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Litigation with the Federal Government, by David Schwartz and Sidney B. Jacoby

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BOOK REVIEWS

LITIGATION WITH THE FEDERAL GOVERNMENT. By David Schwartz & Sidney B. Jacoby. Philadelphia: Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. 1970. Pp.vi, 464. $30.00.

Litigation with the Federal Government is another in the excellent series of practitioners' handbooks published by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. But it will also be welcomed by law teachers and law students, who are becoming increasingly aware of the pervasive influence of the federal government and of the necessity of studying in systematic fashion the impact thereof on our legal structure and on legal institutions. And the work should be useful as a reference source to judges, at both the trial and appellate level, who may be called upon to decide cases to which the Government of the United States is a party. The authors bring to their task a wide expertise, based on practice and teaching. Both have been lawyers with the Department of Justice; one is now a Commissioner of the United States Court of Claims; the other is Professor of Law at Case Western Reserve University. They have taught the subject in law school courses, and are joint editors of a casebook in the area[1] which, although now 7 years old, may be regarded as a companion volume to the present text.

It is a truism to say that the federal government today affects the daily life of every citizen; its taxing power takes a generous bite from his paycheck before he even sees it; its regulatory power controls the quality of the food he buys at the supermarket, the purity of the drugs he purchases at the prescription counter, and the safety of the automobile in which he rides; its military power conscripts, however unwillingly, his sons; its spending power helps provide him with highways, with jobs, with welfare, and retirement benefits. Whether this power is exercised beneficently or not is beside the point; it is there, and it is immense. Economically, since World War II the federal government has emerged as the largest buyer of goods and services in the country, which means that it is the biggest business in the world. Its budgets are astronomical; its procurement alone accounts annually for from 5 to 10 percent of the entire gross national product.

[1] D. SCHWARTZ & S. JACOBY, GOVERNMENT LITIGATION — CASES AND NOTES (1963).

This activity is not exercised blindly or haphazardly (although sometimes it may seem that way). Whatever the overall policies, domestic or foreign, pursued by Congress and the Executive, the detailed actions of the Government's agents (bureaucrats, if you will) are controlled by a fearsome complex of statutes, regulations, and administrative procedures, the mastery of which would take a lifetime. Fortunately, no one individual is required to achieve such mastery.

By far the vast majority of transactions between the Government and its citizens, or between the Government and its suppliers, can be and are handled without resort to litigation. But inevitably disputes and claims arise which require settlement or adjudication. Even when they do not, the possibility that they may, and the very existence of litigation as an ultimate resort, have a potent effect in shaping the statutes, the regulations, and the contracts and agreements which are designed to govern the relationships of the parties. As the authors have elsewhere observed:

> The saying goes that all lawyers are litigation lawyers, whether they counsel, draft or litigate. The adversary system, the jurisdiction of courts, procedure—in a word, litigation—are the background and the unstated measure of everything that lawyers do.[2]

Consistent with this approach, the authors have not limited their treatment to litigation in the narrow sense, but have covered the adversary system (at least to the extent of explaining who the adversary is: the very first chapter, entitled "Counsel to the Government," explains the organization of the Department of Justice, the various Offices of the United States Attorney, and the departmental legal offices), jurisdiction of courts (*e.g.*, the District Courts versus the Court of Claims), and procedure, as well as large chunks of substantive law.

Chapter II takes up "Settlement of Cases with the Government," an important preliminary to litigation, which may avoid it altogether, and Chapter III "Attorneys' Fees," the happy (or not so happy!) sequel. The next two chapters are devoted to the somewhat peripheral subjects of "Contingent Fees and Lobbying" and "Conflict of Interest." Certainly these are important and some aspects of them impinge directly on the conduct of lawyers engaged in litigation with the Government. But their impact is much broader, and it may be questioned whether a book concerned with litigation should even attempt to cover such complex subjects as "Contingent

[2] *Preface* to *id.* at i.

Compensation for Obtaining Government Contracts" (§ 4.103) or "Prohibition of Private Supplementation of Government Compensation" (§ 5.104.3), as opposed to those particular prohibitions which relate to acting as an agent or attorney in the prosecution of claims against the United States, or appearing on behalf of a non-government party in matters in which the United States is a party or has an interest. Inevitably, the treatment of these topics in their full sweep is severely compressed and, I fear, less than lucid, although here as elsewhere the references to more detailed analyses are comprehensive.

