United States Attorneys

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UNITED STATES DEPARTMENT OF JUSTICE

As you have no doubt realized by now, the United States Attorneys Bulletin is now being published on a weekly, rather than biweekly basis. This change will insure that the Bulletin will be as current and up-to-date as possible, making it a much more effective tool for the United States Attorneys and their Assistants. In line with this new policy, we are digesting significant cases from the Circuit and District Courts as quickly as possible, with the help of specially designated Assistants in the various Circuits. Also, we have added a "News Notes" section to keep the United States Attorneys' offices apprised of newsworthy developments in the Department, and a "Points to Remember" section, which will include special notices and policy statements from the Department.

H. Bruce Shreves
Editor

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ANTITRUST DIVISION

Assistant Attorney General Edwin M. Zimmerman

DISTRICT COURT

SHERMAN ACT

OPINION ON DEFENDANTS' MOTIONS TO DISMISS INDICTMENT, TO STRIKE PORTIONS OF BILLS OF PARTICULARS, AND FOR DISCOVERY AND INSPECTION OF GRAND JURY DOCUMENTS.

United States v. The American Oil Co., et al. (Cr. 153 Cr. 65; July 15, 1968; D. J. 60-57-170)

On July 15, 1968, Judge Reynier J. Wortendyke issued an opinion disposing of defendants' motions (1) to dismiss the indictment because of alleged defects in the impanelling of the grand jury; (2) to dismiss the indictment on the ground that, as illuminated by the bill of particulars, the indictment fails to state a violation of law; (3) to strike portions of the bill of particulars on the grounds that the challenged particulars are contrary to and enlarge upon the charges in the indictment; and (4) for discovery and inspection of virtually all the grand jury transcripts, statements and allegedly exculpatory material in the possession of the Government, plus certain documents mentioned in the bill of particulars. The court granted discovery of "the Grand Jury testimony of those persons who, when they testified before the Grand Jury, were officers or employees of any of the moving corporations." The Government did not oppose discovery of the documents mentioned in the bill of particulars. The motions were denied in all other respects.

1. Grand Jury Impanelling

On the theory that more men than women seek to be excused from grand jury duty, two-thirds of the cards placed by the clerk in the jury wheel contained the names of men. Defendants' initial motion to dismiss for faulty impanellment was denied on December 30, 1965, see U.S. v. American Oil Company, 249 F. Supp. 130 (D. N. J. 1965), as was a subsequent motion for reconsideration of that decision. See U.S. v. American Oil Company, 253 F. Supp. 783 (D. N. J. 1966). Based on the newly-discovered information that, in fact, more women than men sought to be excused, thereby aggravating the already substantial imbalance, defendants once again moved to dismiss the indictment for faulty impanelling. The court, in denying this motion, reaffirmed its earlier position that the procedure utilized did not result in the exclusion of "an appropriate class forming a portion of a fair cross-section of the community . . ." Additionally, the court noted that women were represented on the jury lists in substantial, if disproportionate, numbers and that an exact

proportional representation was neither required nor feasible.

2. Motion to dismiss for failure to state a violation of law

Although the sufficiency of the indictment was upheld in 1966, see U. S. v. American Oil Company, 249 F. Supp. 799 (D. N. J. 1966), Atlantic Richfield once again sought a dismissal on the ground that, as illuminated by the bill of particulars, the indictment fails to spell out a violation of law. The court, however, followed the general rule that a bill of particulars can neither add to nor subtract from an indictment. To hold otherwise, the court felt, would usurp the jury's function as the finder of fact.

After holding that the indictment should be construed without regard to the "Bill of Particulars", the court, nevertheless went on to say that even in light of the bill of particulars, the indictment sets forth an offense under the Sherman Act. When viewed in light of the bill of particulars, the indictment, the court said, was susceptible of several interpretations. The court felt it was under no obligation to adopt the interpretation urged by the defendants and noted that it was the jury's function to choose between alternative interpretations.

