IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-2184

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

DR. NEIL SOLOMON, et al.,

Defendant-Appellees

On Appeal from the United States District Court for the District of Maryland

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BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AND THE STATE OF CONNECTICUT AS AMICI CURIAE

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INTRODUCTION AND ISSUE PRESENTED

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Commonwealth of Pennsylvania and the State of Connecticut submit this Brief as *Amici Curiae* in support of Appellee-Defendants Solomon, et al.

The issue addressed in this Brief is whether the United States of America, through its Attorney General has the authority or standing to initiate an action seeking redress for an alleged deprivation of the constitutional rights of residents of a Maryland facility for the mentally handicapped.

INTEREST OF AMICUS CURIAE

The Commonwealth of Pennsylvania shares with the State of Maryland a substantial interest in the issue raised by this appeal.

In the case of Halderman v. Pennhurst, Civil No. 74-1345 (E. D. Pa. filed May 30, 1974) numerous officials of the Department of Public Welfare of the Commonwealth of Pennsylvania as well as a State School and Hospital for the mentally retarded are named as defendants. The plaintiffs allege a deprivation of their claimed constitutional rights to treatment and to treatment in the least restrictive manner possible. In the Halderman action the United States of America was granted leave to intervene as a party plaintiff to vindicate these asserted rights. Subsequently, defendants Motion to Dismiss the United States of America was denied.

The precise issue raised by the defendants in the Halderman action involvesthe legality of the United States' participation as an intervening party. While the intervention issue is not of direct concern to this Court, the paramount issue,

the authority of the United States to participate in, and initiate such litigation, is central to both cases.

The Commonwealth of Pennsylvania contends that the United States of America has absolutely no independent interest sufficient to initiate an action seeking to remedy alleged deprivations of Constitutional rights, absent specific Congressional authorization. To hold otherwise would ignore the well established constitutional principles of case or controversy set forth in Article III, Section 2 of the United States Constitution, and would constitute a serious disruption of the delicate balance of federalism, long preserved and honored by the federal judiciary. Cf. Rizzo v. Goode, 423 U.S. 362 (1976).

STATEMENT OF THE CASE

This action was initiated on February 21, 1974 by the United States of America, through its Attorney General. The complaint alleges that the mentally retarded residents of Rosewood State Hospital, a facility operated by the State of Maryland, are being denied their claimed constitutional rights under the Eighth, Thirteenth, and Fourteenth Amendments of the United States Constitution.

On April 27, 1976, defendants moved to dismiss the complaint on the ground that the United States had no power or authority to initiate this action. After extensive briefing, in which the Commonwealth of Pennsylvania joined as amicus curiae, the Honorable Edward S. Northrop dismissed the complaint and entered judgment accordingly on July 8, 1976. The opinion of the lower court is reported at 419 F. Supp. 358 (D. Md. 1976).

The United States of America brought this appeal on September 3, 1976

ARGUMENT

I. THE UNITED STATES OF AMERICA, THROUGH ITS ATTORNEY GENERAL HAS NO AUTHORITY TO INITIATE THIS ACTION.

The United States of America, through its Attorney General, has been an active litigant in a number of recent cases concerning the rights of institutional individuals.[1] The fact that the United States is participating in, or in fact initiated, these actions can not be doubted. The issue framed in the instant case is the constitutional propriety of the United States' participation in these cases.

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[1] In the mental health field these cases include: Wyatt v. Stickney, 334 F. Supp. 1341 (M. D. Ala. 1971); 344 F. Supp. 373, 344 F. Supp. 387 (M. D. Ala. 1972) aff'd sub nom. Wyatt v. Aderholt, 503 F. 2d 1305 (5th Cir. 1974)(United States appointed as litigating amicus curiae; question of standing not in issue); North Carolina Association for Retarded Children v. North Carolina, No. 3050 (E. D. N. C.)(United States is plaintiff-intervenor; unknown whether question of standing in issue); United States v. Kellner, No. 74-138 (D. Mont. filed November 8, 1974)(United States is plaintiff; question of standing raised, and United States dismissed), Horacek v. Exon, 357 F. Supp. 71 (D. Neb. 1973)(United States is plaintiff-intervenor; question of standing raised; Motion to Dismiss pending), Halderman v. Pennhurst, No. 74-1345 (E. D. Pa. filed May 30, 1974)(United States is plaintiff-intervenor; question of standing raised; Motion to Dismiss denied).

Unquestionably, the power to enforce the Fourteenth Amendment of the United states Constitution rests with the Congress. "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article" (Amendment 14, Section 5). However, there is absolutely no general legislative authority emanating from the Congress which allows the Attorney General of the United States to remedy deprivations of the constitutional rights claimed in this case through civil litigation seeking injunctive relief. Indeed, as amply demonstrated by the Court below, existing legislative authorizations for the invocation of executive power in enforcing various Civil Rights Acts have been carefully defined and are limited in scope. United States v. Solomon, 419 F. Supp. 358, 370-72 (D. Md. 1976). Therefore, the United States possesses no general authority to institute cases like the present one.

