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OVERVIEW

During the period covered by this survey the Tenth Circuit Court of Appeals considered a wide range of issues in the area of constitutional law. This overview first analyzes the court's activity in three important areas: ballot access, freedom of speech, and justiciability of tort claims stemming from operation of nuclear facilities. Finally, there is a brief review of the court's opinions dealing with other questions of constitutional law.

I. MINOR PARTY BALLOT ACCESS: THE TENTH CIRCUIT REJECTS STRICT SCRUTINY

In *Arutunoff v. Oklahoma State Election Board*[1] the Tenth Circuit Court of Appeals considered a constitutional challenge to those portions of Oklahoma's election act which affect ballot access by minor parties. The first portions challenged provided for decertification of previously recognized political parties whose nominees for President, Vice President, or Governor failed to receive ten percent of the votes cast.[2] Decertification denied candidates sponsored by decertified parties the automatic ballot access provided to candidates affiliated with recognized parties.[3] Additionally, the party affiliation of members of decertified parties was changed to Independent.[4] The second portion of the election act which was challenged permitted ballot access to independent candidates under requirements less stringent than those imposed on party candidates.[5]

A. *Oklahoma's Election Act Under Fire*

In the 1980 general election, the Oklahoma Libertarian party's nominees for electors for President of the United States failed to receive the percentage of votes required for continued official recognition.[6] Members of the Libertarian party brought suit to enjoin Oklahoma election officials from decertifying the party and changing the affiliation of party members to In-

1. 687 F.2d 1375 (10th Cir. 1982), *cert. denied*, 103 S.Ct. 1892 (1983).

2. OKLA. STAT. tit. 26, § 1-109 (1981) provides: "Any recognized political party whose nominee for Governor or nominees for electors for President and Vice President fail to receive at least ten percent (10%) of the total votes cast for said offices in any General Election shall cease to be a recognized political party. . . ."

3. OKLA. STAT. ANN. tit. 26, § 1-102 (1981) provides automatic ballot position to recognized political parties complying with statutorily mandated primary procedures. *See* Craig v. Bard, 160 Okla. 34, 15 P.2d 1014 (1932) (interpreting predecessor to section 1-102).

4. OKLA. STAT. tit. 26, § 1-110 (1981) provides: "The secretary of each county election board shall . . . change to Independent the party affiliation on the registration form of each registered voter of a political party which ceases to be a recognized political party."

5. OKLA. STAT. tit. 26, § 5-112 permits independent candidates to be listed on the ballot either through presenting a petition signed by five percent of all registered voters or by simply paying a filing fee.

6. The Libertarian presidential electors gained only 1.2% of the total votes cast in the 1980 general election, far short of the required 10%. 687 F.2d at 1377. *See supra* note 2.

dependent.[7] The district court denied the plaintiffs' request for relief and dismissed the action.[8] The Tenth Circuit, over Judge Seymour's dissent, upheld the district court.[9] The Supreme Court has refused to consider the Tenth Circuit's decision.[10]

B. *The* Arutunoff *Opinion*

The *Arutunoff* plaintiffs claimed that Oklahoma's decertification scheme unduly burdened their rights to freely cast their votes and to associate for the advancement of political beliefs, in violation of the first and fourteenth amendments. The independent candidate access requirements were challenged solely on equal protection grounds.[11] The *Arutunoff* opinion does not set forth the precise basis for plaintiffs' first and fourteenth amendment claims. While the opinion is therefore an inadequate vehicle for analyzing the court's treatment of these particularized claims, the dialogue between the court and the dissent concerning the proper standard of review does provide an opportunity for a brief analysis[12] of the methodological problems existing in this area of constitutional law.

Methodological problems stem from the fact that although the Supreme Court has written extensively on state regulation of ballot access,[13] no unequivocal standard of review has emerged from its decisions.[14] The discussion below limits itself to the standard of review issue in the context of the decertification challenge. The challenge based on easier independent candidate access is not addressed because the court properly held that controlling precedent permits disparate treatment for independent and party candidates.[15]

C. *Differing Interpretations of Supreme Court Precedent*

The majority essentially viewed the Court's decisions as creating no fixed standard of review. Rather, the Supreme Court opinions were read as requiring the judiciary to evaluate ballot restrictions on an ad hoc/sui generis basis.[16] Restrictions judicially deemed "unduly oppressive" are struck down, with lesser restrictions permitted as a proper exercise of the

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7. 687 F.2d at 1377.

8. *Id.*

9. Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 1892 (1983).

10. Arutunoff v. Oklahoma State Election Bd., 103 S. Ct. 1892 (1983), *denying cert. to* 687 F.2d 1375 (10th Cir. 1982).

11. 687 F.2d at 1378.

12. For fuller discussion of Supreme Court cases dealing with ballot access, *see* Elder, *Access to the Ballot by Political Candidates*, 83 DICK. L. REV. 387 (1979); Rada, Cardwell, Friedman, *Access to the Ballot*, 13 URB. LAW. 793 (1981).

13. In chronological order the relevant cases have been: Williams v. Rhodes, 393 U.S. 23 (1968); Jenness v. Fortson, 403 U.S. 431 (1971); Bullock v. Carter, 405 U.S. 134 (1972); Lubin v. Panish, 415 U.S. 709 (1974); Storer v. Brown, 415 U.S. 767 (1974); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); and Clements v. Fashing, 457 U.S. 957 (1982).

14. *Compare Arutunoff*, 687 F.2d at 1379 (McWilliams, J.) (Supreme Court's decisions do not reveal "hard-and-fast" rule or standard for measuring state ballot access laws) *with Arutunoff*, 687 F.2d at 1381 (Seymour, J., dissenting) (Supreme Court's decisions clearly mandate use of strict scrutiny in evaluating ballot access laws imposing more than de minimus burdens).

15. *See* 687 F.2d at 1380 (citing Storer v. Brown, 415 U.S. 724, 725 (1974)).

16. 687 F.2d at 1379.

state's interest in protecting the integrity of the electoral process.[17] This approach emphasizes the need to examine challenged election laws to determine whether, as a practical matter, the laws operate to exclude minor party ballot access.