3. Motion to strike portions of the Bills of Particulars

Count I of the indictment charged all 8 defendants with a conspiracy in restraint of trade "the substantial term of which has been to raise, fix, stabilize and maintain tank wagon prices and retail prices of gasoline . . . ." Counts II and III charged only 4 defendants (who did not join in the instant motion) with a combination and conspiracy to monopolize and an attempt to monopolize based on an agreement to restrict the amount of gasoline available to distributors and dealers engaged in the sale of private brand gasoline. Count I alleged no agreement to restrict supply, although paragraph 15 of the indictment alleged that in furtherance of the combination and conspiracy alleged in Count I the defendants and co-conspirators "did various things, including things to:

> (b) substantially restrict the amount of gasoline available to distributors and dealers engaged in the sale of private brand gasoline in the trading area."

In response to a request that the Government furnish a bill of particulars stating "what action, in fact, each defendant and co-conspirator agreed to take, i. e., the means and methods agreed to, by which each such category and price was to be . . . fixed . . .", the Government responded as follows:

> Atlantic, Gulf, Cities and Cities Service [i.e., the 4 companies which were made defendants in Counts II and III as well as Count I] agreed with each other to substantially restrict the amount of gasoline available to distributors and dealers engaged in the sale of private brand gasoline.

The moving defendants contended that:

> By charging the . . . agreement to restrict supply in the Particulars relating to Count I, the Government has completely disregarded the one thing which the indictment, when read as a whole, most clearly manifests, viz: that the Grand Jury deliberately refrained from charging agreement to restrict supply in Count I.

The Government then filed an amendment to bill of particulars which provided that nothing in the bill would be construed as constituting a claim that the movants agreed with anyone that either they or anyone else should restrict the amount of gasoline available to distributors and dealers engaged in the sale of private brand gasoline.

Based on the fact that the amendment absolved the moving defendants from any agreement to restrict supply, the court held that the bill did not enlarge upon the indictment and, therefore, denied the motion to strike.

4. Discovery and inspection

Defendants moved for an order, pursuant to Rules 6(e) and 16(a) (3), Federal Rules of Criminal Procedure, permitting inspection and copying of the grand jury testimony of each officer and employee of the corporate defendants who testified before the grand jury which returned the indictment herein. Defendants also moved for discovery of:

1. Certain documents identified in the bill of particulars;

2. The grand jury testimony and statements of the witnesses whom the Government intends to call at trial;

3. Statements of persons who have relevant knowledge and whom the Government does not intend to call at trial;

4. The grand jury testimony and statements of representatives of

unindicted alleged co-conspirators and of the alleged "victims" of the alleged conspiracy; and

5. Evidence and information in the Government's possession which is favorable to any of the defendants and to which the defendants are entitled under Brady v. Maryland, 373 U.S. 83 (1963).

The court allowed discovery of "the Grand Jury testimony of those persons who, when they testified before the Grand Jury, were officers or employees of any of the moving corporations." Access to the other materials was denied.

The court granted discovery of the testimony of defendants' officers and employees based on: "the language of Rules 6(e) and 16(a)(3) and the cases construing them, the complexity of this litigation . . ., the fact that the Government will seek to prove that the alleged conspiracy agreement is to be inferred from the activities of the officers and employees of the various corporate defendants, the close proximity of relationship between the parties seeking discovery and the persons whose testimony is sought to be discovered, and the lack of countervailing interests . . . ."

The Government did not oppose defendants' motion for production of certain documents mentioned in the bill. Discovery of the grand jury testimony of the Government's trial witnesses was denied on the ground that the Government is not required to state who its witnesses will be, at least not at this time. Statements of Government witnesses need not be disclosed, the court ruled, except under the terms of the Jencks Act, 18 U.S.C. 3500. Disclosure at this time, therefore, was felt to be premature. A fortiori, statements of non-witnesses need not be turned over. Finally, the court ruled Brady v. Maryland, supra, creates no pre-trial discovery privileges not contained in the Federal Rules of Criminal Procedure. Rather, Brady merely delineates the boundaries of the Government's duty to turn over exculpatory material at trial.

