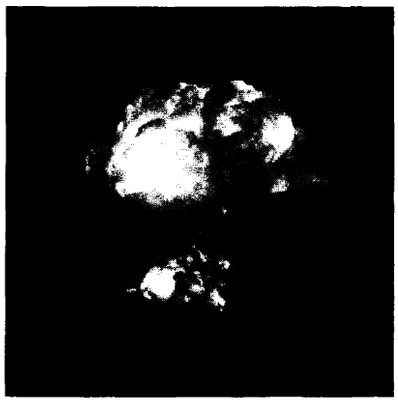
Government Wins Appeal in Lawsuit on Fallout

A landmark ruling that the U.S. government had suppressed critical evidence in a lawsuit emanating from atom bomb tests in the 1950's has now been overturned by a higher court. In the initial opinion, issued last August by federal district court judge A. Sherman Christensen, the government was said to have practiced fraud and deceit during a 1956 trial to avoid responsibility for the deaths of several thousand sheep that had grazed on fallout-laden pastures near the atom bomb test site in Nevada. Agents of the government were accused of withholding key facts, misrepresenting data, and pressuring those who knew the true story to revise their opinions (*Science*, 5 November 1982, p. 545).

Several weeks ago, in a stunning reversal of Christensen's ruling, the U.S. Court of Appeals in Denver declared flatly that there is no evidence whatever of government fraud in the case. "We find nothing to demonstrate that misleading answers were made. . . . There is no basis in the record to suggest that anything was withheld. . . . The plaintiffs . . . were unable to make a case against anyone concerned" and Christenson's opinion resulted merely from "an abuse of discretion."

Bruce Findlay, one of the attorneys representing the Nevada sheepmen, remarks that it is almost as if the appellate court was reviewing a different case. The effect of the new ruling is to derail—and possibly terminate—an attempt by his clients to win a new trial, which Christensen had ordered, as well as to dim considerably the prospects that his law firm will be compensated for its 1000 hours of work in the case. "I think it's likely that there will by a further appeal," Findlay says, although his firm has not yet decided whether the claim would stand a better chance in a rehearing before the same court or before the U.S. Supreme Court.

The appellate court dwells in its 18-page decision on the failure of the sheepmen in the initial trial to make adequate use of scientific data that might have damaged the government's case, such as two internal Atomic Energy Commission (AEC) reports in 1953 on the results of experiments with sheep and radiation at a federal laboratory in Hanford, Washington. The reports indicated that radiation-poisoned sheep and fetal lambs experienced symptoms similar to those experienced by the sheep and fetal lambs owned by the plaintiffs. The plaintiffs argued that data from these reports was illegally suppressed, but the government claims that they were disclosed sufficiently by virtue of having been listed as references in another report which concluded that no such experimental similarities existed. The Justice Department, in its appellate court brief, said that it is perverse and nonsensical to suggest that "the government's experts should have thrust forward information they considered scientifically irrelevant."



Unlike Christensen, Judges Oliver Seth, Robert McWilliams, and Ewing Kerr sided with the government. "The simple response to the charge that [the government's] answers were non-responsive is that plaintiffs did not move to compel further answers," the Justice Department had argued. The appellate court agreed: "Information, data reports, maps, experiments, and witnesses were all available to plaintiffs at the first trial" in 1956, they said in the appellate court decision. "If they did not choose to use it that was a decision they made."

Similarly, there was evidence at the time of the initial trial that government officials had changed their positions during the course of the AEC's investigation. "The plaintiffs were familiar with all the background data as hereinabove described," the appellate court said. "With this familiarity they chose not to seek additional answers or clarifications."

In their appeal, the sheepmen are likely to argue that even though some of the key evidence was indeed available, the significance of it was difficult to determine, except by asking government experts. The question, Findlay says, is "not whether it was available, but whether it was available in a manner that had any meaning for this particular case. At the time, most of the people who were coping with this information on a familiar basis were government employees. Anything we got came either from people who were instructed not to talk or who were thoroughly briefed in advance on the government's position."

—R. JEFFREY SMITH

Private Groups Enunciate "Baby Doe" Principles

The Justice Department has decided to appeal a court decision that has foiled the federal government's attempts to intervene in the case of Baby Jane Doe. Because the infant, born on 11 October, has a series of grave birth defects, doctors and the child's parents decided to forgo surgery that might merely prolong her life.

Meanwhile, a group of nine organizations concerned with the rights and treatment of handicapped newborns has, after months of discussion, produced a statement of "Principles of Treatment of Disabled Infants." Among the signatories are the American Academy of Pediatrics (AAP) and the Association for Retarded Citizens (ARC). The statement is noteworthy in that it marks improved relations between medical groups and organizations representing the handicapped. The two factions disagree with each other in many respects, as evidenced in the continuing battle over the "Baby Doe" regulations which call for extensive federal intervention in the nursery (*Science*, 23 September, p. 1269).

The recent statement is an affirmation of the rights of ill and disabled newborns. It says, for example, "when medical care is clearly beneficial, it should always be provided." The statement also acknowledges that "it is ethically and legally justified to withhold medical or surgical procedures

which are clearly futile and will only prolong the act of dying."