Applying its test in *Arutunoff*, the court concluded that the Oklahoma decertification procedures did not unduly burden ballot access. The majority concluded (without reference to the record) that the requirements for continued certification were not unreasonably high, and that decertified parties could easily become recertified.[18] The fact that ballot access was easier under prior laws was deemed irrelevant; the court stated that the relevant inquiry was the effect of existing law.[19] Given the reasonableness of the burdens created by the existing laws, the plaintiffs were not entitled to relief.[20]

Judge Seymour, in dissent, disagreed with the majority's interpretation of the Supreme Court's ballot access cases. Under her reading, once a minor party established that ballot access restrictions were not de minimus a court was required to apply strict scrutiny and strike down restrictions not reflecting the least restrictive means of protecting ballot integrity.[21] Finding Oklahoma's certification/decertification framework to impose substantial burdens on minor party access (albeit without citation of evidentiary support for this conclusion), Judge Seymour easily found a less restrictive scheme in Oklahoma's previous certification procedures.[22] Hence, the required application of strict scrutiny mandated reversal of the district court's decision to deny plaintiffs their requested relief.[23]

D. *Sources of Methodological Confusion*

The Supreme Court's first contemporary encounter with minor party ballot access restrictions came in *Williams v. Rhodes*.[24] In *Williams* the Court held that two fundamental rights were implicated by state laws affecting minor party ballot access: the right to associate for advancement of political beliefs, and the right of a qualified voter to cast his or her ballot effectively.[25] Ballot access restrictions burdening these fundamental rights could only be justified by compelling state interests.[26]

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17. *Id.* The state's interest in protecting the electoral process from fraud, voter confusion, and similar antidemocratic effects provides the basis for permitting ballot access restriction. *See, e.g.*, Bullock v. Carter, 405 U.S. 134 (1972).

18. 687 F.2d at 1379-80. Under OKLA. STAT. tit. 26, § 1-108 (1981), any non-certified party presenting a petition signed by five percent of the voters in the immediately preceding gubernatorial or presidential election must be certified.

19. 687 F.2d at 1380.

20. *Id.*

21. *Id.* at 1380-83 (Seymour, J., dissenting).

22. *Id.* at 1381. Judge Seymour found further support for her contention that the new laws were unnecessarily restrictive in the lack of evidence of ballot confusion or fraud under the prior statutory provisions. *Id.* at 1382-83.

23. *Id.* at 1383.

24. 393 U.S. 23 (1968).

25. *Id.* at 30-31.

26. *Id.* The Court did not explictly articulate a "least restrictive means" requirement in *Williams*, instead balancing the degree of restriction against the weight of the state's interest. *See id.* at 32.

Bullock v. Carter[27] was the first case to limit *Williams*, doing so in two ways. The first, explicit limitation was the recognition that not every ballot access restriction invoked strict scrutiny; only when meaningful restriction was present would the rigorous strict scrutiny be imposed.[28] The second, implicit limitation is found in *Bullock's* delineation of strict scrutiny methodology. Instead of defining the judicial task as an investigation into whether the legislative restrictions were the "least restrictive alternative," *Bullock* defined the inquiry as an examination of whether the challenged restrictions were "reasonably necessary" to accomplish state goals.[29] Since *Bullock*, the Court has used both a "reasonably necessary" and a "least restrictive alternative" standard to test ballot access restrictions.[30] A situation has therefore been created in which a version of "middle-tier" scrutiny (legitimate state interest combined with reasonable means) coexists with strict scrutiny (compelling state interest combined with least restrictive means).

E. *Resolving the Confusion by Favoring Democratic Participation*

While the divergence in Supreme Court holdings may justify the *Arutunoff* majority, *Aruntunoff* clearly lies outside the spirit of the Court's ballot access opinions. The thrust of the Court's decisions has been directed towards *reducing* access requirements, with antagonism shown towards regulations increasing the numerical requirements for ballot access.[31] The Court also recently noted the honorable and vital role minor parties have played in the moral and political progress of the American polity.[32] Further, ballot access limitations impact directly on core first amendment rights of political expression, clearly justifying judicial apprehension towards state action restricting those rights.

The state in *Arutunoff* did not present even a modicum of proof that its increased restrictions were necessary.[33] Given that evidentiary void, the Tenth Circuit, even if reluctant to apply strict scrutiny, should have found Oklahoma's increased restrictions unnecessary and unduly burdensome and reversed the lower court. Federalistic concerns may justify deference to state legislative programs, but such deference should not override the fundamental philosophy of democratic participation embodied in the Constitution. Absent proof that increased ballot access restrictions are in fact necessary to

27. 405 U.S. 134 (1972).

28. *Id.* at 143.

29. *Id.* at 144.

30. *Compare* Lubin v. Panish, 415 U.S. 709, 719 (1974) (reasonable restrictions permissible); American Party of Texas v. White, 415 U.S. 767, 781 (1974) (restrictions valid unless "significantly less burdensome" alternatives available) *with* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1979) (least drastic means required).

31. *Cf.* Storer v. Brown, 415 U.S. 724, 738 (1974) (expressing concern over ballot access requirement which would effectively increase petition signature requirement, especially if such increase resulted in requirement that signatures of more than five percent of electorate be obtained).

32. *See* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1979) (noting important role of Abolitionist and Progressive parties).

33. Judge Seymour cogently observed that there was no evidence that Oklahoma's prior, less restrictive method of ballot regulation had been inadequate. 687 F.2d at 1382-83 (Seymour, J., dissenting).

protect ballot integrity,[34] such increased regulations should be struck down.

II. FREEDOM OF SPEECH

A. *Libel: Characterizing a Statement as Fact or Fantasy Falls Within the Province of the Court:* Pring v. Penthouse International, Ltd.

