61 Box 16 - JGR/(Department of Justice) DOJ Daily Reports (4) - Roberts, John G.: Files SERIES I: Subject File

RC

THE WHITE HOUSE
WASHINGTON

stay in Chicago, quick
briefing schedule.
GOV: Thanks,
OK: Thanks
RON: 9/4, agent 9/6

U.S. Department of Justice
Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

September 10, 1984

MEMORANDUM FOR: Honorable James W. Cicconi
Special Assistant to the President
The White House

Honorable John G. Roberts, Jr. ✓
Associate Counsel to the President
The White House

FROM: Roger Clegg RC
Associate Deputy Attorney General

Attached is some background information on bilingual ballot access, which I promised to you this morning.

Attachment

Background on Provision of Bilingual Materials Under the Voting Rights Act (Section 203 determinations)

Event: On June 25, 1984 the Bureau of the Census published a list of counties required to provide bilingual voting materials. The new list significantly reduced the number of counties required to provide such materials. Census determinations were based, in part, on legal advice from the Justice Department. Civil rights groups have complained that the publication was designed to limit the availability of bilingual ballots in the upcoming presidential election. (See N.Y. Times 9/10/84, p. 1.)

I. Facts: When Congress enacted the 1975 amendments to the Voting Rights Act it included new provisions requiring bilingual assistance in all aspects of the electoral process to four language minority groups: Alaskan Natives, American Indians, persons of Spanish heritage and Asian Americans. Under the 1975 formula, bilingual materials were required in counties where more than 5% of the citizens of voting age were members of a single language minority group (e.g., Hispanics).

In 1982, Congress extended the Voting Rights Act and amended Section 203 to change the coverage formula. Senator Nickles (Okla.) sponsored the amendment which limited bilingual assistance to those counties where 5% of the citizens are members of a language minority group and "do not speak or understand English adequately enough to participate in the electoral process." It left the determination of English-speaking ability to the Census Bureau. The purpose of the amendment was to "more accurately target" those counties where bilingual assistance was needed and relieve other counties of the burden of providing bilingual voting materials to voters who speak English.

The 1980 Census asked individuals who spoke another language how well they spoke English. Based on those answers Census determined that many counties which had previously been covered were no longer covered by the law because the number of citizens who spoke only another language, and did not speak English, was less than 5%. Under the old formula 384 counties were required to provide bilingual materials, while the amendment reduced the number to 197. At the same time 27 counties were added which had not previously been required to provide bilingual materials. For persons of Spanish heritage the number was reduced from 301 to 171; 14 were added. (Many additional counties are still covered under a different provision of the law which contains a different formula and which was not amended - Section 4(f)(4)).

II. Position of the United States: The Census Bureau has correctly applied the Congressional mandate of the Nickles Amendment.

III. Relationship to Administration Philosophy: The Administration has consistently taken the position that the protections of the Voting Rights Act are essential to protect the right to participate in the electoral process, but that they should be invoked only where necessary, to avoid undue intrusion into local governmental functions.

IV. Anticipated criticisms and planned Department of Justice responses:

Criticism: The new determinations will result in the "disenfranchisement" of many voters who need bilingual assistance.

Response: The Nickles Amendment was intended to and does in fact more accurately target those areas of the country where there are significant concentrations of language minorities who need bilingual assistance. The 1975 amendments, which initiated this requirement, did not guarantee every voter bilingual assistance, but only those voters living in counties where more than 5% needed assistance. Under the old formula even those who spoke English fluently were counted. The new formula is still designed to give help to those who cannot participate in the electoral process because they do not speak English; it simply does not provide assistance for those who can speak English. While a number of counties are dropped from coverage because they do not meet the new criteria, twenty-seven counties were added.

Criticism: The new coverage determinations were made on the basis of "subjective data" which cannot reliably measure language proficiency.

Response: Congress granted the Director of the Census unreviewable discretion to decide whether he had data which could be used to meet the criteria established by the Nickles Amendment. The Director of the Census has decided that information contained on the 1980 census questionnaire can be used to assess the English language proficiency of the groups protected by the Act. That judgment call clearly falls within the scope of responsibility granted by the Nickles Amendment. By granting the Bureau of the Census authority to decide whether new determinations could be made under the criteria used in the Nickles Amendment, Congress reaffirmed its trust in

the expertise and professionalism of the Bureau of the Census. Many important governmental decisions are based on Census determinations and courts have upheld that basis of decision-making. The data used by Census included as many bilingual citizens as possible. Only those who indicated a high degree of English-speaking ability were considered to have adequate ability to participate in the electoral process.

Criticism: The decrease in the number of counties required to provide bilingual assistance sends a "symbolic" message to Hispanic voters that they are not welcome to participate in the electoral process.