As for the basis of decision-making in complex cases, the groups said, "in cases where it is uncertain whether medical treatment will be beneficial, a person's disability must not be the basis for a decision to withhold treatment.

". . . [C]onsiderations such as anticipated or actual limited potential of an individual . . . must not determine the decisions concerning medical care," but "the individual's medical condition should be the sole focus of the decision." This would appear to preclude considerations about the quality of life.

The pediatrics academy, which has been the chief voice for the medical groups, claims that this section does not indicate any change in its position, despite the fact that the AAP supports in principle the decision of Baby Jane Doe's doctors to refrain from surgery. Because the infant was not in the process of dying at the time of the decision, it would seem that the decision was made on the basis of her very severe limitations as well as her poor prognosis.

Denver pediatrician James Strain, past president of the AAP, puts a rather free construction on the principles. He says that the section about "limited potential" was designed with Down's syndrome babies in mind and that surgery for a Baby Jane Doe, who has "no cortical function at all as I understand it" would be a matter of "individual consideration."

Strain also contends that surgery could be regarded as "clearly futile" if it does no more than prolong "an inevitable situation." In other words, he says, any measure that did not give the infant a chance at a normal life-span could be one that "will only prolong the act of dying."

The real message of the principles, says Strain, is that local review committees are needed so that every case can be considered on an individual basis.

Handicapped groups, according to Paul Marchand of the retarded citizens association, interpret the principles rather more broadly. Marchand says that if everyone abided by them, a lot more handicapped babies would be getting treatment, and that there is no question that Baby Jane Doe would be getting surgery. He says that the clause stipulating that an infant's disability not be a basis for withholding treatment also applies in her case, because it means that doctors would not forgo attempts to correct one defect on the grounds that there are others.

So, there remains much to be resolved. Perhaps the most important aspect of the statement, aside from its existence, is its emphasis on the need for society to provide continuing support for such individuals once a decision is made to keep them alive. The Administration, while righteously declaiming about the value of all human life, has made radical cutbacks in relevant support programs.

—CONSTANCE HOLDEN

EPA Tightens Pesticide, Toxic Chemical Testing

Spurred in part by discovery of mismanagement in certain contractor-run chemical testing programs, the Environmental Protection Agency (EPA) last month published regulations to tighten up the testing of pesticide and toxic substances. The new standards, which will take effect next spring, have been in the works since 1980.

The standards spell out EPA's authority to monitor industrial and other outside testing programs that submit data to the agency. For example, they outline the agency's authority to inspect facilities and reject studies, and specify how long an organization must retain raw data for possible auditing. The rules also make clear that contractors or consultants must be notified of the standards and that the sponsor of a study assumes the responsibility for ensuring compliance with them.

EPA's new good laboratory practice standards are modeled closely after Food and Drug Administration standards. They also were written to correspond with guidelines laid down by the Organization for Economic Cooperation and Development, the main difference being the international group's guidelines carry no power of enforcement. This near-uniformity among the several sets of standards is intended to assure that data developed in one country will by accepted internationally.—JEFFREY L. FOX

Yellow Rain on Darwin's White Roses

Braydon Guild, an immunologist at Harvard University and collector of Darwiniana, recently came across what he thinks may be the earliest recorded yellow rain incident. It occurred in Charles Darwin's garden after a summer shower at about 10 a.m. one July morning in 1863. Though no military activity was noted, this is what Darwin observed, according to a letter sent to the *Gardeners' Chronicle and Agricultural Gazette*:

> My wife gathering some flowers immediately afterwards noticed that the drops of water appeared yellowish, and that the white roses were all spotted and stained. . . . I then looked at several roses and syringas and found them much stained in spots. Between the petals of the double white roses there were still drops of the dirty water: and this when put under the microscope showed numerous brown spherical bodies, 1/1000 of an inch in diameter, and covered with short, conical transparent spines. There were other smaller, smooth, colourless sacs about 4/7000 of an inch in diameter. . . . The petals, now that they are nearly dry, seem stained with absolutely impalpable matter of the colour of the rust of iron.

The *Gazette* author who reported this event in 1863 wrote, "We have not been able to ascertain precisely to what plant the larger bodies belong, but we believe them to be the pollen grains of some thistle or centaurea." Others observed that fir pollen and fungi spores could be carried by the wind and deposited by rain on leaves.

Guild was inspired to cite Darwin's encounter with yellow rain after reading in *Nature* that Chinese scientists concluded 6 years ago that yellow rain is probably bee excrement. The Chinese study, published in *Kexue Tongbao* in September 1977, said that an investigation was made to identify the source of yellow rain falling in the countryside. The analysis of 500 yellow, sticky spots revealed them to be primarily pollen, containing the same types of grains (also in the same relative quantities) found in bee excrement. British intelligence knew of this finding, according to *Nature*, but did not comment on it publicly.

These various reports make it seem more plausible that yellow rain could come from natural sources.

—ELIOT MARSHALL