In the heavily publicized case of *Pring v. Penthouse International, Ltd.*,[35] a divided Tenth Circuit Court of Appeals panel overturned a jury verdict finding Penthouse magazine liable for libel.[36] The Penthouse article portrays the thoughts and acts of a Miss Wyoming at a Miss America contest.[37] The article describes Miss Wyoming as performing fellatio with several male companions, thereby causing them to levitate, with several of the acts unwittingly performed during a national television broadcast.[38] In the article Miss Wyoming also performs fellatio-like acts with her baton and thinks she might save the world by performing similar acts with various world leaders.[39]

The court utilized a two-part test in its treatment of this defamation action. The threshold question was whether the publication was about the plaintiff.[40] The jury specifically found that the plaintiff was the Miss Wyoming about whom the article was written.[41] The court of appeals found that the jury's determination was supported by the record, and accepted the jury's conclusion that the publication was about the plaintiff.[42]

The second element of the two-part analysis was whether the story could reasonably be understood as describing actual facts or events about the plaintiff or actual conduct of the plaintiff.[43] Two Supreme Court opinions were drawn on in articulating the "reasonably understood" requirement, and in holding that the fantastic nature vel non of a statement was a question of law. In both *Greenbelt Cooperative Publishing Association v. Bresler*[44]

34. The court stated that plaintiffs were effectively arguing that any party receiving 1.2% of the popular vote is entitled to retain ballot position. *Id.* at 1380. This contention is not well-taken. Plaintiffs did not challenge increased access requirements on the basis of their quantitative showing, but rather on the qualitative nature of their showing. Essentially, plaintiffs argued that under the previous certification program they would have been treated as having sufficient popular support to retain ballot position, and that absent a showing that the old system violated ballot integrity increased restrictions were improper.

35. 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 3112 (1983).

36. 695 F.2d at 440-41.

37. *Id.* at 441.

38. *Id.*

39. *Id.* at 439.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. 398 U.S. 6 (1970). In *Greenbelt* the plaintiff had certain property which the city wanted to buy and other property which he wanted rezoned. Both matters were before the city council at the same time. Various speakers at council meetings referred to the plaintiff's bargaining position as blackmail. A newspaper article reporting on the city council proceedings referred to those statements. After an independent review of the record, the Court held that the newspaper article was not defamatory as a matter of law because no reader could understand the article to mean that the plaintiff had actually been charged with blackmail. *Id.* at 13-14.

and *National Association of Letter Carriers v. Austin*,[45] the Supreme Court held that liability for defamation could not be imposed because the challenged articles involved expressions of opinion which could not reasonably be interpreted as describing a real state of affairs concerning the plaintiffs.[46] Although *Greenbelt* and *Letter Carriers* factually involved constitutional protection for opinion, the Tenth Circuit read both cases as requiring an appellate court to determine whether any type of statement was capable of constituting an assertion of fact.[47] In doing so the Tenth Circuit properly rejected the suggestion that the factual nature of a statement was a question for the jury. The constitutional imperative to protect freedom of expression requires judicial characterization of a statement as ideaistic (and therefore nonactionable) or factual (and therefore potentially actionable).[48] Thus, although *Pring* involved fantasy and not opinion, the Tenth Circuit properly delineated the allocation of functions between the judge and jury.

Turning to the merits, the court of appeals found the challenged portions of the Penthouse article to be "impossibility and fantasy within a fanciful story."[49] According to the court, it would have been impossible for a reader not to have understood that the article was pure fantasy.[50] Because the court considered the Penthouse article to be pure fantasy which could not be taken to imply facts concerning the plaintiff's actual activities, it reversed the lower court, and held that the story could not be defamatory.[51]

Judge Breitenstein's dissent argued that Penthouse should not be allowed to escape liability by embellishing fact with fantasy.[52] He viewed the article as describing factual incidents (performance of fellatio) and fanciful events (public performance of fellatio, levitation as a result of fellatio).[53] Because the jury was able to identify the plaintiff as the subject of the article, and because they could reasonably conclude from the article that plaintiff had committed fellatio, an act of "sexual deviation or perversion," the dissent found sufficient evidence to support a finding of libel.[54]

Essentially, the two opinions debate the degree to which a potentially ideaistic statement can be severed from its context and treated as factual, and therefore independently actionable. In *Pring* that debate is more academic than real. Plaintiff's amended complaint limited the libelous imputa-

45. 418 U.S. 264 (1974). In *Letter Carriers* a union publication referred to the plaintiffs as "scabs" and asserted that as scabs plaintiffs were traitors to God, country, family, and class. *Id.* at 268. The Court cited *Greenbelt* in disallowing recovery for defamation, and stated that there was no libel because the statements concerning treason could not, as a matter of law, be taken as suggesting plaintiffs were in fact traitors. *Id.* at 285-86. While the *Letter Carriers* holding is based on labor law policies, the grounding of these policies in first amendment concerns, *see id.* at 277-83, makes the decision relevent to first amendment analysis.

46. *See supra* notes 41-42.

47. 695 F.2d at 442.

48. *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (first amendment oriented primarily towards protecting expression of ideas).

49. 695 F.2d at 441.

50. *Id.* at 443.

51. *Id.* Appellate power to review lower court rulings on the ideaistic nature of a statement is well established. *See Greenbelt*, 418 U.S. at 282.

52. *Id.* at 444 (Breitenstein, J., dissenting).

53. *Id.* at 444-45.

54. *Id.*

tions to either creation of the impression that plaintiff performed fellatio while on national television, creation of the impression that plaintiff performed fellatio with a named individual, or the imputation that plaintiff performed fellatio-like acts with her baton at the Miss America pageant.[55] The dissent's emphasis that the article was libelous in imputing that Miss Wyoming engaged in fellatio in and of itself is therefore misplaced, as plaintiffs did not (apparently for tactical reasons)[56] plead that libel. Given the limited scope of the alleged libel in the context of a fanciful, ostensibly humorous[57] article, the majority's decision seems correct.