Response: Congress extended the bilingual assistance provisions for ten years. That is a clear message of support for minority participation in the political process. The 1982 amendments, by more accurately targeting areas of need, will enhance participation by language minorities.

Criticism: The Census Bureau should not have published these determinations until after the 1984 elections.

Response: The Census Bureau, pursuant to its longstanding policies, published these determinations as soon as the data was available. The Nickles Amendment was passed in large part because it was viewed as a means of relieving counties of unnecessary legal obligations, and nothing in the legislative history of this amendment suggests that Census should have delayed publication.

V. Talking Points

- The statute was amended by Congress. The Census Bureau and the Department of Justice are simply following the law.

- When it adopted the Nickles Amendment, Congress clearly anticipated that a number of counties would be dropped from the list of those required to provide bilingual assistance.

- Bilingual assistance is still required for those who cannot participate in the electoral process because they do not speak English. The new formula simply excludes those who, although they speak another language, also speak English well enough to participate on the basis of English language materials alone.

- The Census Bureau used data which included as many potentially covered individuals as possible. Only those who indicated a high degree of English proficiency were considered to have adequate ability to participate in the electoral process.

Clegg report 9/10

- Bilingual ballot (P. 1, N.Y. TIMES)
  Send background to Cicconi, cc to me.
  Cicconi called DOJ about it.

- Antitrust report released tomorrow on rise in fuel oil prices - no conspiracy, just s+d.

- Antitrust: acquisition by [illegible] of competitor SCA. [illegible]: consent decree SCA divest self of automobile parts - [illegible] - acquisition by Gemstar Corp - [illegible] firm.
  1+3 merger

U.S. Department of Justice
Office of
The Deputy Attorney General

Washington, D.C. 20530

September 13, 1984

TO: Honorable John G. Roberts, Jr.
Associate Counsel to the
President

FROM: Roger Clegg RC
Associate Deputy Attorney
General

scussion this

Per our discussion this morning.

Attachment

Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, SEPTEMBER 13, 1984

LNR
202-633-1017

The Department of Justice today filed a civil complaint charging that the District of Columbia violated the Clean Water Act by failing to treat completely sewage discharged from the Blue Plains sewage treatment plant.

The Department simultaneously filed a proposed consent decree resolving the suit. The decree would require the District to correct a wide range of deficiencies at the plant and would impose a $50,000 civil penalty for past violations.

"This civil complaint and the very effective settlement represent another significant step in the federal government's firm commitment to cleaning up the Chesapeake Bay," Attorney General William French Smith said.

The discharges from the Blue Plains plant, which receives sewage from the District and five suburban counties, go into the Potomac River and then flow into the bay.

Attorney General Smith said the case was developed jointly by the Justice Department and the Environmental Protection Agency (EPA).

The suit and proposed decree were filed in federal district court in Washington.

The complaint said the District violated an EPA operating permit by failing "on numerous days" since 1979 to provide complete treatment for effluent flows at the Blue Plains plant.

Similarly, the complaint said, there have been numerous violations of the limitations on chemical levels in sewage discharges.

The complaint also alleges that there have been serious failures in the plant's maintenance.

In 1980, the complaint said, EPA issued an administrative order requiring the District to "conduct an aggressive operation and maintenance program in order to improve general conditions at the plant...."

Nonetheless, "On each day after August 18, 1979, defendant failed to provide a maintenance staff of sufficient size and skill to adequately maintain the plant, failed to conduct an adequate preventive maintenance program, and failed to timely perform numerous acts of necessary maintenance."

As a result, "some plant equipment needed in case of emergencies has been unavailable," the complaint said.

The Blue Plains plant, which is owned and operated by the District, is in the southeastern section of Washington. It treats sewage from the District and parts of five suburban counties--Montgomery and Prince Georges in Maryland and Arlington, Fairfax, and Loudon in Virginia.

The consent decree contains a six-page list of major equipment needing repair or replacement at Blue Plains. The decree requires the District to complete repairs by January 1.

In addition, the decree said the chlorine handling and delivery systems for disinfection of effluent discharged from Blue Plains must be repaired and operational by October 1.

The decree requires the District to increase substantially staff personnel at Blue Plains for the operation and maintenance of the plant.

The decree noted that the District also consented to the $50,000 civil penalty that will settle its past violations of the Clean Water Act. The decree contains a schedule of penalties for future violations ranging from $500 per violation per day from the first through the 15th day of violation, up to $2,000 per violation per day from the 31st and subsequent days of violation.

Another provision of the decree requires the District to set aside at least $200,000 for a research center at Blue Plains that will work to improve effluent quality, develop beneficial uses of sludge, and conduct related projects.

The cooperative efforts of the parties were praised by two Justice Department officials involved in development of the case. They are F. Henry Habicht, II, the Assistant Attorney General in charge of the Land and Natural Resources Division, and Joseph E. diGenova, the United States Attorney for the District of Columbia.