Although no Congressional authorization exists for the civil enforcement of the Fourteenth Amendment by the Attorney General, the United States insists that its criminal enforcement duties (18 U.S.C.

§§241 and 242) implicitly encompass the broad civil enforcement powers it now claims[2]. In its Brief the United States merely relies on these statutes and the reasoning of Judge Tuttle alone in In re Estelle, 516 F. 2d 480 (5th Cir. 1975) cert. den. _____U.S. _____ 96 S. Ct. 2637 (1976) for the proposition that when criminal prosecution would be ineffectual,

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[2] 18 U.S.C. §§241 and 242 provide:

§241. If two or more persons conspire to injure, opress, threaten, or intimidate any citizen in the free exercise of enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;...

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to inprisonment for any term of years or for life.

§242. Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason or his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

the Attorney General may seek an alternative civil remedy (Brief for the United States at pp. 31-32).

But the United States relies too much on Judge Tuttle's analysis. Even accepting the argument that the existence of an apparant overlap between these civil (42 U.S.C. §1983)[3] and criminal (18 U.S.C. §§241 and 242) sections implies a Congressional intent to confer civil enforcement power on the Attorney General, nevertheless, the argument is inapplicable here.

Section 241 relates only to conspiracies for deprivation of the rights of citizens. Yet, no allegation of conspiracy is made in the present complaint, nor is any attempt made to state a cause of action under 42 U.S.C. §1985. Section 242 relates only to deprivations of rights by reason of color or race. And again there is no allegation in this complaint which even suggests any deprivation on account of color or race. Thus while Judge

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[3] 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Tuttle's, and the United States' views, may be correct in the limited context of a case alleging either a conspiracy to deprive a citizen of his rights or a deprivation of rights due to race or color, there is nothing in the wording of the criminal statutes that is even applicable to this case.

In a number of cases relied on by the United States, including Wyandote v. United States, 389 U.S. 191 (1967); United States v. Republic Steel Corporation, 362 U.S. 482 (1960); Sanitary District of Chicago v. United States, 266 U.S. 405 (1925); and United States v. San Jacinto Tin Co., 125 U.S. 273 (1888) the Supreme Court has held that if criminal or other remedies authorized by Congress are inadequate, the United States, through its Attorney General, may seek other relief. But these cases provide no support for the United States' contentions here. In each of these instances where the Supreme Court countenanced some alternative form of relief, the purpose was clearly to allow the United States to protect rights of the United States qua United States, pursuant to Article I, Section 8,

clause 3, or pursuant to some existing property interest. In each of these cases the United States was a proper party before the Court in the first instance, and the Court merely invoked its inherent powers to fully remedy a controversy between legally interested parties one of which happened to be the United States. In this case, however, the United States has no independent interest in the controversy. Beyond an admirable concern over the conditions of state mental facilities throughout the nation, the United States has no independent interest in the specific conditions at Rosewood. Therefore, invocation of United States v. San Jacinto Tin Co., supra. and similar cases is misplaced here.

In addition, the United States relies on 28 U.S.C. §516[4] as providing authority for their initiation of this action (Brief for the United States at p. 10). Section 516 simply empowers

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[4] 28 U.S.C. §516 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United SStates, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General

the Department of Justice to conduct litigation in which the United States is a party or is interested. The section merely identifies who shall act as counsel for the United States in litigation. Thus, in this case, the United States, as a party, is represented by its Attorney General. That is the complete scope and effect of Section 516. It says no more. There is no basis on which to conclude that Section516 was meant to grant "standing" to or empower the United States to initiate suit when it is not otherwise a proper litigant. A broader construction would do violence to the clear meaning of the statute which, based on its legislative history, must be strictly construed. United States v. Daniel, Urbahn, Seelye and Fuller, 357 F. Supp. 853 (N. D. Ill. 1973).

This statute does nothing more than grant the Attorney General the sole authority to provide representation for the United States in cases in which the United States has an interest. It does not and could not change the constitutional requirement of standing. The mere fact that the United States is interested in a particular area of legal development does not confer upon it the "interest" required by the Constitution and necessarily contemplated by Section 516.

The United States also raises the novel and disquieting argument best described as implied amendment of substantive Constitutional law by appropriation. The United States suggests that because Congress has appropriated money for the special litigation program of the Department of Justice, pursuant to which this action was brought, Congress has in effect given its imprimatur to the Department of Justice's activities. "Surely he that imagines this may imagine more." S. Johnson, Rasselas, Poems & Selected Prose (New York 1958). An annual appropriation is that and nothing more. There is absolutely no basis on which to conclude that Congress intended sub silentio to greatly expand the Attorney General's enforcement powers in the civil rights area by this rather insignificant appropriation, which, by its own terms, is only temporary.

The Congressional appropriation to the special litigation program confers no standing on the United States Attorney General to enforce the Fourteenth Amendment. Nor can it enlarge the power of the Attorney General beyond constitutional bounds. It is the duty of a federal court to assure that every plaintiff possesses the standing to proceed. That basic requirement can not be met by the United States.