B. *Invasion of Privacy: Application of Defamation Standards*

In *Rinsley v. Brandt*[58] the court of appeals affirmed the district court's entry of summary judgment against plaintiff Rinsley in his action for invasion of privacy. Rinsley alleged that a book written and published by the defendants had invaded his privacy by placing him before the public in a false light.[59] The book in question, *Reality Police: The Experience of Insanity in America*, sharply criticized Dr. Rinsley's treatment of patients in mental institutions. The trial court found that the challenged portions of the book were either true, or were opinions and therefore not actionable.[60]

The court, in considering Rinsley's appeal, analogized false light privacy actions to defamation actions.[61] Essential to both actions is a determination that the matter published is not true.[62] Because a false statement is required, truth is an absolute defense to both actions.[63] Additionally, because opinions are not assertions of fact and are therefore not actionable,[64] statements which are opinion do not create liability for invasion of privacy.[65]

Rinsley first challenged the propriety of the district court making a summary determination that certain statements in the book were true. The Court of Appeals noted that whether a statement is true or false is a question of fact,[66] and upheld the district court's decision regarding the truth of the statements because Rinsley failed to raise a genuine issue of fact.[67] Additionally, Rinsley's own testimony confirmed the accuracy of the challenged passages,[68] making the trial court's summary determination altogether

55. *Id.* at 441.
56. *See id.*
57. Penthouse labeled the article as a "humorous" piece. *Id.* at 444 (Breitenstein, J., dissenting). This labeling is insufficient to determine liability, however. *See* Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979).
58. 700 F.2d 1304 (10th Cir. 1983).
59. *Id.* at 1305.
60. *Id.*
61. *Id.* at 1307.
62. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652E comment a (1977)).
63. 700 F.2d at 1307.
64. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). *See also supra* notes 43-48 and accompanying text.
65. 700 F.2d at 1307.
66. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 617 (1977), which states that the truth of statement is a question for the jury in defamation actions).
67. 700 F.2d at 1308.
68. *Id.*

proper.

In reviewing the district court's finding that particular portions of the book were opinion, the Tenth Circuit noted that the determination as to whether a statement is an assertion of fact or an opinion is a question of law.[69] The court concluded that the challenged passages were not actionable because they did not suggest any undisclosed facts that might be false,[70] but were merely exaggerated expressions of criticism.[71]

C. *State Power to Limit Broadcast Advertising of Alcohol Under the Twenty-First Amendment*

In *Oklahoma Telecasters Association v. Crisp*[72] the Tenth Circuit considered the constitutionality of portions of the Oklahoma Alcoholic Beverage Control Act. The act prohibited television broadcasters and cable television operators from advertising alcoholic beverages.[73] Telecasters and cable operators filed separate suits against Crisp, the director of the Oklahoma Alcoholic Beverage Control Board, claiming that the law violated their rights to free speech.[74] The district court granted the plaintiffs' separate motions for summary judgment, ruling that the state's power to regulate liquor pursuant to the twenty-first amendment[75] did not override the first amendment rights of the telecasters and cable operators.[76] Crisp appealed from the summary judgments rendered by the district court; his appeals were consolidated for consideration by the Tenth Circuit.

The critical issue on appeal was the precedential effect of the Supreme Court's dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*[77] for want of a substantial federal question.[78] Beginning with *Hicks v. Miranda*[79] the Supreme Court has consistently held that summary dispositions are decisions on the merits, and as such are binding on lower federal courts.[80] Although summary dispositions are binding, the precedential value of summary dispositions are limited. Only when the constitutional questions presented in an earlier case's jurisdictional statement are clearly the issues before a lower court is the lower court bound by a Supreme Court summary disposition.[81]

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69. *Id.* at 1309 (citing National Association of Letter Carriers v. Austin, 418 U.S. 264, 283-84 (1974)).

70. 700 F.2d at 1309 (citing RESTATEMENT (SECOND) OF TORTS § 566 (1977).

71. 700 F.2d at 1309.

72. 699 F.2d 490 (10th Cir.), *cert. granted sub nom.* Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 66 (1983). A more extensive analysis of *Oklahoma Telecasters* appears *infra* in Comment, *The Substantive Fallacy of the Twenty-first Amendment: A Critique of Oklahoma Telecasters Association v. Crisp*, 61 Den. L.J. 239 (1984).

73. *See* OKLA. STAT. tit. 37, § 516 (1981).

74. 699 F.2d at 492.

75. U.S. CONST. amend XXI, § 2 provides: "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

76. 699 F.2d at 493.

77. 69 Ohio St. 2d 361, 433 N.E.2d 138, *appeal dismissed*, 456 U.S. 902 (1982).

78. Queensgate Inv. Co. v. Liquor Control Comm'n, 456 U.S. 902 (1982).

79. 422 U.S. 332 (1975).

80. *Id.* at 344-45.

81. Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curium). *See also Oklahoma Telecasters*,

The court of appeals examined the jurisdictional statement in *Queensgate* and concluded that the constitutional issues presented there were substantially identical to those present in *Oklahoma Telecasters*.[82] The Tenth Circuit characterized the plaintiffs in both cases as arguing that liquor advertising was protected commercial speech, that the twenty-first amendment did not ex proprio vigore allow a state to infringe on protected commercial speech, and that a state's restrictions unconstitutionally burdened free speech rights.[83] Having determined that the issues presented by *Queensgate* were presented by *Oklahoma Telecasters*, the court concluded that it was obligated to uphold Oklahoma's regulation of liquor advertising.[84]

Despite the effect of *Queensgate*, the court proceeded to undertake an independent examination of the Oklahoma law. The basis for this decision was the Supreme Court's admonition against excessive reliance on summary dispositions, and the fact that the laws in *Oklahoma Telecasters* imposed more severe restrictions than those upheld in *Queensgate*.[85] The court therefore decided to proceed independently, treating *Queensgate* as a warning against too easily finding Oklahoma's laws unconstitutional.[86]

The court began its independent examination by noting that the Oklahoma law could be viewed either as a regulation incident to the sale of liquor or as a means by which the state protects its people from the dangers attending alcohol use.[87] In either event the Oklahoma law was within the authority granted to the states by the twenty-first amendment, and was therefore entitled to an added presumption of validity.[88] The court then analyzed the Oklahoma restrictions with reference to the standards *Central Hudson Gas and Electric Corp. v. Public Service Commission*[89] established for determining the validity of regulations touching commercial speech.[90]

Central Hudson set forth a four-pronged approach to review of commercial speech regulations: 1) whether the commercial speech concerns lawful activity and is not misleading; 2) whether the governmental interest underlying regulation is substantial; 3) whether the regulation directly advances the governmental interest; and 4) whether the regulation is more extensive than necessary.[91] The court quickly disposed of the first two steps in the *Central Hudson* analysis, finding that neither the sale nor use of alcohol was illegal, that advertisements for alcoholic beverages were not inherently misleading,[92] and that several substantial state interests were affected by alcohol abuse: health and safety of citizens, highway safety, family stability, and the

699 F.2d at 496 (listing relevant Supreme Court cases). Even where a summary affirmance acts as binding precedent a lower court is free to reject the reasoning used by the affirmed court. *Oklahoma Telecasters*, 699 F.2d at 496. *See Mandel*, 432 U.S. at 176-77.