Habicht said: "The agreement exemplifies this Administration's commitment to see that standards set by Congress under the Clean Water Act are met by municipalities."

DiGenova said: "This consent decree is a good example of cooperation between the government of the District of Columbia and the federal government. We hope the commitments made by the District of Columbia will help assure that the Chesapeake can be enjoyed by all Americans for years to come."

Thomas P. Eichler, EPA Regional Administrator, said: "This agreement is one more important step in ensuring the continued progress toward improving water quality in the Potomac River and, ultimately, the Chesapeake Bay. Cleaning up and protecting the bay continues to be one of EPA's top priorities."

The Justice Department will solicit public comment on the proposed consent decree for 30 days following publication of the notice in the Federal Register. All such comment will be carefully considered by the Department before any request to the court to approve the decree.

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Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, SEPTEMBER 13, 1984

LNR
202-633-1017

The Department of Justice today filed a civil complaint to require 83 companies, three towns, and a school district to pay for the cleanup of carcinogens and other hazardous substances at a major waste site in Michigan.

The Department simultaneously filed a consent decree in which the 87 defendants agreed to pay a total of more than $14 million for the removal and cleanup of the hazardous wastes on the surface of the site.

The Environmental Protection Agency (EPA), which conducted the federal investigation, developed its case under the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation and Liability Act -- the Superfund legislation.

Attorney General William French Smith said the complaint and decree were filed in U.S. District Court in Flint.

The case was developed jointly by EPA, Justice, and the State of Michigan. They conducted several months of negotiations with the 87 defendants that led to today's decree.

Serious discussions began after EPA issued an administrative order in March requiring 11 companies, including 10 in today's decree, to begin a cleanup of hazardous materials at the site.

"This case clearly shows the federal government's ability and firm commitment to use all of the enforcement tools provided by the hazardous waste laws," Attorney General Smith said.

"Vigorous federal enforcement not only results in the cleanup of hazardous waste sites but also serves to spur important voluntary action for cleanups," Smith said.

"Today's case is particularly significant because it is the No. 1 Michigan site on the National Priority List of the nation's most serious hazardous waste sites designated for government action under the Superfund Program.

"We believe this is an excellent example of the type of cooperation that has now been developed -- cooperation among federal agencies, cooperation by the Federal government with state governments."

F. Henry Habicht, II, the Assistant Attorney General in charge of the Land and Natural Resources Division, said: "The companies and other defendants are to be commended for assuming the responsibility for the cleanup of the site. The work provided for in the settlement is already underway."

The complaint said that the waste site, operated by Berlin and Farro Liquid Incineration, Inc., is on a 40-acre tract near the community of Swartz Creek, which is a few miles from Flint.

While Berlin and Farro is named in the complaint, it is not among the 87 defendants agreeing in the consent decree to pay for site cleanup costs. Those other 87 defendants generated solid or hazardous wastes they had transported to the site for handling, storage, or disposal, the complaint said.

Last year, the complaint said, the Michigan Department of Natural Resources analyzed contents of leaking drums excavated from the landfill at the waste site. Substances found in the tests included polychlorinated biphenyls (PCB's), benzene, ethylbenzene, and hexachlorocyclopentadiene and other related compounds.

Tests conducted of groundwater from the upper aquifer at the site found benzene, ethylbenzene, 1-1 dichlorobenzene, toluene, trichloroethane, 1-2 dichloroethane, trichloroethylene, xylene, and other substances.

"Trichloroethylene, 1-2 dichloroethane, benzene, 1-1 dichlorobenzene, and ethylbenzene are carcinogens and can cause other serious toxic effects," the complaint said.

"The solid and hazardous wastes and hazardous substances in the surface areas of the site, particularly the landfill, present a threat to the groundwater at or near the site through the migration of these substances through the soil and into the groundwater," the complaint said.

The waste site included unlined storage lagoons, a sludge trench, and landfills containing about 33,000 drums. The

majority of the drums "are crushed and contain waste sludge or contaminated solids," the consent decree said.

"It is the contention of the United States and the state that the landfill contains liquids and contaminated soils within and below the landfill which may be leaching into surrounding soils and groundwater," the decree said.

In response to earlier actions by both the state and the EPA, some cleanup already has taken place at the site.

Under today's consent decree, the defendants agreeing to help finance the cleanup will pay money into a trust fund set up for financing work at the waste site.

The total of more than $14 million to be paid for the cleanup includes $1.75 million to the state and $350,000 to the federal government for cost of work related to the waste site that was performed prior to filing of the consent decree.

The firms retained to conduct the site cleanup will remove wastes and contaminated soils from the site and all liquid from the landfill areas. As much as 75,000 tons of soil may be removed from the site under the cleanup program.

