United States Attorneys

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UNITED STATES DEPARTMENT OF JUSTICE

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NEWS NOTES

FORMER ALABAMA ATTORNEY GENERAL INDICTED

August 2, 1968: A federal grand jury in Birmingham, Alabama, has returned indictments against former Alabama Attorney General Richmond Flowers and three other men, charging them with conspiracy to commit extortion. The defendants were accused of having conspired to wrongfully exact payments in violation of 18 U. S. C. 1951 from persons, companies and corporations doing business in Alabama during Mr. Flowers' term of office, from 1963 to 1967. Among actions taken in furtherance of the conspiracy were demands to corporations wishing to issue stock in Alabama for payments of up to five percent of the stock issue; extortion of money from small loan companies by threatening investigation of their activities and practices under Alabama's usury laws; the dismissal of an injunction suit against a corporation in return for a payment of almost $60,000. Conviction under Section 1951 of Title 18 carries a maximum penalty of $ 10,000 in fines and 20 years imprisonment per count.

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POINTS TO REMEMBER

MILITARY SELECTIVE SERVICE ACT - VENUE - EXPEDITING PROSECUTIONS

In Johnston v. United States, 351 U.S. 215 (1956), the court cited the general rule that where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime. Pointing out "The possibility that registrants might be ordered to report to points remote from the situs of draft boards neither allows nor requires judicial changes in the law of venue", the court held that the venue of the selective service law violation lies in the judicial district where the duty ordered by the local board was to be performed.

We are directing your attention to Johnston at this time in connection with the procedure whereby the Selective Service System reports delinquent registrants to the United States Attorney for the judicial district in which the registrant's local board is located. This procedure sometimes delays prosecution because venue for trial of the alleged violation often does not lie in that district, and in a few instances prosecution has been initiated in the wrong district.

It is important, therefore, that the proper venue be determined as soon as a delinquent report is received in your office. If it is determined that venue does not lie in your district, the matter should be transferred to the appropriate United States Attorney as soon as possible.

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ANTITRUST DIVISION

Assistant Attorney General Edwin M. Zimmerman

DISTRICT COURT

SHERMAN ACT

ORDER DENYING DEFENDANTS' MOTIONS TO COMPEL ADDITIONAL GOVERNMENT COMPLIANCE OR DISMISS COMPLAINT.

United States v. Venice Work Vessels, et al. (Civ. 67-1623; June 20, 1968; D. J. 60-258-4)

Upon submission of briefs and oral argument Judge James A. Comiskey, by Minute Entry dated June 20, 1968, denied all pending defendant's motions to compel additional Government compliance with a prior Rule 34 discovery order, or in the alternative to dismiss the complaint for the Government's non-compliance with such order.

This case was filed after a grand jury investigation conducted between May 1966 and January 1967 into possible violations of the Sherman and Hobbs Acts affecting the brokerage of work vessels in Plaquemines Parish, Louisiana. The last session of the grand jury was held on January 19, 1967, and the grand jury term expired in August 1967. Subsequent to expiration of the term of the grand jury, Acting Assistant Attorney General Zimmerman made the determination to proceed by civil suit rather than by the criminal prosecution recommended by the staff, and the complaint was filed on November 6, 1967.

In January, 1968, the defendants filed motions to dismiss alleging, on the authority of Proctor & Gamble, that the Government had made improper use of the grand jury to secure evidence solely for the purpose of prosecuting a civil action. Specifically, defendant Leander H. Perez, Sr., former President of the Plaquemines Parish Commission Council, charged that the grand jury investigation and the subsequent civil action were politically motivated and maliciously made in an effort to harass and embarrass Perez "particularly because of his known opposition to the United States Attorney General's employer and mentor . . .", that the Government knew when it initiated the grand jury proceeding that there was no genuine legal basis for any criminal indictment, and that consequently the Government had abused and subverted the grand jury to secure evidence to support a civil action. It was further contended that proof of such wrongful use of the grand jury could only be established by production of records in the possession of the Government, and accordingly the defendants moved under Rule 34 F. R. Civ. Pr. to inspect: (1) the entire grand jury transcript, (2) internal Government

documents relating to the Government's decisions to convene the grand jury, and decisions concerning possible criminal or civil proceedings against the defendants, (3) documents showing names of persons authorized to conduct grand jury proceedings, (4) documents identifying all witnesses before the grand jury, and (5) documents relating to complaints made against any of the defendants.