82. 699 F.2d at 497.
83. *Id.*
84. *Id.*
85. *Id. See Mandel*, 432 U.S. at 176-77.
86. 699 F.2d at 497.
87. *Id.*
88. *Id.* at 498.
89. 447 U.S. 557 (1980).
90. *See* 699 F.2d at 498-502.
91. 447 U.S. at 566.
92. 699 F.2d at 500.

productivity of the work force.[93] To these already substantial interests the court added the state's twenty-first amendment power to regulate alcoholic beverages.[94] Thus, the first two prongs of the test were satisfied.[95]

Regarding the third part of the *Central Hudson* test, the court held that Oklahoma was not required to use the best means to advance its interest, but was only required to choose a means directly advancing the state interest.[96] Accordingly, even though no evidence tied reducing advertising to a reduction in alcohol consumption, the court held that the advertising prohibitions were reasonably related to reducing the sale and consumption of alcoholic beverages.[97] The court noted that the alcohol industry's advertising conduct indicated that it was not unreasonable to recognize the consumption/advertising connection;[98] in conjunction with the deference to state action arising by virtue of the twenty-first amendment, the advertising restrictions plainly were a means to directly advance the state's interests.[99]

Analysis of the fourth prong was more problematic. Appellees argued that the Tenth Circuit should uphold the lower court's finding that a ban on all rebroadcasting of alcohol-related commercials was excessive.[100] Noting that the point was not without difficulty, the Tenth Circuit nonetheless reversed the lower court. Analogizing Oklahoma's restrictions to the ban on substantially all billboard advertising upheld in *Metromedia, Inc. v. City of San Diego*,[101] the court essentially held that no advertising business has the right to control the use of its chosen medium.[102] Given the extensive state authority stemming from the twenty-first amendment, and the availability of other mediums for acquiring alcohol-related information, Oklahoma's restrictions, even if severe, were not excessive.[103] Because Oklahoma's laws did not unconstitutionally burden appellee's commercial speech rights, the lower court was reversed and its injunction against enforcement of the laws dissolved.[104]

III. *McKAY V. UNITED STATES*: JUSTICIABILITY OF NUCLEAR TORTS REVISITED

In *McKay v. United States*[105] the Tenth Circuit Court of Appeals considered the justiciability of tort claims seeking redress for property damages allegedly caused by release of radiation from a nuclear munitions plant. *Mc-*

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 501.
98. *Id.*
99. *Id.*
100. *Id.*
101. 453 U.S. 490 (1981).
102. 699 F.2d at 502.
103. *Id.*
104. *Id.* Judge McKay's brief concurring opinion added an interesting twist to the decision. Judge McKay noted that the challenged laws were enacted by voter referendum, and replaced a previous prohibition ordinance. Given the quid pro quo conceived by the voters (i.e. total regulatory package for surrender of prohibition), he doubted the court's power to sever the challenged provision from the entire regulatory regime. *Id.* (McKay, J., concurring).
105. 703 F.2d 464 (10th Cir.), *cert. denied*, 103 S.Ct. 3085 (1983).

Kay provided the Tenth Circuit with its first opportunity to apply its holding in the landmark *Silkwood v. Kerr-McGee Corp.*[106] decision, although that application seems questionable in light of the trial court's holding.[107]

A. *Background and Lower Court Opinion: Non-Justiciability through Primary Jurisdiction*

Owners of land surrounding the Rocky Flats nuclear weapons plant brought suit against the United States government and the plant's operators (federal defendants), and against several state defendants, alleging that the plant's operation had tortiously injured plaintiffs' property.[108] The landowners' complaint asserted negligence, nuisance, liability without fault, and an unconstitutional "taking."[109] In addition to demanding attorney's fees and twenty-six million dollars of compensatory damages plaintiffs' prayer included a request for one-hundred-sixty million dollars in exemplary damages.[110]

After years of pretrial activity, the United States District Court for the District of Colorado granted the federal defendants' motion for summary judgment on the grounds that the plaintiffs' complaint did not present justiciable issues.[111] The basis of the trial court's finding of non-justiciability was the pervasive federal administrative agency role in determining permissible radiation levels from nuclear facilities in the context of the political decision to operate a nuclear facility at Rocky Flats.[112] This combination of factors led the district court to hold that the doctrine of primary jurisdiction operated to preclude judicial consideration of plaintiffs' claims against the federal defendants.[113]

Plaintiffs' claims were grounded in the allegation that Rocky Flats had created a widespread health hazard, and that this general hazard had damaged their property. Plaintiffs did not allege the existence of personal injury

106. 667 F.2d 908 (10th Cir. 1981), *rev'd in part*, 52 U.S.L.W. 4043 (U.S. Jan. 11, 1984) (No. 81-2159). For fuller discussion of *Silkwood, see* Note, Silkwood v. Kerr-McGee Corp.: *Preemption of State Law for Nuclear Torts?*, 12 ENVTL. L. 1059 (1982); Note, *Federal Preemption: State Law Principles of Strict Liability in a Nuclear Accident—a Preemption Problem in Light of the Price-Anderson Act?*, 6 U. DAYTON L. REV. 279 (1981); Comment, Silkwood v. Kerr-McGee Corp.: *Workers' Compensation and Federal Preemption Rescue the Nuclear Tortfeasor*, 60 DEN. L.J. 291 (1982).

107. *See infra* notes 133-35 and accompanying text.

108. *McKay*, 703 F.2d at 465.