The consent decree provides that the firms contracting to do the cleanup work must purchase a performance bond that is 150 percent of the full contract price. "In the event of default," the decree said, "the bond shall provide that the work shall be satisfactorily and fully completed to the satisfaction of EPA...."

EPA and the state are conducting a study of the site that will determine the extent of the threat to the groundwater and whether further work is required.

There will be a 30-day public comment period on the consent decree following publication of notice in the Federal Register. It will then become final on approval by the court.

Here is the list of 87 defendants agreeing to help finance the cleanup and the amount for each as designated in an appendix to the decree.

Acme Oil Company --	$ 5,000;
Action Auto Company --	5,000;
Allied Corporation --	217,345;
American Hospital Supply Corporation --	10,659;
Amoco Oil Company/Standard Oil Company, (Ind.) --	46,274;
Atlantic Richfield Company (successor to Anaconda Wire & Cable Co.) --	5,000;
Anchor Motor Freight, Inc. --	5,000;
B & M Cartage Co., Inc. --	5,000;
Baker Perkins, Inc. --	5,000;
Bradford-White Corporation --	23,479;
Brunswick Corporation --	20,948;
City of Burton --	5,000;
Burwood Products Company --	8,059;
Carman-Ainsworth Community Schools --	5,000;
Chemical Recovery Systems, Inc. --	100,000;
Byron Elevator/Chieftain Oil Co.	5,000;
Clark Equipment Company --	5,000;
City of Clio --	5,000;
Consumer's Power Company --	7,498;
Container Specialities Inc. --	5,000;
Dana Corporation --	471,564;
Detroit Edison Company --	5,528;
Diecast Corporation --	54,073;
NL Industries, Inc. (Doehler Jarvis)	128,751;
Dow Corning Corporation --	1,162,129;
Eagle Ottawa Leather Company --	5,000;
Eaton Corporation --	431,434;
Eisenhour Construction Co. Inc. --	5,000;

Federal-Mogul Corporation --	15,995;
Ford Motor Company --	211,667;
General Motors Corporation --	8,441,335;
Grand Trunk Western Railroad Company --	143,802
Great Lakes Steel Division-National Steel Corp. --	24,697;
Hastings Manufacturing Company --	5,000;
International Harvester Company --	31,401;
ITT Hancock Industries --	5,000;
Wyman Gordon/Jackson Crankshaft --	5,000;
K Mart Corporation --	5,000;
Keeler Brass Company --	64,964;
Tom King Oil, Inc. --	5,000;
Knape & Vogt Manufacturing Company --	21,878;
Koegel Meats, Inc. --	5,000;
City of Lampeer --	5,000;
Laro Coal & Iron Company --	57,452;
La Salle Machine Tool, Inc. (Fenton and Sys-T-Mation Divisions) --	23,411;
Lear Seigler Corporation --	5,000;
Leslie Metal Arts Company, Inc. (LESCOA) --	5,000;
Lindell Drop Forge Company --	5,000;
Master Finish Company --	5,446;
Michigan Bell Telephone Company --	5,000;
Michigan Consolidated Gas Company --	5,000;
Total Pipeline Corporation --	5,000;
Midland-Ross Company --	508,561;
Monsanto Company --	99,813;
Motor Products-Owosso Corporation --	15,872;
Motor Wheel Corporation --	55,318;
MWA Company --	7,703;
Bay City Division of Newcor --	5,000;
Organic Chemicals, Inc. --	12,995;
Parke, Davis & Co. --	5,000;
Parker-Hannifin Corporation --	5,000;
Ren Plastics Division of Ciba-Geigy Corporation --	13,983;
Reynolds Metals Company --	70,382;
Rockwell International Corporation --	13,655;
Rospatch Corporation --	5,000;
Rowe International, Inc. --	5,000;
Sealed Power Corporation --	37,722;
Sears, Roebuck & Company --	5,000;
Shaw-Walker Company --	5,000;
Shell Oil Company --	11,849;
Spartan Oil Corporation --	17,992;

State Heat Treat, Inc. --	1,400;
Stow/Davis Furniture Company --	5,000;
Sun Exploration and Production Company --	5,336;
Sundstrand Heat Transfer, Inc. --	16,392;
SWS Silicones Corporation --	197,369;
Simpson Industries, Inc. for Teer Wickwire --	5,000;
Thierica, Inc. --	1,400;
Turner Bear Corporation --	5,000;
U.S. Chemical Company, Inc. --	60,000;
Roblin Industries, Inc. (United Steel & Wire Company Division) --	1,400;
Universal Electric Company --	5,000;
Upjohn Company --	895,404;
GTE Valeron Corporation --	5,000;
Victory Machine Company --	5,000;
Whirlpool Corporation --	24,875
Wright Brothers Collision Service, Inc. --	1,400;
$14,000,610; TOTAL:	$14,000,610;

# # #

Clegg 9/13

Blue Plains filing: D.C. plant dumping into river → bay. Complaint + consent decree → clean up.

