110TH CONGRESS 1st Session } HOUSE OF REPRESENTATIVES { REPORT 110–160

NO OIL PRODUCING AND EXPORTING CARTELS ACT OF 2007 (NOPEC)

MAY 21, 2007.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

SUPPLEMENTAL VIEWS

[To accompany H.R. 2264]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2264) to amend the Sherman Act to make oil-producing and exporting cartels illegal, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "No Oil Producing and Exporting Cartels Act of 2007" or "NOPEC".

SEC. 2. SHERMAN ACT.

The Sherman Act (15 U.S.C. 1 et seq.) is amended by adding after section 7 the following:

"SEC. 7A. (a) It shall be illegal and a violation of this Act for any foreign state, or any instrumentality or agent of any foreign state, to act collectively or in combination with any other foreign state, any instrumentality or agent of any other foreign state, or any other person, whether by cartel or any other association or form of cooperation or joint action—

"(1) to limit the production or distribution of oil, natural gas, or any other petroleum product;

"(2) to set or maintain the price of oil, natural gas, or any petroleum product; or

"(3) to otherwise take any action in restraint of trade for oil, natural gas, or any petroleum product;

when such action, combination, or collective action has a direct, substantial, and reasonably foreseeable effect on the market, supply, price, or distribution of oil, natural gas, or other petroleum product in the United States.

"(b) A foreign state engaged in conduct in violation of subsection (a) shall not be immune under the doctrine of sovereign immunity from the jurisdiction or judgments of the courts of the United States in any action brought to enforce this section.

"(c) No court of the United States shall decline, based on the act of state doctrine, to make a determination on the merits in an action brought under this section.

"(d) The Attorney General of the United States may bring an action to enforce this section in any district court of the United States as provided under the antitrust laws.".

SEC. 3. SOVEREIGN IMMUNITY.

Section 1605(a) of title 28, United States Code, is amended—

(1) in paragraph (6), by striking "or" after the semicolon;

(2) in paragraph (7), by striking the period and inserting "; or"; and

(3) by adding at the end the following:

"(8) in which the action is brought under section 7A of the Sherman Act.".

PURPOSE AND SUMMARY

With control of 40% of the world's production, OPEC has substantial influence over the price of oil. OPEC member nations have extensive oil reserves and therefore can readily increase supply and lower prices. In addition, many of the non-OPEC oil-producing countries—such as the United States—have large private oil-producing sectors. These companies have very little spare production capacity and cannot easily increase production in the event of shortages or otherwise expand to increase market share.[1]

H.R. 2264, the "No Oil Producing and Exporting Cartels Act of 2007 or 'NOPEC,'" deems it to be illegal and a violation of our Nation's antitrust law for any foreign state, or any instrumentality or agent of any foreign state, to act collectively whether by cartel or any other form of cooperative action to limit the production or distribution of oil, natural gas, or any other petroleum product or to set the price of such commodities. The bill exempts OPEC and other Nations from the provisions of the Foreign Sovereign Immu-

[1] U.S. Energy Information Administration, *Country Analysis Briefs —Non-OPEC Fact Sheet,* Nov. 2005, at *http://www.eia.doe.gov.*

nities Act to the extent those governments are engaged in price-fixing and other anticompetitive activities with regard to pricing, production, and distribution of petroleum products. It also makes clear that the so-called "act of state" doctrine does not prevent courts from ruling on antitrust charges brought against foreign governments, and that foreign governments are "persons" subject to suit under the antitrust laws. Finally, it authorizes the Department of Justice to bring lawsuits in Federal court against oil cartel members.