Staff: Norman H. Seidler, Bernard Wehrmann, Barry Ravech and David Leinsdorf (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT--DAMAGES

COURT REMANDS FEDERAL TORT CLAIMS ACT CASE FOR FAILURE OF DISTRICT COURT TO MAKE FINDINGS OF FACT CONCERNING PARTICULAR ELEMENTS OF DAMAGES.

Ainsley Traylor v. United States (C. A. 6, No. 17,989; decided June 26, 1968; D. J. 157-31-144)

In a Tort Claims Act suit, the district court rendered judgment for plaintiff in the amount of $5,000. Plaintiff appealed, contending that the award was inadequate. The Sixth Circuit vacated the judgment of the district court, remanding the case for findings of fact on the question of damages.

The Court of Appeals pointed out that the district court had found that medical and hospital expenses totalled $764.65, but had made no further findings concerning particular elements of damages. The Court noted that plaintiff in this case might be entitled to damages for (1) pain and suffering; (2) incidental expenses for cosmetic repair of a scar; (3) permanent injuries. The Court then stated that the damages award of $5,000 was inadequate, but the Court ruled that the proper procedure was a remand to the district court for findings on the various elements of damages. The Court stressed the importance of findings on the elements of damages in a tort case, citing Hathaley v. United States, 351 U.S. 173.

Staff: United States Attorney Ernest W. Rivers; Assistant United States Attorney Philip Huddleston (W.D. Ky.)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

IN PARTIAL DISABILITY CASE UNDER LONGSHOREMEN'S ACT, DEPUTY COMMISSIONER IS NOT REQUIRED TO MAKE AN AWARD FOR CONTINUING COMPENSATION AND MAY, IN COMPUTING WORKER'S WAGE-EARNING CAPACITY, CONSIDER HIS ACTUAL WAGES AFTER INJURY.

Freddie Joe Welch and Paul L. Tugwell v. Gerald B. Leavey (C. A. 5, No. 24,082; decided July 10, 1968; D. J. 83-74-56)

Two longshoremen sustained permanent partial injuries. However, the Deputy Commissioner only awarded them compensation for a limited period of time, refusing to award them continuing compensation for their permanent injuries. The workers brought this action in the district court to review the Deputy Commissioner's refusal to make that additional award. The district court dismissed the action, and the Fifth Circuit affirmed.

The Court of Appeals rejected appellants' claim that, since they suffered permanent injuries, they must receive an award for continuing compensation for those injuries. The statute, the Court noted, aside from scheduled disabilities, awards compensation only for loss of "wage-earning capacity". Moreover, the Court held, the Deputy Commissioner did not err in considering the fact that one of the claimants had actually earned more money after injury than before. While not controlling, the Court ruled, a comparison of wages earned before and after an injury is certainly relevant under the statute.

Staff: United States Attorney Morton Susman; Assistant United States Attorney Carl Walker (S.D. Tex.)

UNIVERSAL MILITARY TRAINING AND SELECTIVE SERVICE ACT

PROBATIONARY EMPLOYEE IS NOT IN "TEMPORARY POSITION" WITHIN MEANING OF ACT SO AS TO DEPRIVE HIM OF REEMPLOYMENT AND SENIORITY RIGHTS UNDER STATUTE.

Jay G. Collins v. Weirton Steel Co. (C.A. 4, No. 11,908; decided June 18, 1968; D. J. 151-83-166)

Section 9(b) of the Universal Military Training Act, 50 U.S.C. 459(b), affords a statutory re-employment right to a veteran who "leaves a position (other than a temporary position)". If the veteran is entitled to statutory re-employment, he must also be accorded the seniority he would have acquired but for his military service. In this action brought by the United States on behalf of a veteran who had been on probationary status with the defendant company prior to his military service, the question presented was whether a probationary employee occupies a "temporary position" within the meaning of the Act. The district court held that he does, and the court therefore granted summary judgment for the company. The Fourth Circuit reversed.