Flint, Michigan: hazardous waste dumping, involves large cos.

Dinkins, previous p.m.: no DOJ filing in comparable north case.

[Advised RAH of above]

U.S. Department of Justice
Office of the Deputy Attorney General

9/27

To: John Roberts

From: Roger Clegg

Here is the updated version of the Chicago background material. Sorry for the delay, but it took us a long time to get the circuit court's opinion.

DOJ daily report

BACKGROUND
ON
UNITED STATES v. CHICAGO BOARD OF EDUCATION

Event: On Wednesday, September 26, the Seventh Circuit Court of Appeals, at the request of the Department of Justice, reversed a district court order requiring the United States to, among other things, provide the Chicago Board of Education with $103 million for the forthcoming school year and propose legislation ensuring that Chicago receives at least $103 million in each future year to fund a desegregation program for Chicago's public schools. Civil rights groups and the City of Chicago may criticize us for this.

I. Facts: On August 13, 1984, District Judge Shadur in Chicago entered an order which imposed a variety of substantial obligations upon the United States. The underlying desegregation lawsuit was settled in 1980 by a consent decree between the United States and the Chicago Board of Education. One provision of that consent decree required both the United States and Chicago to "make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan."

The district judge concluded that this "good faith effort" provision required the United States to do a number of things, including:

(1) Give Chicago $103.858 million for this school year and, in any event, $29 million from the Department of Education immediately;

(2) Propose and support legislation which would ensure that Chicago gets at least $103.858 million for this and each subsequent school year;

(3) Oppose legislation which would keep Chicago from getting at least this much money each year;

(4) Require all parts of the Executive Branch to look for money for Chicago.

This order was earlier "stayed" (i.e., not put into effect pending the appellate court decision) by the Court of Appeals. On Wednesday, the Court of Appeals reversed the district court and vacated this order in its entirety. The

appellate court ruled that the district court had greatly overstated the United States' obligations under the decree and that the lower court's findings of "bad faith" conduct by the United States were erroneous and, in any event, were not sufficient to support the remedial order's sweeping requirements. The Court of Appeals accepted the Justice Department's argument that the decree did not require the Executive Branch to engage in legislative activity to make funds available to Chicago but required only that Chicago receive its "equitable fair share" of funds Congress has already appropriated to assist local desegregation programs across the country. The Court of Appeals did not reach the broader constitutional questions concerning the judiciary's authority to direct Executive Branch activities but based its decision solely on an interpretation of the consent decree.

II. Position of the U.S.: The district court's order was based on a clearly erroneous interpretation of the United States' obligations under the decree. Moreover, it impermissibly interfered with relations between the Executive and Legislative Branches of the Federal Government and, by judicial fiat, redirected to Chicago funds that the Secretary of Education had already allocated to other needy school districts to support local education and desegregation efforts. As noted, the Court of Appeals ruled that the lower court had incorrectly interpreted the decree and therefore did not address the question of whether the order violated separation of powers principles.

III. Relationship to Administration Philosophy: The Administration has consistently stressed that courts should not engage in "judicial activism" that impermissibly interferes with the legislative and executive functions of Government. Our opposition to the district court's attempt to restrain the President from exercising his most basic and exclusive constitutional duties was consistent with this policy.

IV. Anticipated Criticisms and Planned Department of Justice Responses:

Criticism: The Reagan Administration has undermined Chicago's desegregation program.

Response: The Administration will not allow a federal judge to dictate to the President how to make the funding decisions entrusted to his discretion or how to conduct his relations with Congress. Chicago is completely free to fulfill its responsibility to desegregate its schools and the Administration supports these efforts. However, as the Court of

Appeals ruled, the decree did not require taxpayers across the country to fund this program, at the expense of other worthy education and desegregation activities in other communities.

Criticism: The Reagan Administration is reneging on a legal commitment entered into by a prior Administration.

Response: Wrong. The consent decree does not commit the United States to act as an "insurer" for Chicago, requiring that the Federal Government provide all desegregation funds that Chicago is either unwilling or unable to raise in order to cure prior segregation. Nor did the decree "contract away" the President's right and obligation to perform his constitutional duties. The Court of Appeals correctly ruled that the district judge's interpretation of the decree's language was clearly erroneous.

V. Talking Points:

° The district court's interpretation of the language in the decree was simply wrong.

° The Administration fully supports Chicago's desegregation efforts but it will not, and is not required to, shift the lion's share of federal desegregation and education funds to Chicago at the expense of other needy school districts.

° The Court of Appeals agreed with the Justice Department on both of these points.