BACKGROUND AND NEED FOR THE LEGISLATION

BACKGROUND ON OPEC

The Organization of Petroleum Exporting Countries (OPEC) produces approximately 40% of the world's petroleum. The OPEC countries include Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates, and Venezuela. OPEC states that its mission "to coordinate & unify the petroleum policies of Member Countries & ensure the stabilization of oil prices in order to secure an efficient, economic & regular supply of petroleum to consumers, a steady income to producers & a fair return on capital to those investing in the petroleum industry."[2]

OPEC, to fulfill its stated mission, has taken steps throughout the years to control the supply and price of crude oil in an effort to "stabilize" prices and secure "a steady income to producers." To this end, OPEC has undertaken numerous actions, as a matter of routine, to fix supply and prices. These actions, as compiled by the United States Energy Information Administration, include the following concerted actions taken in recent years:

- September 24, 2003: OPEC decides to lower its production quota from 25.4 million barrels per day to 24.5 million barrels per day, effective November 1, 2003.
- February 10, 2004: OPEC decides to lower OPEC's production quota from 24.5 million barrels per day to 23.5 million barrels per day, effective April 1, 2004.
- March 31, 2004: OPEC re-confirms the new production ceiling of 23.5 million barrels per day effective April 1, 2004, which was agreed upon on February 10, 2004.
- June 3, 2004: OPEC decides to increase its production quota to 25.5 million barrels per day effective July 1, 2004, and to 26.0 million barrels per day effective August 1, 2004.
- September 15, 2004: OPEC decides to increase its production quota to 27.0 million barrels per day effective November 1, 2004.
- December 10, 2004: OPEC decides to output quotas unchanged, but pledges to cut overproduction over quota levels by 1 million barrels per day effective January 1, 2005.
- January 30, 2005: OPEC decides to leave its target production levels unchanged, and to temporarily suspend its price band mechanism.
- March 16, 2005: OPEC decides to increase its production quota to 27.5 million barrels per day effective immediately.

[2] *See http://www.opec.org/home.*

- June 15, 2005: OPEC decides to increase its production quota to 28 million barrels per day effective July 1, 2005 and authorizes an additional 500,000 barrels per day increase in its quotas "should oil prices remain at current levels or continue to rise further." OPEC also decides to replace its previous OPEC reference basket of seven crude oils with a new one consisting of eleven crude streams, effective June 16, 2005.
- September 19, 2005: OPEC agrees to make available to the market all of the spare capacity in member countries (estimated at 2 million barrels per day by OPEC), should it be called for, for a period of 3 months, starting October 1, 2005.
- December 12, 2005: OPEC decides to leave output quotas unchanged.
- January 31 , 2006: OPEC decides to leave output quotas unchanged.
- March 8, 2006: OPEC decides to leave output quotas unchanged.
- June 1, 2006: OPEC decides to leave output quotas unchanged. [3]

Even though OPEC controls "only" 40% of the world's production, its influence over prices is substantial. First, the OPEC countries have extensive reserves and can easily increase supply and lower prices. Second, many of the non-OPEC oil-producing countries—such as the United States—have large private oil-producing sectors. These companies have very little spare production capacity and cannot easily increase production in the event of shortages or otherwise expand to increase market share. [4]

ANTITRUST ANALYSIS

If private actors collusively controlled supply and prices in the manner that OPEC member nations do, there is no question that their conduct would be illegal as a *per se* violation of the Sherman Act, and that they would be subject to criminal and civil liability. [5] Typically, however, foreign states are immune from suit in Federal court. Section 1604 of title 28 of the United States Code provides that a "foreign state shall be immune from the jurisdiction of the

[3] U.S. Energy Information Administration, *Country Analysis Briefs—OPEC,* Aug. 6, 2006, at *http://www.eia.doe.gov.*

[4] U.S. Energy Information Administration, *Country Analysis Briefs—Non-OPEC Fact Sheet,* Nov. 2005, at *http://www.eia.doe.gov.*

[5] Section 1 of the Sherman Act provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony [punished as provided by law].