The Court of Appeals recognized that court decisions on the precise issue were in conflict prior to the Supreme Court's decision in Tilton v. Missouri P.R. Co., 376 U.S. 169. In Tilton, the Supreme Court held that veterans who had been in a training program were entitled to seniority rights without regard to the interruption of their military service since it was "reasonably certain" that they would have advanced upon completing the training course. Applying the Tilton test to the instant case, the Court held that it was

"reasonably certain" that the veteran here would have been retained by his company after completion of his probation, and therefore his position was not "temporary". In addition, the Court noted that the veteran was only on probationary status because of the collective bargaining agreement between the company and the union; and, the Court held, that agreement could not be allowed to deprive the veteran of rights which he would otherwise have under the law.

Staff: Robert C. McDiarmid (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURTS OF APPEALS

NARCOTICS AND DANGEROUS DRUGS

NO UNLAWFUL SEARCH WHERE NARCOTICS REMOVED BY AGENT FROM DEFENDANT'S VEHICLE AT LATTER'S DIRECTION.

United States v. Albert Haden (C. A. 7, July 1, 1968)

The defendant was charged with transferring narcotic drugs without the required order form in violation of 26 U. S. C. 4705(a). After conviction, he was sentenced to ten years' imprisonment. In his appeal, the defendant contended there was an unlawful search and seizure in violation of the Fourth Amendment. The Government agent entered the defendant's car and removed narcotics at the defendant's direction, and he contends his consent was vitiated by the trickery and deceit employed by the agent in posing as other than an agent of the Government, citing Gouled v. United States, 255 U.S. 298 (1921).

The Court of Appeals found the decision in Gouled, which held that when a Government agent enters the home or office of a suspect by deception and subsequently makes a search he violates the Fourth Amendment, did not apply in this case. Employing the principle in Lewis v. United States, 384 U.S. 206 (1966); Hoffa v. United States, 385 U.S. 293 (1966) and Lopez v. United States, 373 U.S. 427 (1963), the Court held that when the defendant voluntarily revealed and surrendered the drugs to the agent by instructing him where they were to be found, the agent did not conduct a search of the car and seize the drugs, he only took what the defendant contemplated he would take. The act of the defendant was a waiver of the privacy of his car for the limited purpose of allowing the agent to retrieve the package.

Staff: United States Attorney Thomas A. Foran; Assistant United States Attorneys John P. Lulinski, Gerald M. Werksman and Eugene Robinson (N. D. Ill.)

PHYSICIANS EXEMPT ONLY IF ACTING IN ORDINARY AND AUTHORIZED COURSE OF PROFESSION.

Russell W. White v. United States (C. A. 8, July 9, 1968)

The defendant, a medical doctor, was found guilty of all nine counts in an information charging him with the unlawful sale of depressant or

stimulant drugs in violation of 21 U.S.C. 331(q)(2). Under Section 360a(b), 21 U.S.C., a doctor, acting in the ordinary and authorized course of his profession, is exempt from the provisions of Section 331(q)(2). The defendant contended that, being a doctor, he is entitled to dispense these drugs without restriction.

The Court held that a practitioner is not immune from the Federal Food, Drug, and Cosmetic Act solely because of his status. To be unimpeded in the issuance of prescriptions, a doctor must have established a bona fide physician-patient relationship which was not found in this case.

White also contended in his appeal that it should have been alleged in the information and proven at the trial that the drugs had moved or were transported in interstate commerce. The Court stated there is nothing in the Act or the legislative history that indicates that Section 331(q)(2) applies only to drugs which have moved in interstate commerce. The Court held that the "control of drugs is of such importance to the public health, welfare and safety of the people of the entire nation, that the power of Congress extends even to intrastate activities which would interfere with or obstruct the granted power to regulate interstate commerce in drugs."

The Court in another case under 21 U.S.C. 331(q)(2) entitled Benny Lee Whalen v. United States (July 12, 1968), where the identical question of Congress' power was raised, affirmed the conviction on the basis of White, supra.

Staff: United States Attorney Veryl L. Riddle (E.D. Mo.)