THE WHITE HOUSE

WASHINGTON

October 5, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Consent Decree in Alcan-Arco

Associate Deputy Attorney General Roger Clegg has advised me that the Justice Department today announced the filing of a consent decree settling its civil antitrust action challenging the acquisition by Aluminum Limited of Canada (Alcan) of the aluminum producing assets of Atlantic Richfield Company (Arco). Under the terms of the decree, Arco must retain at least a 60 percent interest in its newly-completed aluminum rolling mill in Kentucky. Alcan will hold the other 40 percent in a production joint venture. Arco had not yet used the mill to produce aluminum cans, but had planned to do so. If Alcan had been permitted to acquire the mill in its entirety, the result would have been the elimination of a significant new potential competitor in the aluminum can market. (Alcan is the non-Communist world's largest aluminum company.) Carefully wrought conditions on the joint operation of the mill will ensure that Alcan and Arco remain competitors in the product market. The proposed decree has been filed with the U.S. District Court in Louisville and will become final if approved by the Court after a 60-day period for public comment.

The case is noteworthy in two respects:

° It is the first "potential competitor" case brought by Justice in recent years. As noted, Arco was not yet in the aluminum can market, but rather was a potential entrant.

° The use of a production joint venture to settle the case is an innovative approach. In this case this approach was both economically efficient and helped preserve competition.

Pursuant to our usual procedures in such cases, I have prepared a memorandum for Baroody, alerting him of this newsworthy development from Justice.

Attachment

THE WHITE HOUSE

WASHINGTON

October 5, 1984

MEMORANDUM FOR MICHAEL E. BARODY
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PUBLIC AFFAIRS

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Consent Decree in Alcan-Arco

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FFF:JGR:aea 10/5/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

October 5, 1984

MEMORANDUM FOR MICHAEL E. BARODY
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PUBLIC AFFAIRS

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

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FFF:JGR:aea 10/5/84
cc: FFFielding/JGRoberts/Subj/Chron

DATE: 10-6-84
The New York Times
PAGE: 29

Novel Antitrust Pact for Arco, Alcan

By ROBERT D. HERSHEY Jr.

Special to The New York Times

WASHINGTON, Oct. 5 — The Justice Department today announced a novel antitrust agreement under which Alcan Aluminum Ltd. would acquire most, but not all, of the Atlantic Richfield Company's aluminum business.

Arco would keep a 60 percent interest in its new $400 million rolling mill in Logan County, Ky. Alcan would obtain the remaining 40 percent and all of Arco's other aluminum operations. The price is estimated at between $600 million and $1 billion, depending on the market value of preferred stock.

In June, the department decided that the transaction, as initially structured, would substantially reduce competition.

Since the plant is not operating yet, the case involves potential, rather than existing, competition. Such a doctrine has been seldom used by trustbusters since the Federal Trade Commission brought several suits during the Carter Administration. But Justice Department guidelines, updated in 1982, embrace the doctrine, particularly in "horizontal combinations" involving direct competitors.

Lawyers in private practice asserted that today's settlement probably does not represent a major change in the Government's antitrust enforcement because of the unusual circumstances of the case. Nonetheless, antitrust specialists said they were intrigued by the settlement, which requires the companies to independently price and market the production from the plant, which is the first aluminum rolling mill built in the United States for 10 years or more.

J. Paul McGrath, Assistant Attorney General for the antitrust division, said the arrangement would preserve Arco, or a company that might buy its interest, as a significant and independent entrant into the market for beverage-can bodies.

The decree, filed with the United States District Court in Louisville, Ky., and subject to its approval, provides safeguards against the market becoming more concentrated.

"Unlike many joint ventures," Mr. McGrath said, "this one is strictly limited to operation of the plant as a cost center rather than a profit center. Each company is solely responsible for determining its own product mix and level of output, and each must independently market its share of the plant's output."

The companies, moreover, are barred from exchanging information about competitively sensitive subjects during the 10-year life of the agreement.

Arco, an oil company with a substantial but ailing metals business, is not precluded from selling its stake in the Kentucky plant, but it may not sell to the Aluminum Company of America, the Reynolds Metals Company or the Kaiser Aluminum and Chemical Corporation, the biggest American producers, according to the decree. Arco is also not to sell its share piecemeal. At its Los Angeles headquarters, Arco issued a statement today saying it was seeking to sell its interest in the mill as well as its other metals operations.

Alcan, a Canadian company, ranks fourth, with 13.5 percent of the market. The four biggest companies have 87.9 percent of the market.

The settlement clears the way for Alcan to purchase Arco's other aluminum properties. These include a primary smelter in Sebree, Ky.; rolling mills in Louisville and Terre Haute, Ind., and a 25 percent interest in an refinery in Ireland.

Commenting on the joint production, Donald I. Baker, who headed the antitrust division in 1976 and 1977, said, "It certainly is a novel and innovative soluti ...," showing that "the whole merger enforcement business is pretty complicated."