15 U.S.C.A. § 1 (2006).

Although § 1 of the Sherman Act provides criminal penalties for price-fixing and other restraints of trade, other provisions of the antitrust laws provide for civil enforcement. For example, section 15 of the Clayton Act provides, in pertinent part:

> That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys fo the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

15 U.S.C.A. § 25 (2006).

courts of the United States and of the States [with specific exceptions]."[6]

One exception to sovereign immunity applies where the suit "is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[7]

Although the coordination of oil production by the OPEC countries as a means of controlling price levels would appear to be a "commercial activity"—and therefore not protected by sovereign immunity—a district court in 1979 held otherwise. The district judge concluded that the act of an OPEC member nation "establishing the terms and conditions for removal of natural resources from its territory" was a "governmental activity," not a commercial activity within the meaning of the exception to the principles of foreign sovereign immunity.[8] The court dismissed the antitrust suit brought by a labor union against OPEC. One purpose of H.R. 2264 is to reaffirm that the antitrust laws do indeed apply to the OPEC nations in their role as commercial actors, engaging in such collusion, where such conduct impacts the United States.

The other obstacle to antitrust lawsuits against OPEC is the "act of state" doctrine, which commands courts to avoid review of the actions of foreign governments and to defer certain disputes with foreign government to the political branches of the government. This doctrine was cited by the Ninth Circuit in affirming the dismissal of the case discussed above.[9]

H.R. 2264 minimizes any "act of state" doctrine concerns with bringing an antitrust action against the OPEC nations, because it entrusts to the Executive Branch the discretion whether to bring charges under this provision.[10] A court's concern about insinuating itself in matters properly within the bailiwick of the political branches is mitigated when Congress, by this legislation, and the Executive Branch, by bringing the action, explicitly authorizes judicial involvement.

The NOPEC legislation was first introduced in the 106th Congress, and has been reintroduced in every Congress since. It was reported by the Senate Committee on the Judiciary, with considerable bipartisan support, in the 106th Congress, again in the 108th Congress, and again in the 109th Congress. In the 109th Congress, the bill passed the Senate as a provision in the Energy Policy Act of 2005. In the 110th Congress, the Senate Committee on the Judiciary ordered the bill favorably reported on April 25, 2007, by unanimous consent.

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[6] 28 U.S.C.A. § 1604 (2006)

[7] 28 U.S.C.A. § 1605(a)(2) (2006).

[8] International Ass'n of Machinists v. Organization of Petroleum Exporting Countries, 477 F.Supp. 553, 568 (C.D. Cal 1979). The district judge reasoned, "This Court agrees that this 'commercial activity' should be defined narrowly. . . . From the evidence presented to this Court, it is clear that the nature of the activity engaged in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource to wit, crude oil from its territory." *Id.* at 567.

[9] The Ninth Circuit rested its decision not on the grounds that sovereign immunity precluded the suit, but on the "act of state doctrine."

[10] Rus the bill authorizes only the Department of Justice to enforce NOPEC, the Executive Branch necessarily will consider the foreign policy implications of such a suit before bringing charges.

HEARINGS

On May 16, 2007, the Antitrust Task Force of the Committee on the Judiciary held an oversight hearing on the subject of market failure in the oil industry and the possible uses of the antitrust laws to restore competition in that industry, during which the NOPEC legislation was a major topic of discussion. Witnesses at the hearing included Representatives Bart Stupak (D-MI) and Heather Wilson (R-NM); Richard Blumenthal, Attorney General for the State of Connecticut; Dr. John Felmy, chief economist at the American Petroleum Institute; and Mark Cooper, director of research for the Consumer Federation of America.

COMMITTEE CONSIDERATION

On May 17, 2007, the Committee met in open session and ordered the bill, H.R. 2264, favorably reported with an amendment, by voice vote, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 2264.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2264, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 18, 2007.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2264, the No Oil Producing and Exporting Cartels Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Daniel Hoople, who can be reached at 226–2860.

Sincerely,

PETER R. ORSZAG,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 2264—No Oil Producing and Exporting Cartels Act of 2007.