109. *Id.* at 466. The takings claim was disposed of by noting that the Court of Claims had exclusive jurisdiction over such claims when exceeding $10,000. *Id.* at 469-70. In upholding the Court of Claims' exclusive jurisdiction, the Tenth Circuit rejected plaintiffs' contention that these takings claims could be heard under the doctrine of pendent jurisdiction. *Id.* at 470.

110. *Id.* at 466.

111. Good Fund Ltd.—1972 v. Church, 540 F. Supp. 519 (D. Colo. 1982), *rev'd sub nom.* McKay v. United States, 703 F.2d 464 (10th Cir.), *cert. denied*, 103 S.Ct. 3085 (1983). The claims against the state defendants were not dismissed. *See* 703 F.2d at 548 (holding that only claims against federal defendants are dismissed).

112. *See* 540 F. Supp. at 537-48.

113. *Id.* at 538-39. The doctrine of primary jurisdiction requires a court to defer to agency factfinding where legislative intent and agency expertise dictate that an agency, not a court, should serve as factfinder. Primary jurisdiction therefore operates to divest a court of any function except judicial review of the agency decision. B. SCHWARTZ, ADMINISTRATIVE LAW §§ 166-168 (1976).

to any specific person.[114] The Environmental Protection Agency (EPA),[115] however, had determined that the off-site radioactivity effects from Rocky Flats had not created a general health and safety hazard.[116] Given EPA's conclusion, the court held that it lacked jurisdiction to entertain tort claims grounded in allegations relating to creation of a general health hazard.[117] Any finding contrary to that of the EPA would usurp the agency's factual conclusion, based on its statutory jurisdiction, that Rocky Flats' operation had not created a general health hazard.[118] Deference to agency jurisdiction therefore precluded any judicial action except consideration of the arbitrariness of the EPA's findings concerning Rocky Flats' generalized health effects.[119]

Buttressing the reasons for finding primary jurisdiction were the national defense aspects of Rocky Flats. The trial court noted that the decision to operate Rocky Flats was reviewed annually,[120] and that the judiciary has traditionally recognized that questions concerning national defense (including its nuclear component) are usually left to the other branches of government.[121] Given the political nature of the Rocky Flats operation, and the existence of an agency having statutory jurisdiction over the health and safety issues involved in the lawsuit, and a special competence in resolving those issues, a proper respect for the judiciary's constitutional role required recognition of, and deference to, EPA's primary jurisdiction.[122]

B. *The Appellate Opinion: Justiciability Through Non-Preemption*

On appeal, the Tenth Circuit did not frame the issues in terms of primary jurisdiction, instead analyzing the trial court's opinion as a finding that state tort remedies had been preempted through either pervasive regulation or the presence of a political question.[123] Seizing on the distinction the lower court had drawn between claims of individualized personal injury and the claims presented concerning property damage,[124] the Tenth Circuit pointed out that if preemption existed for property injuries it would also exist for personal injuries.[125] The court, on the basis of its *Silkwood* decision,

114. 540 F. Supp. at 545.

115. *Id.*

116. The Environmental Protection Agency (EPA) had jurisdiction to determine the health and safety effects of Rocky Flats' radioactive releases. *Id.* at 537.

117. *Id.* at 538. Plaintiffs argued that the EPA's findings were not final, were the result of a collusive attempt by government agencies to insulate themselves from liability, were not final agency action, and were improperly promulgated, with the result that the doctrine of primary jurisdiction did not mandate deference to the findings. *Id.* at 540-43. The trial court rejected these contentions, finding them insufficient to justify assuming jurisdiction. *Id.* The Tenth Circuit, because it did not analyze the trial court's primary jurisdiction conclusions, *see infra* notes 123-132 and accompanying text, did not consider these arguments.

118. 540 F. Supp. at 538-39.

119. *Id.*

120. *Id.* at 545.

121. *Id.* at 547.

122. *Id.*

123. McKay v. United States, 703 F.2d 464, 466 (10th Cir.), *cert. denied*, 103 S. Ct. 3085 (1983).

124. 703 F.2d at 466-67.

125. *Id.*

then simply rejected the viability of a preemption analysis with respect to state tort claims requesting compensatory damages.[126]

Having rejected preemption as a basis for denying plaintiffs their requested relief the court of appeals turned to what it perceived to be the alternate ground for the trial court's decision, which was the presence of a political question.[127] The political question doctrine is rooted in separation of powers principles,[128] and seeks to avoid judicial usurpation of political branch prerogatives by refraining from judicial decisionmaking on questions constitutionally reserved for the political branches.[129] The Tenth Circuit, while recognizing that certain aspects of the Rocky Flats operation had political overtones (e.g. the decision to operate the plant),[130] rejected the proposition that deciding to provide civil remedies to plaintiffs injured by radiation releases involved a political question.[131] Hence, plaintiffs' claims were justiciable.[132]

C. *Critique*

The circuit court's opinion, while probably correct in terms of existing precedent, does not satisfactorily address the lower court's opinion. The district court did not base its holding on a straight-forward preemption theory, recognizing that *Silkwood* precluded such an approach.[133] Instead, the court examined whether the doctrine of primary jurisdiction precluded consideration of tort claims based on the generalized health and safety effects of Rocky Flats, explicitly recognizing that with respect to issues not falling within the EPA's jurisdiction (e.g. the effect of Rocky Flats on a single individual),[134] primary jurisdiction was inapplicable. Further, the lower court did not use the political question doctrine as an alternate basis for its rejection of plaintiffs' claims. The political nature of atomic weapons production was merely an additional justification for finding that executive agencies had primary jurisdiction to investigate the effects of governmental conduct in the production of such weapons.[135] Had the the lower court opinion been ad-

126. *Id. Silkwood* held that compensatory tort actions were not preempted by federal regulation. 667 F.2d at 922. This aspect of *Silkwood* was not affected by the Supreme Court's review of the case.

127. 703 F.2d at 467-69.

128. *Id.* at 470.

129. Baker v. Carr, 369 U.S. 186 (1962).

130. 703 F.2d at 470.