Another antitrust lawyer, Marc Gary of Mayer, Brown & Platt, said potential competition cases are hard to prove, suggesting that the department had found a satisfactory solution.

Under the settlement, a separate management company would be created to operate the plant and each company would have the right to enlarge the plant even if the other did not participate.

Mr. McGrath said the arrangement would allow the plant to be brought on line more quickly and efficiently than if Arco were to operate it alone.

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^Justice Forces Unprecedented Antitrust Settlement In Aluminum Deal<

^By MICHAEL J. SNIFFEN=

^Associated Press Writer=

WASHINGTON (AP) _ The Justice Department on Friday approved a major aluminum industry consolidation but only after forcing unprecedented changes in the deal to avoid the elimination of one competitor.

The groundbreaking solution to the department's antitrust concerns in the acquisition was based on a new joint venture idea offered by Assistant Attorney General J. Paul McGrath. His proposal is aimed at helping U.S. industry compete better with foreign firms while also allaying some congressional worries that too many mergers are being approved.

The department said it will not oppose the sale of most of Atlantic Richfield Co.'s aluminum assets to Alcan Aluminium Ltd., a Canadian firm, but Arco's just-completed Logan County, Ky., rolling mill will not be part of the sale.

That efficient, new facility, the only aluminum rolling mill built in this country in more than a decade, will be run as a joint venture of the two firms. The mill was designed by Arco to produce the type of sheet aluminum used in beverage cans, a market in which Alcan would have been a new competitor.

This was the first time that Justice antitrust officials had asked two competitors to resolve antitrust concerns by structuring their deal as a joint venture rather than an acquisition.

In many U.S. heavy industries, executives have argued that they need to merge companies to present more efficient competition to foreign firms, but some in Congress have worried that mergers are proceeding so rapidly that consumers will be hurt by a reduction in price competition.

McGrath, head of the department's antitrust division, first offered the idea of joint ventures as alternatives to mergers or acquisitions earlier this year when he looked at two controversial steel mergers. But the steel companies did not take his suggestions, and their cases were resolved in different ways.

Under the agreement, Arco will pay 60 percent of the cost of running the mill and receive 60 percent of its product to sell independently. Alcan's share of costs and products will be 40 percent. They will be barred from discussing prices or marketing.

Arco said Friday it hopes to sell its share of the joint venture, but Alcan and other major aluminum producers are barred for 10 years by this agreement from buying that 60 percent share.

Thus, there will still be a new competitor producing aluminum for beverage cans.

In the original deal announced Jan. 5, Alcan was to pay Arco between $600 million and $1 billion. The companies declined to put a value on the new arrangement.

The case also is one of the first in recent years based on allegations that section 7 of the Clayton Act would be violated by a deal that reduced potential rather than actual competition. The section prohibits mergers or acquisition that tend to substantially lessen competition.

The agreement was embodied in a proposed consent decree to settle a civil antitrust suit to block the deal. The suit and the decree were filed simultaneously in U.S. District Court in

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Louisville, Ky.

Norsett challenged the original deal because production for beverage cans ``is one of the largest and most important segments of the aluminum business (and) is highly concentrated.'' He said the largest four producers accounted for 87.9 percent of all sales in the United States last year.

The world's largest aluminum company, outside communist countries, Alcoa had U.S. sales amounting to one quarter of its total 1982 revenues of $8.2 billion. Primarily an oil company, Arco's aluminum operations contributed $718 million to the company's total 1982 revenues of $26 billion.

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Arco Aluminum Sale To Alcan Gets Approval

By Mark Potts
Washington Post Staff Writer

The Justice Department yesterday announced a unique settlement in an antitrust case that requires two aluminum companies to operate jointly a production facility involved in the dispute.

The agreement clears the way for the acquisition of Atlantic Richfield Co.'s aluminum division by Canada's Alcan Aluminum Ltd., the world's largest aluminum company, at a price of between $600 million and $1 billion. Arco and Richfield have never announced an exact price for the transaction.

"The use of the production joint venture as a means of settling [this type of] case is, I believe, an innovation," said J. Paul McGrath, assistant attorney general in charge of the antitrust division.

Under the settlement, which is to be in effect for 10 years, Alcan and Arco will share an Arco aluminum-rolling mill in Logan County, Ky. Arco will get a 60 percent share of the mill's production and Alcan will get a 40 percent share. An independent management company will be set up to run the plant, with representatives on its board from the two companies.

Arco and Alcan will split the costs of operating the mill 60-40, but in essence will run it as if it were two mills, with each company determining its own product mix and marketing those products. The settlement only affects the Logan County facility; Alcan is free to acquire Arco's other aluminum operations as originally planned.