H.R. 2264 would seek to prohibit foreign states from working collectively to limit the production, set the price, or otherwise restrain the trading of petroleum and natural gas when such actions affect U.S. markets. The bill would authorize the Department of Justice (DOJ) to enforce the legislation by filing antitrust actions in federal courts. The bill also would provide that foreign states that restrain trade in petroleum and natural gas would not be immune from the judgment of U.S. courts under the doctrine of sovereign immunity.

CBO cannot estimate a precise cost of implementing H.R. 2264 because we have no basis for assessing the likelihood that the Administration might initiate antitrust actions against foreign states under the bill. Based on information from DOJ on the costs of investigations of alleged antitrust violations, CBO estimates that similar investigations to those that might be brought under H.R. 2264 could cost up to $4 million per year, subject to appropriation of the necessary funds.

H.R. 2264 could result in the collection of additional criminal or civil penalties. Collections of criminal fines are recorded in the budget as revenues, which are deposited in the Crime Victims Fund and later spent. Civil fines are also recorded as revenues. CBO cannot estimate the impact of H.R. 2264 on direct spending and revenues because we cannot determine whether DOJ would file suit against alleged violators, whether the agencies would win such legal action, or how much in penalties might be collected by federal agencies. In any case, enacting those provisions would either have no significant net impact on the deficit or would reduce future deficits (through collections of civil fines).

H.R. 2264 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on State, local, or tribal governments.

On May 4, 2007, CBO transmitted a cost estimate for S. 879, the No Oil Producing and Exporting Cartels Act of 2007, as ordered reported by the Senate Committee on the Judiciary on April 25, 2007. The two bills are similar, and our cost estimates are the same.

The CBO staff contact for this estimate is Daniel Hoople, who can be reached at 226–2860. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2264 enables the United States Department of Justice to bring lawsuits in Federal

court against nations that engage in conduct designed to fix the price of oil.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 3 of the Constitution.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2264 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. This section sets forth the short title of the bill as the "No Oil Producing and Exporting Cartels Act of 2007 or (NOPEC)."

Sec. 2. Sherman Act. Section 2(a) makes it illegal for any foreign state, or instrumentality or agent of any foreign state, to act collectively with others to: (1) limit the production of, (2) set or maintain the price of, or (3) otherwise retrain trade for oil, natural gas, or any other petroleum product, when such action has a direct, substantial, and reasonably foreseeable effect on the market, supply, price, or distribution of oil, natural gas, or other petroleum product. In substance, this clarifies that the Sherman Act reaches international state actors in the petroleum production business.

Subsection (b) provides that a foreign state engaged in conduct under subsection (a) shall not be immune under the doctrine of sovereign immunity from the jurisdiction or judgments of the courts of the United States. Subsection (c) provides that the courts shall not decline to hear cases brought under section 2 based on the "act of state" doctrine. Subsection (d) provides that the Attorney General of the United States may bring an action to enforce this section.

Sec. 3. Sovereign Immunity. Section 3 amends the Foreign Sovereign Immunity Act, 28 U.S.C. § 1605(a), to make it explicit that sovereign immunity does not protect a country for actions brought under new section 7A of the Sherman Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

SHERMAN ACT

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Sherman Act".

* * * * * * *

SEC. 7A. (a) It shall be illegal and a violation of this Act for any foreign state, or any instrumentality or agent of any foreign state, to act collectively or in combination with any other foreign state, any instrumentality or agent of any other foreign state, or any other person, whether by cartel or any other association or form of cooperation or joint action—

(1) to limit the production or distribution of oil, natural gas, or any other petroleum product;

(2) to set or maintain the price of oil, natural gas, or any petroleum product; or

(3) to otherwise take any action in restraint of trade for oil, natural gas, or any petroleum product;

when such action, combination, or collective action has a direct, substantial, and reasonably foreseeable effect on the market, supply, price, or distribution of oil, natural gas, or other petroleum product in the United States.