As might be expected, the main emphasis of the book is on the prosecution of claims against the Government, both those based on contract and those based on tort. Whatever the situation at private law, the distinction between the two is almost ironclad when the Government is the defendant, for reasons both historical and statutory. The Government waived its sovereign immunity to suit on contract over a century ago, in tort only in 1945. Two entirely different statutes are controlling (the Tucker Act[3] as to one, the Federal Tort Claims Act[4] as to the other), each with its separate exceptions, provisos, and qualifications. In the main, two distinct courts have jurisdiction: the Court of Claims (with concurrent jurisdiction, limited to $10,000, in the federal district courts) in the case of contracts, the District Courts in the case of torts. Two different choice-of-law rules apply: with minor exceptions, contracts with the Government are governed by federal rather than state law; in tort cases the applicable law is that of the "place where the act or omission occurred." These, and other, subjects are fully developed by the authors,[5] again, with copius reference to supplementary source material.

Apart from the complexities and inconsistencies inherent in any such dichotomy, a number of unfortunate consequences have ensued. Two might be mentioned:

(1) Apparently because of the minatory language of the Tucker Act, denying the Court of Claims jurisdiction over "cases not sounding in tort," that court has consistently refused to hear cases based on "contracts implied in law" (quasi-contracts), although it freely grants relief based on "contracts implied in fact." This rule, which

[3] 28 U.S.C. § 1491 (1964); *id.* § 1346 (1964), *as amended*, (Supp. IV, 1969).

[4] 28 U.S.C. §§ 1346(b), 1402(b), 1504, 2110, 2402, 2411(b), 2676, 2680 (1964); *id.* §§ 2401(b), 2412, 2671-75, 2677-79 (1964), *as amended* (Supp. IV, 1969).

[5] D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT, ch. XII (1969).

is probably too deeply entrenched to be changed except by legislation, seems to be based on a failure to recognize that quasi-contractual relief can be had in at least two quite different situations: (a) for money had and received, or benefits conferred, where it would be unjust for the defendant to retain what he has obtained, and (b) where the plaintiff elects to "waive the tort and sue in assumpsit," as for some types of conversion. In neither case is there any true contract, but only in the latter is there a tort, and it would seem that only the latter should come under the statutory bar. By way of compensation, the Court of Claims has not infrequently granted relief as on a "contract implied in fact" where in private law the claim would be frankly recognized as quasi-contractual. But this indirect means of reaching a desirable result is only a palliative and not a cure. However, some quasi-contractual claims can be recognized under another heading of jurisdiction: claims arising under the Constitution. The authors devote a section to this problem, with citations to the leading cases and comments.[6]

(2) By contrast, in at least one case, a federal court dismissed a suit brought under the Federal Tort Claims Act, alleging illegal use of a secret process in excess of the limitations of the license under which the secret had been disclosed to the United States, on the ground that since the defendant's knowledge of the process had been obtained lawfully, any subsequent use thereof beyond the confines of the license was a breach of contract, cognizable only in the Court of Claims, and not a tort within the jurisdiction of a district court.[7] Although perhaps defensible, the result seems to show a rather rigid attitude toward the boundaries of contract and tort.[8] The case is an interesting one, which involved the distribution of the Bofors anti-aircraft gun during and after World War II, and involved a substantial sum of money.[9] It also involved the much debated question of the validity of an agreement by the United States to submit a dispute to arbitration.[10] The authors do not cite it, nor do they discuss the arbitration question anywhere.

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[6] *Id.* § 9.121.

[7] Aktiebolaget Bofors v. United States, 93 F. Supp. 131 (D.D.C. 1950), *aff'd*, 194 F.2d 145 (D.C. Cir. 1951).

[8] The *Restatement of Torts*, section 757(b) (1939), relied on by the court, makes the question whether the alleged improper use is tortious turn on the question whether it "constitutes a breach of confidence," but *comment j* observes that such a "breach of confidence . . . may also be a breach of contract."