The Logan County plant is not yet open, and its use as the centerpiece of the settlement represents another unusual twist: the first successful use by the Justice Department in years of the concept of "potential competition," in which the the department argues that a merger could remove from the marketplace a competitor that has not yet appeared, but has the potential to do so.

The chief product to be produced by the Logan County plant will be aluminum-can body stock, a business that Alcan is already in but that Arco has not yet entered—but would have once the Logan County plant was ready. "Based on the new plant's capabilities and Arco's plans for its utilization, it was clear that Arco would have become a significant new entrant into the can-body stock market except for this acquisition," McGrath said. According to Justice Department figures, the plant would have made Arco the nation's fifth-largest producer of can stock, behind fourth-place Alcan.

"The parties have claimed that Alcan's participation in this joint venture will enable them to bring the plant up faster and operate it more efficiently than would be the case if Arco alone were operating it," McGrath said. "The joint venture agreement specifically provides for both parties to contribute their technology and expertise to the operation of the new mill. If this does increase the plant's efficiency, the joint venture will permit the parties and, ultimately, consumers to realize this benefit while still preserving Arco as an independent entrant."

Arco will be allowed during the period of the agreement to sell its interest in the plant to any company outside the aluminum industry. Arco also will be allowed to expand the plant's capacity, either alone or in conjunction with Alcan.

Best-known as an oil company, Los Angeles-based Arco obtained the aluminum operations when it acquired Anaconda Aluminum Co. in 1977. It announced plans to sell most of its aluminum holdings to Alcan in January, and the Justice Department challenged the sale in June on grounds that it violated the Clayton Antitrust Act. Yesterday's settlement was filed as a proposed consent decree with a civil antitrust suit in federal district court in Louisville, Ky. It is subject to 60 days of public comment and approval by the court.

Arco said yesterday that once it completes the sale to Alcan, it plans to put its remaining metals operations up for sale.

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Background on GEIER v. ALEXANDER
(Tennessee Higher Education Desegregation Case)

Event: On Tuesday, September 25, a federal district court in Tennessee, over the objection of the Department of Justice, adopted a settlement agreement entered into by the other parties in a higher education desegregation case. The United States is the only party in the case that objected to the settlement agreement. Civil rights groups may criticize us for this.

I. Facts: A class of black plaintiffs (represented by, among others, the NAACP Legal Defense Fund), a class of white professors at Tennessee State University, and the State of Tennessee entered into a settlement agreement, or "consent decree," to resolve the latest chapter in drawn-out litigation designed to remedy prior de jure segregation in public colleges and universities in Tennessee. Tennessee's higher education system has been operating under a court-ordered desegregation plan for a number of years. In recent years, the black plaintiffs have requested further relief from the court, arguing that the existing desegregation plan has not resulted in a sufficient degree of integration.

To resolve this claim, the district court approved the consent decree entered into by the black plaintiffs and the state of Tennessee. Tennessee will be legally obligated to carry out all the requirements of the decree. The decree requires the State to erect racially preferential "goals" for faculty hiring and student enrollment, both graduate and undergraduate, as well as a number of other racial preferences. */

II. Position of the U.S.: The United States objected to court approval of the consent decree because it requires the use of admissions, hiring, and other racial preferences in violation of the Constitution. Some of the preferences to be established are the same type as those struck down by the Supreme Court in the famous case of Bakke v. University of California Regents. No decision has yet been made on whether to appeal the district court's decision.

*/ One provision contemplates the development of scholarship programs limited to members of a certain race, and another provision requires the State to provide 75 black college students per year with special tutoring, scholarships, etc., to encourage their enrollment in professional schools.

III. Relationship to Administration Philosophy: The Administration has consistently stressed that the Constitution requires all governmental entities to behave in a "color-blind" manner and not to prefer any person who is not a victim of racial discrimination over another on the basis of race. Governments therefore cannot remedy prior discrimination against one racial group by discriminating against another through racial quotas. This is the essential lesson of the Supreme Court's decision in Bakke and other equal protection cases.

IV. Anticipated Criticism and Planned Department of Justice Response

Criticism: The Reagan Administration has attempted to foil a comprehensive desegregation plan agreed to by all the other parties in the case.

Response: The United States will not be a party to -- indeed, will vigorously oppose -- any desegregation plan which requires a state government to violate the constitutional rights of innocent students, regardless of whether the state has agreed to take such action. More discrimination is simply not the way to end discrimination. We made every effort to work with the state and other parties to develop an effective desegregation plan that did not include racial preferences, as we have in other statewide higher education cases (Louisiana, North Carolina), but these efforts were unavailing.

V. Talking Points

° The United States fully supports efforts to end unconstitutional segregation in Tennessee's higher education system and worked with the parties to accomplish this goal.

° It would not, however, be a party to any plan which requires quotas and other racial preferences.

° The United States will continue to oppose racial discrimination, no matter what form it takes.