PATENTS

ONLY PERSON RECOGNIZED TO PRACTICE BEFORE PATENT OFFICE MAY REPRESENT HIMSELF AS QUALIFIED TO PREPARE APPLICATIONS FOR PATENTS.

United States v. Harold Lawrence Blasius (C.A. 2, July 8, 1968)

In October, 1963, an information substantially in the form of the statute was filed against Blasius charging him with violations of 35 U.S.C. 33. The charges were based upon advertisements in such magazines as Popular Science, Popular Mechanics and Mechanix Illustrated, and several solicitation letters to individuals. In all of them Blasius held himself out as qualified to prepare applications for patent. The jury returned verdicts of guilty on forty-nine counts and judgments of conviction were entered against Blasius in December, 1967.

Blasius' primary argument on appeal was that as long as he did not hold himself out as being "recognized to practice before the Patent Office",

he could not be violating 35 U.S.C. 33. In support of his position he relied upon the recent case of Hull v. United States, 390 F. 2d 462 (D.C. Cir., 1968), which was remanded for a new trial in light of its interpretation of Section 33, "that there could be no conviction under the section unless the accused had misrepresented his or her status as a registered practitioner and that there could be no finding of guilt for the mere rendering of service by one who does not pretend to that status."

The Court of Appeals in United States v. Blasius, in expressly disagreeing with the interpretation of Section 33 given in Hull v. United States, stated: "the plain sense of the second clause [which reads, 'or as being qualified to prepare or prosecute applications for patent'] is that anyone who is not recognized to practice before the Patent Office is subject to penalty if he holds himself out as professionally competent to prepare or prosecute applications for patent."

Affirmed.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Charles J. Fanning, John R. Wing and Pierre N. Leval (S.D. N.Y.)

* * *

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern, III

APPOINTMENTS

Indiana, Southern - ROBERT L. BAKER; Indiana University Law School, J. D., and formerly in private practice.

Indiana, Southern - GEORGE A. BRATTAIN; Indiana University Law School, J. D., and formerly a law clerk in U. S. District Court.

Indiana, Southern - ROBERT B. KEENE; George Washington University, LL.B., and formerly Judge Advocate, U. S. Navy.

Louisiana, Eastern - JULIAN R. MURRAY, JR.; Tulane Law School, LL.B., and formerly in private practice and Assistant District Attorney, Orleans Parish.

Missouri, Western - FREDERICK O. GRIFFIN; Washington University Law School, J. D.

New York, Southern - ALAN B. MORRISON; Harvard University Law School, LL.B., and formerly in private practice.

New York, Southern - JOHN F. POLLARD; Brooklyn Law School, LL.B., and formerly with New York City Police Department.

New York, Southern - DANIEL J. SULLIVAN; Columbia Law School LL.B., and formerly in private practice.

MORE ASSISTANTS FOR FISCAL YEAR 1969

On Monday, July 29, 1968, the Senate approved a budget which would have enabled us during FY1969 to hire 100 more Assistants and clerks and exempted us from the limitations on hiring imposed by P.L. 90-364. A conference was called on Wednesday, July 31st, to resolve the differences between this bill and the House bill (which had granted us only 50 more Assistants and clerks and not exempted us). The Conference recommended 65 more Assistants and clerks and no exemption. Both Houses adopted the Conference report on Thursday, August 1, 1968.

A bill has been introduced in the House which would create 14,000 positions for the Director of the Bureau of the Budget to allocate to executive departments to ease the impact of the law restricting hiring. The Department has already submitted its request for some of these positions on behalf of the United States Attorneys and some of its legal Divisions. Hopes are high that the bill will pass soon after Congress returns from its recess. Until passage of this bill, and allocation of positions from the Bureau of the Budget, P.L. 90-364 will continue to limit hiring.

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

SUPREME COURT

INDIANS

LIABILITY OF UNITED STATES FOR TREATY VIOLATIONS; MEASURE OF DAMAGES DISTINGUISHED FROM LIABILITY FOR INTEREST.