(b) A foreign state engaged in conduct in violation of subsection (a) shall not be immune under the doctrine of sovereign immunity from the jurisdiction or judgments of the courts of the United States in any action brought to enforce this section.

(c) No court of the United States shall decline, based on the act of state doctrine, to make a determination on the merits in an action brought under this section.

(d) The Attorney General of the United States may bring an action to enforce this section in any district court of the United States as provided under the antitrust laws.

* * * * * * *

SECTION 1605 OF TITLE 28, UNITED STATES CODE

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case—

(1) * * *

* * * * * * *

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the

United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; **[**or**]**

(7) Not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339a of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) * * *

(B) Even if the foreign state is or was so designated, if—

(i) * * *

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred**[**.**]***; or*

(8) in which the action is brought under section 7A of the Sherman Act.

* * * * * * *

SUPPLEMENTAL VIEWS

The Organization of Petroleum Exporting Countries (OPEC) sits atop the world's supply of oil. Founded in Baghdad in 1960, OPEC members' national oil ministers meet regularly to discuss prices and set crude oil production quotas. OPEC's member nations include Iran, Iraq, Kuwait, Saudi Arabia, Venezuela, Qatar, Indonesia, Libya, the United Arab Emirates, Algeria, and Nigeria. Together they control roughly 40% of world oil production, and about ⅔ of the world's proven oil reserves. The Federal Trade Commission has found that "OPEC . . . continues to have a significant influence on world crude oil prices, even though coordination among its members to reduce output is imperfect."[1]

Many of the OPEC regimes are either totalitarian or unstable states. Some are openly hostile to American interests. Few would seriously argue that the presence of such a cartel is beneficial to the United States.

H.R. 2264, the "No Oil Producing and Exporting Cartels Act of 2007 or 'NOPEC,'" is an effort to end the collusive behavior of OPEC by subjecting it to U.S. antitrust laws. H.R. 2264 does this by amending the Sherman Antitrust Act (15 U.S.C. § 1 et seq.) to make it illegal for foreign countries to collude to restrain output or fix prices of oil, gas, or any petroleum product, and would give au-

[1] FEDERAL TRADE COMMISSION, THE PETROLEUM INDUSTRY: MERGERS, STRUCTURAL CHANGE, AND ANTITRUST ENFORCEMENT 5 (2004).

thority to the U.S. Attorney General to enforce the provisions. The bill is a response to the Ninth Circuit's decision in *International Association of Machinists and Aerospace Workers v. OPEC,* which held that the countries constituting OPEC could not be held liable for antitrust violations because of the act of state doctrine.[2] As such, the bill explicitly eliminates the concepts of sovereign immunity and the act of state doctrine as OPEC's defenses to an antitrust suit.

H.R. 2264, while well intentioned, could have a litany of consequences for America, both at home and abroad. I have requested that GAO study the impact that the bill may have on U.S. foreign policy, our trade balances, and our ability to station troops in the Middle East. In addition, this bill could lead to a number of retaliatory actions by these foreign governments, including an oil embargo like the one that occurred in 1973 and the seizure of U.S. assets abroad. At my request, the GAO will study the likelihood of such retaliatory actions and their impact on the U.S. economy. Separate and apart from those concerns, the costs of enforcing a judgment against a foreign state-owned entity are unknown and might not be worth the effort.

Finally, I would like to note the importance of regular order in the consideration of such important legislation. The Antitrust Task Force held one hearing on gas prices the day before the markup of this legislation. At that hearing, which was repeatedly interrupted by votes on the floor and other procedural anomalies, the legislation received scant attention. In fact, one of the witnesses observed that there was little that Congress could do to impact the price of gasoline in the short term. Given the potential wide-ranging impacts that this bill could have on the American economy and its extremely limited value in reducing the price of gasoline in the short term, I think it would have been wise to give it more thorough and deliberate consideration.

LAMAR SMITH.

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[2] 649 F.2d 1354 (9th Cir. 1981).