131. *Id.* at 471-72. Applying the test enunciated in Baker v. Carr, 369 U.S. 186 (1962), the court noted the lack of a textual commitment of this issue to a political branch, the availability of manageable judicial standards for resolving these claims, and the general propriety of judicial action in the circumstances presented by this litigation. 703 F.2d at 471. *See Baker v. Carr*, 369 U.S. at 217.

132. 703 F.2d at 472.

133. 540 F. Supp. at 532.

134. *Id.* at 545.

135. The lower court's "political question" analysis states:

> The plaintiffs' contentions are that the manner in which these authorized operations have been conducted has caused the deposition of transuranium elements on their lands which then have become unusable because of claimed resultant health hazards. It is my considered view that the determination of the existence of such hazards and the acceptability of them are also political decisions for the Congress and the President. *They have placed responsibility for the collection and evaluation of the relevant data in the*

dressed on its own terms, *McKay* might easily have reached a different result.

IV. CASE DIGESTS

A. *Speech Restrictions Created by Drug Paraphernalia Laws*

In three separate cases the court of appeals considered the constitutionality of drug paraphernalia laws.[136] Each statute or ordinance was attacked as being vague and overbroad, and as permitting prosecution on the basis of a third person's intent.[137] For the most part the court found its decision in *Hejira Corp. v. MacFarland*[138] to be dispositive of these challenges, holding that the intent element of the statute cured any vagueness problems.[139] Additional challenges, however, involving suppression of speech effects from the regulations, raised new issues in the Tenth Circuit.

The speech challenges fell into two categories: non-commercial and commercial. The non-commercial challenges centered around the statutory criteria for discerning the presence of drug paraphernalia. These criteria provided that the content of descriptive materials accompanying an object could be used to define its paraphernalia status.[140] The court rejected this challenge, holding that the first amendment impact, if any, was merely incidental to regulation of nonspeech conduct (presumably sale of the accompanying paraphernalia object) associated with the protected speech.[141] Because the regulations were narrowly drawn to regulate nonspeech conduct, their incidental impact on protected speech was constitutionally permissible.[142]

The commercial speech objections arose from statutory provisions criminalizing advertising of drug paraphernalia by a person with actual or constructive knowledge that the advertised items constituted paraphernalia.[143] The trial courts ruled that the bans, which barred advertising over wide geographical areas,[144] were more extensive than required by the state interest at hand and therefore unconstitutional.[145] The Tenth Circuit re-

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designated agencies and in the absence of a showing that there has been a violation of the agency standards, this court has no power to intervene. Accordingly, all of the plaintiffs' claims against the United States, Dow, and Rockwell must be dismissed for lack of jurisdiction.

Id. at 548 (emphasis supplied).

136. General Stores, Inc. v. Bingaman, 695 F.2d 502 (10th Cir. 1982) (challenging N.M. STAT. ANN. § 30-31-2 (1978)); Kansas Retail Trade Cooperative v. Stephan, 695 F.2d 1343 (10th Cir. 1982) (pre-effective date challenge to H.B. 2020); Weiler v. Carpenter, 695 F.2d 1348 (10th Cir. 1982) (challenging Clovis, N.M. Ordinance No. 1150-80 (July 24, 1980)).

137. *General Stores, Inc.*, 695 F.2d at 503; *Stephan*, 695 F.2d at 1345-46; *Weiler*, 695 F.2d at 1349.

138. 660 F.2d 1356 (10th Cir. 1981).

139. *E.g.*, *Stephan*, 695 F.2d at 1343 ("a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed") (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982)).

140. *General Stores, Inc.*, 695 F.2d at 503; *Weiler*, 695 F.2d at 1350.

141. *General Stores, Inc.*, 695 F.2d at 504-05; *Weiler*, 695 F.2d at 1350.

142. *General Stores, Inc.*, 695 F.2d at 505; *Weiler*, 695 F.2d at 1350.

143. *Stephan*, 695 F.2d at 1345; *Weiler*, 695 F.2d at 1350.

144. *Stephan*, 695 F.2d at 1345 (statewide); *Weiler*, 695 F.2d at 1350 (no geographic limit).

145. *Stephan*, 695 F.2d at 1347; *Weiler*, 695 F.2d at 1350. *Cf.* Central Hudson Gas & Electric

jected these rulings,[146] apparently on the ground that the advertising proposed an illegal transaction, and was therefore not protected by the first amendment.[147]

The only defect in any of the laws was in the Clovis, New Mexico city ordinance, which provided for forfeiture of paraphernalia without a hearing.[148] The court said that a hearing in connection with the forfeiture was required, but that a post-forfeiture hearing would suffice.[149]

B. *Constitutionality of Bankruptcy Court Filing Fees*

In *Otasco, Inc. v. United States (In re South)*[150] debtors of Otasco filed for bankruptcy, naming Otasco as a creditor. Otasco filed pleadings objecting to having the debts discharged, and was required to pay a filing fee in connection with these pleadings.[151] Instead of paying the fee, Otasco filed a motion claiming that the filing fee was an unconstitutional burden on its right to protect its property from governmental action.[152] The bankruptcy court agreed, and ruled that the fee requirement was unconstitutional as violative of due process.[153] The district court affirmed.[154]

Otasco argued that creditors of bankrupts are placed in a position where they must defend their property rights and that the imposition of a filing fee to defend those rights unconstitutionally burdens their access to the courts.[155] Otasco relied primarily on its interpretation of *Boddie v. Connecticut*[156] and read that decision to declare filing fees unconstitutional when they operated to preclude access to the courts for the litigation of fundamen-

Corp. v. Public Service Comm'n, 447 U.S. 557, 564 (1980) (restrictions on commercial speech cannot be more extensive than necessary).

146. *Stephan*, 695 F.2d at 1347-48; *Weiler*, 695 F.2d at 1350. The court's comments in *Stephan* appear to be dicta, as neither party appealed the trial court's ruling on the advertising ban. 695 F.2d at 1347-48.