Following submission of briefs and oral argument, the court by Minute Entry dated February 19, 1968, entered an order which, after expressly assuming "that the plaintiff was properly motivated in commencing the investigation of the defendants for criminal violations of the Sherman Antitrust Act. . . ." narrowly confined discovery to only those documents which would reveal at what point the Government had made its determination not to proceed criminally against the defendants. Accordingly, the court ordered the Government to produce only those documents and records necessary to establish

> (1) the date on which the plaintiff decided not to take any criminal action against the defendants but to instead proceed civilly under the Sherman Antitrust Act, (2) the individual or individuals who made that decision and (3) the reasons underlying this decision by the plaintiff. . . .

In March, the Government produced, together with an explanatory affidavit, certain sections of internal memoranda (including the fact memo) from which everything had been deleted except the few sentences containing relevant dates, personnel identifications, and the ultimate statements of recommended action. This material clearly indicated that the staff recommendations for criminal prosecution, and the executive-level determinations to proceed civilly had all taken place after the last grand jury session, and that the grand jury was not used subsequent to the time these decisions were made.

The Government, however, demurred against documentation of the "reasons" called for by item (3) of the court's order and proffered only those portions of the documents containing the bare concluding statements of heads of the Antitrust and Criminal Divisions against criminal prosecution. The Government argued that the undisclosed bulk of these memoranda setting forth in detail the basis of recommendations both for and against criminal action, had no relevance to the issue of grand jury abuse, was protected by attorney-client privilege, and was also subject to invocation of executive privilege by the Attorney General. (The Government, however, did not formally invoke the executive privilege.) Accordingly, the Government moved that the court amend its order so as to relieve the plaintiff of further obligation to produce any other material relating to reasons underlying the

Government's choice of action. By Minute Entry dated April 1, the court denied the Government's motion to amend. During oral argument the court hinted that the Government had sufficiently complied with the February 19 order, which prompted the Government, after denial of its motion for modification, to inform the court by letter that it considered that it had produced sufficient information to show that grand jury abuse was not present in the case and that it was taking no action to produce additional documentary materials. The defendants thereupon filed Rule 37 motions challenging the adequacy of the Government's prior production, substantially renewing their demands for all documents originally sought, and alternatively demanding that the suit be dismissed upon the Government's failure to comply.

On June 20 the court, again without opinion, entered an order denying all defendants' motions.

Staff: Kenneth C. Anderson and David I. Haberman
(Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

CLAIM FOR DAMAGES BY OWNER OF CRUISE VESSEL ON GROUND THAT COAST GUARD NEGLIGENTLY DELAYED CERTIFICATION OF VESSEL, THEREBY CAUSING OWNER TO LOSE BUSINESS, IS NOT BARRED BY EXCEPTIONS IN TORT CLAIMS ACT FOR MISREPRESENTATION AND INTERFERENCE WITH CONTRACT RIGHTS, BUT IS BARRED BY DISCRETIONARY FUNCTION EXCEPTION.

Coastwise Packet Co. v. United States (C. A. 1, No. 7094; decided July 11, 1968; D. J. 157-36-1131)

Plaintiff, the owner of a sailing vessel designed for the "windjammer" cruise business, claimed that he lost the season's business for the summer of 1964 because the Coast Guard negligently delayed certifying the safety of his vessel. Plaintiff claimed that subordinate officials of the Coast Guard delayed certification because they adopted too stringent a standard for assessing the ability of a vessel to right itself after a knockdown. Certification was eventually granted after plaintiff appealed to the Commandant of the Coast Guard, but this was too late for the 1964 season. Plaintiff also claimed that he had been misled into believing that the vessel would be certified, and had accordingly made contracts for the 1964 season which, when certification was delayed, he could not fulfill.

The district court held that three exceptions to the Tort Claims Act, in 28 U.S.C. 2680, precluded suit: misrepresentation, interference with contract rights, and discretionary function. The Court of Appeals ruled that the first two exceptions did not apply. While parts of the complaint alleged misrepresentation and accordingly would be precluded by the exception, the Court of Appeals did not think that the claim of misrepresentation was essential to the entire cause of action; rather, it concluded that the primary claim asserted was for negligent delay. As to the exception for interference with contract rights, the Court of Appeals concluded that the damage asserted was for loss of use of the vessel: "the only relevance of the fact that plaintiff anticipated profits from already executed passenger contracts is as evidence of the value of that use".

However, the Court of Appeals affirmed on the basis of the discretionary function exception, noting that in the area of certification of this type of sailing vessel, there were no established standards; rather, the Coast Guard's delay in certifying the vessel was caused by its attempt to establish a standard.