[9] In the Court of Claims, the plaintiff subsequently established a breach of contract, and the amount of damages was referred for further proceedings. Aktiebolaget Bofors v. United States, 153 F. Supp. 397 (Ct. Cl. 1957).

[10] *See, e.g.*, Braucher, *Arbitration Under Government Contracts*, 17 LAW & CON-

On the other hand, in *Aleutco Corp. v. United States*,[11] discussed by the authors in section 13.111, it was recognized that the same act might constitute both a breach of contract and a conversion, giving plaintiff an election to sue under the Tucker Act or under the Tort Claims Act. Significantly, the court in that case said that, since the Government has now waived its immunity in both types of cases, "there is no policy in the law which requires that the forum of the district court be denied a plaintiff who pleads and proves a classic case in tort."[12]

Claims for tort and for breach of contract are not the only kinds of claims taken up by the authors, nor are the Court of Claims and the District Courts the only tribunals considered. Also covered are claims under the Tucker Act founded upon the Constitution, or upon an Act of Congress or regulation of an executive department, congressional reference jurisdiction of the Court of Claims, claims submitted for administrative settlement to the Comptroller General, contract disputes within the jurisdiction of the various departmental boards of contract appeals, and suits against government officers and corporations. Tax, antitrust, lands, and patent litigation are considered, as is the subject of debt collection by the Government. Foreign claims, Indian claims, and miscellaneous types of small claims are taken up. There is even a section (§ 7.106.2(h)) on oyster growers' claims. Other matters covered include "Multiple Parties, Joinder and Assignment of Claims" (Chapter XIV), "Discovery and Privilege of Government Papers" (Chapter XV), "Remedies for Fraud Upon the Government" (Chapter XVII), and a topic with the intriguing title "Characteristics of the United States as Litigant and Moving Party" (Chapter XVIII).

A few omissions and possible inadequacies of treatment might be noted:

(1) Although the celebrated case of *Acme Process Equipment Co. v. United States*[13] is cited several times for minor points, there is no mention of the principal ruling of the Court of Claims therein that, as an alternative to the normal remedy of damages for breach

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TEMP. PROB. 473 (1952); Cogan, *Are Government Bodies Bound by Arbitration Agreements?*, 22 ARB. J. (n.s.) 151 [4 Y.P.A. 37] (1967); 53 COLUM. L. REV. 879 (1953).

[11] 244 F.2d 674 (3d Cir. 1957).

[12] *Id.* at 679.

[13] 347 F.2d 509 (Ct. Cl. 1965), *noted in* 19 VAND. L. REV. 173 (1965).

of contract, it could award the remedy of "restitution," based on reasonable costs incurred by the plaintiff which "benefited" the Government, although this could result in the contractor recovering far more on a losing contract than he would have received had the contract been carried through to completion. This is a controversial question in the general law of contract remedies and restitution.[14] Unfortunately, the reversal of *Acme* by the Supreme Court on other grounds[15] has left us without a final answer in the field of government contracts.

(2) The discussion of "Extraordinary Contractual Actions to Facilitate the National Defense," which is based on the Act of 28 August 1958[16] and implementing regulations, appears in a section headed "Statutory Consent to Claims on Formally Defective Contracts" (§ 9.117(d)). The discussion mentions only the formalization of informal commitments and the correction of mistakes, omitting the more important power to make "amendments without consideration," that is to "bail out" a losing contractor who is faced with a catastrophic shutdown of his plant.[17] It is pointed out that relief under the Act is "conditioned upon a finding of desirability in the interest of national defense, a discretionary matter not ordinarily reviewable by the courts," but no mention is made of the possible objections which could be made to the discrimination which necessarily results from this type of standard.[18]

(3) The subject of tax litigation is mentioned briefly but not developed in any detail, although there are several references to the United States Tax Court and to suits for tax refunds in the Court of Claims or District Courts. The Renegotiation Act[19] is mentioned, in connection with standard contract clauses (§ 9.104), but there is no discussion of the renegotiation process itself or of pro-

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[14] *Compare* Boomer v. Muir, 24 P.2d 570 (Cal. Dist. Ct. App. 1933), *with* Kehoe v. Rutherford, 56 N.J.L. 23, 27 A. 912 (1893). *See* Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 OHIO ST. L.J. 264 (1959).