II. THE UNITED STATES HAS NO STANDING TO BRING THIS ACTION

Generally one party lacks standing to assert the rights of another. This principle applies to the United States as well as every other litigant. Bailey v. Patterson, 369 U.S. 31 (1962); Brown v. Board of Trustees of La Grange Independent School District, 187 F. 2d 20 (5th Cir. 1951); United States v. Biloxi Municipal School District, 219 F. Supp. 691 (S. D. Miss. 1963), aff'd 327 F. 2d 929 (5th Cir. 1963); United States v. School District of Ferndale, Michigan, 400 F. Supp. 1122 (E. D. Mich.

1975); 400 F. Supp. 1131 (E. D. Mich. 1975); and 400 F. Supp. 1141 (E. D. Mich. 1975).

Clearly, the United States can not derive standing itself from the asserted denial of the constitutional rights of others. The United States must show some impaired legally cognizable interest of its own to establish independent standing if it is to bring this action.

The interest manifested by the United States in the conditions at Rosewood State Hospital is certainly not an interest in the conduct of interstate commerce which is sufficient to confer standing on the United States.[5] Nor does it constitute an interest in some property right of the United States, which would be sufficient to confer standing on the United States.[6]

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[5] In re Debs, 158 U.S. 564 (1895); United States v. Brand Jewelers, Inc. 318 F. Supp. 1293 (S. D. N. Y. 1970); United States v. City of Jackson, 318 F. 2d 1 (5th Cir. 1963); rehearing denied, 320 F. 2d 870 (5th Cir. 1963); United States v. United States Klans, 194 F. Supp. 897 (M. D. Ala. 1961); United States v. Lassiter, 203 F. Supp. 20 (W. D. La. 1962) aff'd 371 U.S. 10 (1962).

[6] United States v. New York Times, 403 U.S. 713 (1971); Cotton v. United States, 11 How. 229 (1851); United States v. San Jacinto Tin Company, 125 U.S. 273 (1888); Sanitary District of Chicago v. United States, 266 U.S. 405 (1925); United States v. Bell Telephone Co., 128 U.S. 315 (1888); United States v. Fitzgerald, 201 Fed. Rep. 295 (8th Cir. 1912).

Only one case in the litany cited by the United States arguably stands for the proposition that the Attorney General, absent Congressional authorization has standing to sue on behalf of citizens based on allegations of a widespread denial of constitutional rights. In United States v. Brand Jewelers, Inc. 318 F. Supp. 1293 (S. D. N. Y. 1970), after an extensive discussion of the standing of the United States to remedy burdens on interstate commerce, the court held alternatively, in a single sentence and without discussion, that the United States had standing to sue to end a widespread deprivation of property through state action, without due process of law.

This holding is ably criticized by the lower court, 419 F. Supp. at 365-66, as well as the court in United States v. School District of Ferndale, Michigan, supra. The Commonwealth of Pennsylvania as amicus curiae strongly supports these and other recent holdings which thoughtfully reach a contrary result. United States v. County School Board of Prince George County, Va., 221 F. Supp. 93 (E. D. Va. 1963); United States v. Biloxi Municipal School District, 219 F. Supp. 691 (S. D. Miss. 1963) aff'd on other grounds

326 F. 2d 237 (5th Cir. 1964), cert. den. 379 U.S. 929 (1964); United States v. Madison County Board of Education, 219 F. Supp. 60 (N. D. Ala. 1963), aff'd on other grounds 326 F. 2d 237 (5th Cir. 1964), cert.den. 379 U.S. 929 (1964).

The United States is thus left only with its "direct concern" for the treatment and rehabilitation of the mentally retarded as evidenced by various federal appropriations in this area. (Brief for the United States at p. 16) There is, however, no allegation in the complaint that such appropriations are being misused. The only issue raised by the complaint is an alleged deprivation of constitutional rights. To derive standing from the bare fact that federal appropriations exist in the area would effect an unusual and dangerous mutation on the doctrine of standing.

If standing is found on the basis of the federal governments' financial involvement in an area, the United States, unlike any other litigant would have the extraordinary power to challenge any act of a state or local government which may allegedly violate some constitutional right, so

long as some federal expenditure was involved. The United States would be able to question, despite the clear "case or controversy" dictates of the Constitution, a wide variety of state and local governmental actions. And, the fundamental relationship of co-existing sovereignty between the federal government and the several states which was constitutionally created and judicially preserved would be destroyed. Rizzo v. Goode, supra.

The concern expressed by the United States is, to be sure, appreciated by the recipients of its largess. But that concern does not rise to the magnitude necessary to invoke the federal judicial power over a recipient state defendant.

CONCLUSION

For the foregoing reasons and authorities, the Commonwealth of Pennsylvania and the State of Connecticut as amici curiae respectfully urge this Court to affirm the order of the District Court.

Respectfully submitted,

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CERTIFICATION OF SERVICE

AND NOW, this 30th day of December, I, Jeffrey Cooper, Deputy Attorney General for the Commonwealth of Pennsylvania, Counsel for amici, hereby certify that on December 30, 1976, I served the Brief of the Commonwealth of Pennsylvania as Amicus Curiae by placing this document in the United States Mail, postage prepaid, in Harrisburg, Pennsylvania, addressed to:

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