Staff: Robert V. Zener (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT--COLLATERAL ESTOPPEL

DETERMINATION ADVERSE TO CLAIMANT IN CIVIL ACTION DOES NOT COLLATERALLY ESTOP HIS CLAIM UNDER LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Young & Co. and Texas Employers Insurance Assn. v. Shea (C. A. 5, No. 24,249; decided July 10, 1968; D.J. 83-74-57)

A longshoreman brought a personal injury action against the shipowner, who in turn impleaded plaintiff's employer. The jury found that plaintiff had not sustained an injury when he fell, and judgment was entered for the shipowner. Thereafter, the longshoreman filed a claim under the Longshoremen's Act, and the employer argued that the prior judgment collaterally estopped the claimant from contending that he had sustained any injury. The Deputy Commissioner refused to apply the doctrine of collateral estoppel, and granted an award to the longshoreman. In the employer's suit to review the Deputy Commissioner's award, the district court upheld the award, and the Fifth Circuit (Thornberry, J.) affirmed.

The Court of Appeals held that since the burden of proof on a claimant under the Longshoremen's Act was less stringent than his burden in a civil action, there was no basis for holding that the adverse decision in the civil action collaterally estopped him under the Longshoremen's Act. The Court of Appeals also noted other differences between the two proceedings which, in its opinion, made the doctrine of collateral estoppel ineffective, including the principle that doubts are to be resolved in favor of a claimant under the Longshoremen's Act.

Staff: United States Attorney Morton L. Susman and Assistant United States Attorney Carl Walker (S.D. Tex.); Alfred H. Myers and Arthur Bolstein (Department of Labor)

MEDICAL CARE RECOVERY ACT

GOVERNMENT'S RIGHT TO SUE IS INDEPENDENT OF RIGHT OF INJURED PARTY, AND IS NOT BARRED BY GOVERNMENT'S FAILURE TO INTERVENE IN LATTER'S SUIT AGAINST TORTFEASOR.

United States v. Tom York, d/b/a York's Mobil Service and John Hare (C.A. 6, No. 18,001; decided July 24, 1968; D.J. 77-72-290)

The United States sued under the Medical Care Recovery Act, 42 U.S.C. 2651-2653, to recover the reasonable value of medical care which it furnished to an individual who was injured by the defendant's employee on March 15, 1964. The injured party had sued the defendant on July 22, 1964 in a state court action of which no notice was given the United States. The Medical Care Recovery Act provides, inter alia, that the Government may (1) intervene or join in an action brought by the injured party against the tortfeasor, or (2) if such suit is not commenced within 6 months after the medical treatment is founded, the Government may bring its own action to recover for the value of the medical care. 42 U.S.C. 2651(b). The defendant contended that since the injured party's suit had been commenced within 6 months of the Government's furnishing of medical care, and the Government had failed to intervene in that suit, the Government's right to bring the independent suit was barred. The district court accepted this argument, but the Sixth Circuit reversed.

The Court of Appeals held that the Government's right to sue under the Act was an independent right, and did not exist merely by way of subrogation to the rights of the injured party. Moreover, the Court of Appeals held that the only discernable purpose of the statutory provision relied upon by defendant was to protect the injured party's right to bring his action by delaying for 6 months the time within which the Government might independently sue. Absent express language showing that Congress intended to enact a partial statute of limitations on the Government's right to sue, the court held no such limitations would be implied. The Court of Appeals then rejected the contrary view expressed by several district court decisions.

Staff: William G. Kanter (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURTS OF APPEALS

MILITARY SELECTIVE SERVICE ACT

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

United States v. Jack Frederick McKart (C. A. 6, No. 18, 194; June 14, 1968)

The defendant's father was killed in action in World War II and as he had no brothers he was placed in Class IV-A in July 1964 as the sole surviving son of a family of which one or more members were killed in action or died in the line of duty. In 1966 the local board learned of the death of the defendant's mother and reclassified him I-A on the ground that there was no "family" left. He made no effort to appeal the classification. At his trial for failure to report for induction, McKart attempted to defend his refusal to report on the ground that he was still entitled to a IV-A classification as a sole surviving son under 50 U. S. C. App. 456(o). The district court ruled that his failure to exhaust his administrative remedies barred him from raising the validity of his classification as a defense in a criminal proceeding.

On appeal McKart contended that a registrant is not required to exhaust his administrative remedies when the issue of classification is purely one of law and the position of the Selective Service System is so well established that an appeal would be futile. The Court of Appeals framed the question before it as:

When a Selective Service registrant who has not appealed his classification through the Selective Service procedures is tried for failure to submit to induction into the Armed Forces, may the registrant raise the defense, upon wholly undisputed facts, that he was wrongfully classified in violation of statute?

Answering the question in the negative the Court pointed out that "The requirement that judicial review of a registrant's classification must await both the full exhaustion of administrative remedies and acceptance for induction is founded on the policy of mobilizing national manpower in the shortest practicable period."