[15] United States v. Acme Process Equip. Co., 385 U.S. 138 (1966).

[16] 50 U.S.C. §§ 1431-32, 1434-35 (1964); *id.* § 1433 (1964), *as amended* (Supp. IV, 1969).

[17] *See generally*, Jansen, *Public Law 85-804 and Extraordinary Contractual Relief*, 55 GEO. L.J. 959 [4 Y.P.A. 51] (1967); Peirez, *Public Law 85-804 Contractual Relief for the Government Contractor*, 16 AD. L. REV. 248 (1964).

[18] *See* Mayer, *Relief Under Title II of the First War Powers Act: An Illusion?*, 21 J. BAR ASS'N. D.C. 208 (1954); McClelland, *The Administration of Title II of the First War Powers Act*, 61 DICK. L. REV. 215 (1957); McClelland, *Title II — One Year Later: A Legislative Midsummer Night's Dream*, 62 DICK. L. REV. 327 (1958). [Note: Title II of the First War Powers Act was, in part, a predecessor of Public Law 85-804.]

[19] 50 U.S.C. App. §§ 1211-33 (1964), *as amended* (Supp. IV, 1969).

ceedings before the Renegotiation Board and appeals therefrom to the Tax Court.

But these are minor deficiencies in a book which, overall, is comprehensive, accurate, and enlightening.

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PAPERBACK BOOKS DEALING WITH THE ENVIRONMENT

Besides symbolizing the most current phase of man's struggle against threats to his environment, the recent observance of "Earth Day" and "Crisis in the Environment" have contributed to the creation of a new group of readers seeking to explore the nature of these threats. The same technology that instituted much of our environmental destruction has produced an outpouring of excellent books that examine the environment and its woes. Many titles formerly available only in expensive hardcover editions have recently been reproduced in paperback. It is now possible for the inquisitive reader to pursue through paperback editions a structured inquiry into the history, scope, and present nature of the pollution crisis, and to obtain some insight into future problems.

For the person desiring a survey of the history and scope of our environmental problems, four publications are particularly helpful. A good place to begin is with Leona and Robert Rienow's *Moment in the Sun*[1] which, though it has some technical errors, offers a general treatment of the nature of the fundamental problems. After this exposure, the reader may wish to examine the classic work in the conservation field, Fairfield Osborn's *Our Plundered Planet*.[2] Because of Osborn's almost prophetic qualities, this 22-year-old book, with a few minor changes, might have been written yesterday. Although only limited material is available on the historic role of government in protecting the environment, Stewart Udall's *The Quiet Crisis*[3] is required reading. For lawyers interested in conservation, William Douglas's *A Wilderness Bill of Rights*[4] is an excellent little book.

Once the fundamentals have been grasped, the reader may wish to examine the past and present attempts to solve our environmental problems. The man-nature relationship necessary to create a harmonious environment has been a concern of writers for centuries,

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and a substantial amount of literature is available in paperback. Valuable information is contained in two books edited by William R. Ewald, Jr., *Environment and Public Policy — The Next Fifty Years*[5] and *Environment For Man — The Next Fifty Years*.[6] For one wishing to obtain a sound philosophical perspective, Rene Dubos, a brilliant writer, has written a fine book entitled *So Human an Animal*;[7] his earlier work, *Man Adapting*,[8] is also highly recommended. A good new book on the philosophy of ecology is *The Subversive Science — Essays Toward An Ecology of Man*.[9] But while one can benefit from studying the evolution of suggested approaches, the rudimentary problems still remain. The basic cause of pollution is an overabundance of both people and products. Of these two topics, the population problem has been more extensively treated. Paul Ehrlich's *The Population Bomb*[10] has become the gospel for most conservationists. Another good book is Philip Appleman's *The Silent Explosion*.[11] For a comprehensive coverage of the subject, two books, *Population in Perspective*[12] and *The Population Crisis*,[13] are strongly recommended.

While many scholarly works concerning the role of science and technology in environmental destruction exist, only a few, such as Barry Commoner's *Science and Survival*,[14] are available in paperback editions.

Presently, the nation's two most serious environmental concerns

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[1] L. RIENOW & R. RIENOW, MOMENT IN THE SUN (1967) (New York: Ballentine Books).

