Report of Division of Health Effects Research, Environmental Protection Agency, 1971); Love, Sharp and Finklea, *Atmospheric Levels of Air Pollution Producing Significant Harm* (In-House Technical Report, Division of Effects Research, Environmental Protection Agency, 1971).

<sup>133</sup> *Pennsylvania Coal Co. v. Mahan*, *supra* note 127.

<sup>134</sup> *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>135</sup> *See* text at note 103 *supra*.

<sup>136</sup> 42 U.S.C. §1857h-1 (1970). Quoted in note 47 *supra*.

<sup>137</sup> *See* *Bad Air Over Birmingham*, *Time*, November 2, 1971 at 49.

<sup>138</sup> *See* text at note 31 *supra*.

<sup>139</sup> Amendments to Part 420—Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Appendix L §1.5.1(d), 36 Fed. Reg. 20513 (1971); *compare*, Table II with Table III, Appendix L, 36 Fed. Reg. 15504-06 (1971); *see* text at n.33 *supra*.

<sup>140</sup> K. DAVIS, *DISCRETIONARY JUSTICE*, Baton Rouge: Louisiana State University Press (1969), p. 160.

<sup>141</sup> *November 19th Transcript* at 16, 18, 21.

<sup>142</sup> *Id.* at 25-26, 28 (Judge Pointer). For example U.S. Steel has established a new position of Vice-President-Environmental Control. Earl W. Mallick has been appointed to this position. *Birmingham Post-Herald*, Jan. 27, 1972 at 18, col. 2.

<sup>143</sup> S. Rep. No. 403, 90th Cong., 1st Sess. 31 (1967).

<sup>144</sup> 36 Fed. Reg. 15486 Appendix L. at 15503-06, as amended *id.* at

20513 (1971); Jefferson County Board of Health Proposed Air Pollution Control Rules and Regulations (1972); K. DAVIS, *DISCRETIONARY JUSTICE*, 54-68, 219-20 (1969).

<sup>145</sup> 36 Fed. Reg. 15486, §420.10-15 (1971). These control plans are still proposed. Birmingham Post-Herald, Jan. 19, 1972 at 2, col. 3-8.

<sup>146</sup> Birmingham Post Herald, Dec. 30, 1971 at 4, col. 7-8.

<sup>147</sup> Birmingham Post Herald, Dec. 30, 1971 at 4, col. 1.