Peoria Tribe of Indians v. United States (Sup. Ct., 390 U.S. 468 (1968), D.J. 90-2-20-278)

The Indian Claims Commission found that the United States had violated an 1857 treaty with the Peoria Indians by selling some 207,759 acres by public sales instead of by public auction. It was further found that the United States received $172,726 less than would have been realized had the sale been in conformance with the treaty. Article 7 of the treaty placed a burden upon the United States to invest unpaid proceeds in safe and profitable stocks. The question presented the Supreme Court in this case was whether the burden to invest applied to proceeds which the United States never received.

The Government argued that the Indian's recovery was limited to $172,726. It relied upon the general rule that the United States is not liable for interest on claims against it as precluding any greater award. The Court, while recognizing this principle, distinguished this case as one involving the measure of damages for the treaty's violation and not one involving the power to award interest against the United States. It concluded that the United States had a clear duty to invest the proceeds of the sale until they were paid over to the Indians. The Supreme Court, relying upon the case of United States v. Blackfeather, 155 U.S. 180 (1894), held that the Government's obligation applied to proceeds which it would have received had the treaty not been violated, and reversed and remanded the case to the Court of Claims and Indian Claims Commission.

Staff: Robert S. Rifkind (Solicitor General's Office); William M. Cohen (Land and Natural Resources Division)

COURTS OF APPEALS

PUBLIC LANDS

SOVEREIGN IMMUNITY; EFFECT OF JUDGMENT DETERMINES JURISDICTION IN SUIT AFFECTING UNITED STATES.

Simons v. Vinson (C. A. 5, No. 24824, May 3, 1968, D. J. 90-2-18-102)

In 1923, the Supreme Court determined the Oklahoma-Texas boundary along the Red River subject to changes wrought by erosion and accretion. The United States, owner of the south half of the Red River channel, made various oil leases pursuant to congressional authorization. Appellants were adjacent riparian landowners who claimed that the south bank of the river had been subjected to accretion to which they claimed title.

They filed their complaints against the Department of Interior, the Bureau of Land Management and the Bureau of Indian Affairs, the various federal officials in charge, federal oil and gas lessees and a purchaser of oil from the lessees. Relief sought was an injunction against all the defendants from interfering with their alleged title, to acquire a quitclaim to the disputed land from the Government, damages and accounting from the oil purchaser and damages from the lessees as well as termination of their title and possession of oil and gas rights.

The Court, in dismissing the suit, refused to pass upon the merits of the appellants' claim, holding that the suit in essence was against the United States and the United States cannot be sued without its consent. The fact that the United States was not a named defendant was irrelevant, for the Court looks to the effect of the judgment, which in this case would operate against the Government. Because the appellants failed to show that the statute under which the Secretary of the Interior acted was constitutionally void or that he acted outside of his statutory authority, the Court lacked the necessary jurisdiction to consider the appellants' claim.

Staff: William M. Cohen (Land and Natural Resources Division)

CONDEMNATION

APPELLATE COURT WILL NOT REVIEW FINDINGS OF FACT BY COMMISSION.

Rousseaux v. United States (C. A. 5, 1968, 394 F. 2d 123, D. J. 33-25-315-232)

The United States acquired restrictive use easements by condemnation to conform with NASA requirements for a buffer zone around a Mississippi Test Facility. The Court appointed a commission which was charged to determine just compensation by subtracting the fair market value of the land after the taking from the pre-taking market value. There was no dispute over the highest and best use of the land after the easement was imposed, but a

dispute arose over optimum pre-taking use of the land. The landowners' contention was that the highest and best use of the land was for homesite, cultivation and timberland. The commission entered findings and conclusion closely conforming with the Government's contention that the highest and best use was only for growing timber.

The Court held that it could not review the finding of facts by the commission on conflicting facts which had been before the commission. It further stated that the commission's report measured up to the standards of United States v. Merz, 376 U.S. 192 (1964), and affirmed.

Staff: William M. Cohen (Land and Natural Resources Division)

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