[2] F. OSBORN, OUR PLUNDERED PLANET (1968) (New York: Pyramid).

[3] S. UDALL, THE QUIET CRISIS (1963) (New York: Avon Books).

[4] W. DOUGLAS, A WILDERNESS BILL OF RIGHTS (1965) (Boston: Little Brown & Co.).

[5] ENVIRONMENT AND PUBLIC POLICY — THE NEXT FIFTY YEARS (W. Ewald, Jr. ed. 1968) (New York: Charles Scribner's Sons).

[6] ENVIRONMENT FOR MAN — THE NEXT FIFTY YEARS (W. Ewald, Jr. ed. 1965) (New Haven: Yale University Press).

[7] R. DUBOS, SO HUMAN AN ANIMAL (1968) (Bloomington: Indiana University Press).

[8] R. DUBOS, MAN ADAPTING (1967) (Bloomington: Indiana University Press).

[9] THE SUBVERSIVE SCIENCE — ESSAYS TOWARD AN ECOLOGY OF MAN (P. Shephard & D. McKinley eds. 1969) (Boston: Houghton Mifflin Co.).

[10] P. EHRLICH, THE POPULATION BOMB (1968) (New York: Ballentine Books).

[11] P. APPLEMAN, THE SILENT EXPLOSION (1965) (Boston: Beacon Press).

[12] POPULATION IN PERSPECTIVE (L. Young ed. 1968) (New York: Oxford University Press).

[13] THE POPULATION CRISIS (L. Ng & S. Mudd eds. 1965) (Bloomington: Indiana University Press).

[14] B. COMMONER, SCIENCE AND SURVIVAL (1966) (New York: The Viking Press).

are the qualitative deterioration of the cities, and the plague of air and water pollution. A bibliography on the specific maladies of urban ecology is unnecessary since hundreds of titles on this subject can be found in any bookstore. In contrast, there are surprisingly few paperbacks available on air and water pollution. *The Air Pollution Primer*,[15] produced by the National Tuberculosis and Respiratory Disease Association, which had been supplying it without charge through its local chapters, is an excellent background book on air pollution. *The Unclean Sky*,[16] a technical explanation of air pollution by meteorologist Louis Battan, presents an understandable treatment of a complex subject. For the practicing lawyer, useful symposiums on air pollution can be found in both the *Arizona Law Review*[17] and *Law and Contemporary Problems*.[18] And Stanley Degler has produced a volume entitled *State Air Pollution Control Laws*[19] as part of BNA's new Environmental Management Series.

Apart from the ruminations of the scientific community, the problem of controlling water pollution has received little attention. The basic chemical problems of purification are explained in *Water Is Everybody's Business*.[20] The biological overtones are discussed in a well-written volume entitled *Streams, Lakes, Ponds*.[21] The legal nuances of water pollution were recently analyzed in a symposium issue of the *Boston College Industrial & Commercial Law Review*,[22] and it should be noted that over the years both specialty law reviews and the *Natural Resource Lawyer: the Journal of the Section of Natural Resource Law of the American Bar Association* have supplied beneficial guidance to the practitioner. *The Orsanco Story, Water Quality Management in the Ohio Valley Under an Interstate Compact*[23] traces the efforts of several states to combat water pollution. Additionally, three books studying waste

[15] NATIONAL TUBERCULOSIS AND RESPIRATORY DISEASE ASSOCIATION, THE AIR POLLUTION PRIMER (1969).

[16] L. BATTAN, THE UNCLEAN SKY (1966) (Garden City, N.Y.: Anchor Books).

[17] *Symposium — Air Pollution*, 10 ARIZ. L. REV. 1 (1968).

[18] *Symposium — Air Pollution Control*, 33 LAW & CONTEMP. PROB. 195 (1968).

[19] S. DEGLER, STATE AIR POLLUTION CONTROL LAWS (1969) (Washington, D.C.: Bureau of National Affairs, Inc.).

[20] A. BEHRMAN, WATER IS EVERYBODY'S BUSINESS (Garden City, N.Y.: Anchor Books).

[21] R. COKER, STREAMS, LAKES, PONDS (1968) (New York: Harper & Row).