147. The exact basis for the Tenth Circuit's rulings is unclear. The district court's decision in *Stephan* had two bases, first that the ban was geographically overbroad, and second that the ban reached non-paraphernalia advertisers. *Stephan*, 695 F.2d at 1347. The Tenth Circuit properly rejected the second, or categorical, overbreadth rationale. *See* Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496-97 (1982) (overbreadth doctrine inapplicable to commercial speech). The geographical overbreadth argument, which is grounded in the requirement that commercial speech regulation be no broader than necessary, was not addressed in *Stephan*. *See* 695 F.2d at 1347-48.

In *Weiler*, the court relied on its ruling in *Stephan* and the Supreme Court's *Flipside* ruling in reversing the trial court. *See* 695 F.2d at 1350. Because neither *Stephan* nor *Flipside* address the problem of overextensive restrictions of commercial speech, *Weiler* is necessarily grounded in a finding that the proposed speech is unconstitutional because proposing an illegal transaction. *Cf. Flipside*, 455 U.S. at 496 (government can ban speech proposing illegal transaction). Similarly, *Stephan* appears grounded in *Flipside*'s recognition that speech proposing illegal transactions can be banned in its entirety.

148. *Weiler*, 695 F.2d at 1350.

149. *Id.* at 1351.

150. 689 F.2d 162 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 1522 (1983).

151. 689 F.2d at 164.

152. *Id.* at 164.

153. 6 Bankr. 645 (Bankr. W.D. Okla. 1980), *aff'd*, 10 Bankr. 889 (W.D. Okla. 1981), *rev'd*, 689 F.2d 162 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 1522 (1983).

154. 10 Bankr. 889 (W.D. Okla. 1981), *rev'd*, 689 F.2d 162 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 1522 (1983).

155. 689 F.2d at 164.

156. 401 U.S. 371 (1971).

tal rights.[157]

The Tenth Circuit Court of Appeals explained that *Boddie* did not hold that access to the judicial system can never be burdened, but instead instituted a balancing test.[158] When access to court is burdened, the interest the individual is seeking to protect in court is balanced against the governmental interest in imposing the restriction.[159] Otasco was seeking to protect its contractual rights, none of which touched fundamental interests.[160] Against Otasco's interests were balanced the governmental interest in recouping the costs of the bankruptcy system and in discouraging creditors from harassing debtors rather than genuinely contesting discharge.[161] In light of the nonfundamental nature of Otasco's interest, the legitimate governmental interests in exacting the fee, and Otasco's ability to pay, the Tenth Circuit concluded that the filing fee did not unconstitutionally burden access to the courts.[162]

C. *Residency Requirements*

Smith v. Paulk[163] considered the constitutionality of an Oklahoma statute which required applicants for employment agency licenses to have been Oklahoma residents for one year.[164] After being denied a license solely because of his failure to meet the residency requirement,[165] Smith filed suit against the Oklahoma Commissioner of Labor alleging that the residency requirement violated Smith's rights under the privileges and immunities, equal protection, and due process clauses of the United States Constitution.[166] The district court held that the Oklahoma law violated the privileges and immunities clauses of article IV and the fourteenth amendment by restricting the right to travel.[167]

The court of appeals noted that it was a corporate application which had been denied, and that corporations do not have the benefit of the privileges and immunities clause or the fourteenth amendment.[168] Despite these facts, the court ruled that because Smith intended to relocate to manage the corporation, personal rights to migrate were restricted by the statute, rendering Smith's claims justiciable.[169]

The Tenth Circuit applied Supreme Court case law holding that legislation which restricts the right of interstate migration must be justified by

157. 689 F.2d at 164.
158. *Id.* at 165.
159. *Id.*
160. *Id.*
161. *Id.* at 165-66.
162. *Id.* at 166.
163. 705 F.2d 1279 (10th Cir. 1983).
164. OKLA. STAT. tit. 40, § 53(b) (1981).
165. 705 F.2d at 1281.
166. *Id.*
167. *Id.*
168. *Id.* at 1283. To support the proposition that a corporation does not have the benefit of the privileges and immunities clauses the court cited Western & Southern Life Ins. Co. v. Standard Bd. of Equalization, 451 U.S. 648, 656 (1981); Asbury Hosp. v. Cass County, 326 U.S. 207, 210-11 (1945), and Hemphill v. Orloff, 277 U.S. 537, 548-50 (1928).
169. 705 F.2d at 1284.

compelling state interests and must be narrowly tailored to achieve those interests.[170] The court stated that a less lengthy residency requirement would adequately serve the state interest of investigating applicants to ensure that employment agencies operated in the public interest.[171] Hence, although the residency requirement was itself a proper legislative measure, the existence of an alternative less restrictive than the one-year requirement rendered the Oklahoma statute unconstitutional.[172]

D. *Associational Standing to Challenge Third Party Subpoena*

In *Grandbouche v. United States*[173] the Tenth Circuit considered the issue of standing to protect the first amendment right of association from governmental invasion through subpoena. A grand jury subpoena served on the First National Bank of Englewood, Colorado ordered production of all records pertaining to the accounts of two groups advocating noncompliance with the federal tax system.[174] The two groups and individual members of one of the groups brought suit asking that the subpoena be quashed on the grounds that enforcement of the subpoena would violate first amendment rights of association.[175] The district court ruled that the petitioners lacked standing to raise the first amendment claims because the subpoena was directed to a third party.[176]

The court of appeals reversed the district court and remanded the case for a hearing to consider whether the petitioner's first amendment rights would actually be violated by enforcing the subpoena.[177] First amendment guarantees were distinguished from fourth and fifth amendment rights, which cannot be infringed unless the governmental action is directed at the holder of the right.[178] The court observed that the right to associate freely will be chilled equally whether associational information is compelled from an organization itself or from third parties.[179] Accordingly, an organization and its members have standing to protect their first amendment rights of association which are infringed by governmental information gathering activities directed at third parties.[180]

Nathan Chambers
Peter C. Forbes

170. *Id.*
171. *Id.* at 1285.
172. *Id.*
173. 701 F.2d 115 (10th Cir. 1983).
174. The groups were the National Commodity & Barter Association (NCBA) and the National Unconstitutional Tax Strike Committee (NUTS). *Id.* at 116.
175. *Id.*
176. *Id.*
177. *Id.* at 118-19.
178. *Id.* at 117.
179. *Id.* at 118.
180. *Id.*