[22] *Water Use — A Symposium*, 9 B.C. IND. & COM. L. REV. 531 (1968).

[23] E. CLEARY, THE ORSANCO STORY, WATER QUALITY MANAGEMENT IN THE OHIO VALLEY UNDER AN INTERSTATE COMPACT (1967) (Baltimore: Johns Hopkins Press).

in its various physical states are recommended: *Waste Management and Control*;[24] *Federal Pollution Control Programs: water, air and solid waste*,[25] and *Cleaning Our Environment, The Chemical Basis for Action*.[26] For students of either air or water pollution two commendable books on the economics of pollution control are *Quality of the Environment*[27] and *Controlling Pollution — the Economics of a Cleaner America*.[28]

There have been a number of books written on the specific problem of pesticides. The danger in the indiscriminate use of pesticides was forcefully brought to the public's attention by Rachel Carson's *Silent Spring*.[29] Denounced by the industrial community since publication, this book has probably contributed more to create public interest in the environment than any other single work. Of greater technical depth is Robert Rudd's *Pesticides and The Living Landscape*.[30] And for the lawyer, BNA has produced *Pesticides and Pollution*.[31]

The future pollution problems being created by our ever-increasing products of science and technology should be of concern to the general reader. The inherent threat posed to ecology by atomic power is apparent. In spite of its minor technical errors and emotional approach, Richard Curtis and Elizabeth Hogan's *Perils of the Peaceful Atom*[32] cogently articulates the arguments against the productive use of peaceful nuclear power. A more impartial, balanced presentation is made in *Selected Materials on Environmental Effects of Producing Electric Power*.[33] Recently, the super-

[24] NATIONAL ACADEMY OF SCIENCES — NATIONAL RESEARCH COUNCIL, WASTE MANAGEMENT AND CONTROL (1966) (Pub. No. 1400).

[25] S. DEGLER & S. BLOOM, FEDERAL POLLUTION CONTROL PROGRAMS: WATER, AIR AND SOLID WASTE (1969) (Washington, D.C.: Bureau of National Affairs, Inc.).

[26] REPORT OF THE AMERICAN CHEMICAL SOCIETY, CLEANING OUR ENVIRONMENT, THE CHEMICAL BASIS FOR ACTION (1969) (Washington, D.C.).

[27] O. HERFENDAHL & A. KNEESE, QUALITY OF THE ENVIRONMENT (Baltimore: Johns Hopkins Press).

[28] CONTROLLING POLLUTION — THE ECONOMICS OF A CLEANER AMERICA (M. Goldman ed. 1967) (Englewood Cliffs, N.J.: Prentice-Hall).

[29] R. CARSON, THE SILENT SPRING (1962) (New York: Fawcett World Library — Crest Books).

[30] R. RUDD, PESTICIDES AND THE LIVING LANDSCAPE (1964) (Madison: The University of Wisconsin Press).

[31] S. BLOOM & S. DEGLER, PESTICIDES AND POLLUTION (1969) (Washington, D.C.: Bureau of National Affairs, Inc.).

[32] R. CURTIS & E. HOGAN, PERILS OF THE PEACEFUL ATOM (1969) (New York: Ballantine Books).

[33] JOINT COMM. ON ATOMIC ENERGY, 91ST CONG., 1ST SESS., SELECTED MATERIALS ON ENVIRONMENTAL EFFECTS OF PRODUCING ELECTRIC POWER (Joint Comm. Print 1969).

sonic transport program has become a national issue. Tax monies are being used to assist private industry in the development of an airplane that would produce little benefit and much harm. The case against the SST is well presented by William Shurcliff in *The S/S/T and Sonic Boom Handbook*.[34]

Now that public interest in the environment problem has been kindled, it is hoped that further study will follow. As our environmental problems flow from our way of life, solutions are extremely difficult. The problem involves most intellectual disciplines, but is primarily a social one, thus falling largely into the domain of lawyers. In a profession facing ever-rising costs, this is one subject where it is possible to procure a good basic library for the price of a few technical treatises.

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[34] W. SCHURCLIFF, THE S/S/T AND SONIC BOOM HANDBOOK (1970) (New York: Ballantine Books).

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