Since the registrant did not utilize the procedures available to test his classification, the Court did not pass upon the question as to whether he would have been entitled to a IV-A classification under the statute if he had

exhausted his administrative remedies.

This decision is brought to your attention to point up the fact that whether there was a "basis in fact" or not for a registrant's classification, he cannot attack the classification in a criminal proceeding unless he has exhausted his administrative remedies.

Staff: United States Attorney Robert M. Draper
(S. D. Ohio)

THEFT FROM INTERSTATE SHIPMENT

PHYSICAL REMOVAL OF GOODS FROM VEHICLE NOT REQUIRED UNDER 18 U. S. C. 659 TO CONSTITUTE THEFT.

United States v. Jerome Fusco (C. A. 7, No. 16633, decided July 2, 1968)

Fusco was convicted by a jury under a single count indictment charging theft of gasoline from an interstate shipment in violation of 18 U. S. C. 659. The evidence showed that Malone, a gasoline supply truck driver for Mobil Oil, was directed to transfer his entire load of gasoline from Hammond, Indiana, to Hyde Park station in Illinois. Malone delivered a portion of the load as directed; the remainder he delivered to the defendant's station where defendant paid Malone for the gasoline but never paid Mobil Oil.

The Court rejected the Government's argument that Fusco participated in the actual theft of the gasoline. The Court adopted the defendant's position that Malone had, in fact, completed the theft when he left Hyde Park station with the gasoline in his possession and under his control with the intent to convert it to his own use. Since Malone was guilty of stealing or unlawfully taking, as contemplated by the statute, he rendered impossible the participation by Fusco in the crime in any capacity other than that of aider and abettor, i. e., a receiver of stolen goods.

The Seventh Circuit cited in support of its conclusion United States v. Padilla, 374 F. 2d 782 (2nd Cir., 1967), where the Court construed United States v. DeNormand, 149 F. 2d 622, 624 (2nd Cir., 1945), as holding that the crime prescribed by Section 659 was committed without the physical removal of the goods from the vehicle.

Staff: United States Attorney Thomas A. Foran (N. D. Ill.)

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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

APPOINTMENTS

Arkansas, Western - SAM HUGH PARK; University of Arkansas, LL. B., and formerly with the Maritime Administration.

California, Central - DAVID H. ANDERSON; University of Southern California Law School, J. D., and formerly in private practice.

California, Central - LARRY S. FLAX; University of Southern California Law School, J. D.

Tennessee, Western - KEMPER B. DURAND; University of Tennessee College of Law, J. D., and formerly in private practice and law clerk to chief judge of U. S. District Court.

Virginia, Eastern - DAVID G. LOWE; University of Virginia Law School, LL. B., and formerly Assistant Legal Officer, U. S. Army and in private practice.

RESIGNATIONS

Michigan, Eastern - PATRICIA J. PERNICK; to join the County Prosecutor's Office.

Illinois, Eastern - RAYMOND F. ROSE; to run for State Attorney.

California, Central - LOYAL E. KEIR; to become Assistant Regional Solicitor for Department of Interior.

FORM 52 -- RESIGNATION OF ASSISTANTS

In the future when filling out Form 52's for resignations, the Assistant United States Attorneys are requested to give their specific reason for leaving, i. e., the name of the agency or firm to which the Assistant will be going. Since we will be publishing in the Bulletin the resignations occurring in the United States Attorneys' offices, as well as the new appointments, this added information on the new position of the Assistant could also be included in our write-up.

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

COURTS OF APPEALS

INDIANS

MANDAMUS: SECRETARY OF INTERIOR HAS DISCRETION TO APPROVE CONTRACTS INVOLVING RESTRICTED INDIAN PROPERTY; STAY ON REMAND TO ALLOW ADMINISTRATIVE CLARIFICATION AND DECISION ON MERITS.

Udall v. Taunah, and Red Elk v. Taunah (C.A. 10, Nos. 9679 and 9680, July 18, 1968; D.J. 90-2-12-377)

This action sought to reverse the Secretary's refusal to approve a family settlement contract involving restricted Indian property, which had been presented in an Indian probate proceeding. The Secretary agreed that the Examiner of Inheritance lacked authority to approve such contracts. Ruling that the Secretary had not approved the contract because he mistakenly believed he lacked such authority, the district court directed Secretarial approval.

On the Government's appeal, the Court of Appeals reversed. While it held that the Secretary has discretionary authority to approve contracts involving restricted Indian property, the Court found that the discretion had not been exercised in this case, i.e., the record did not show that the contract had been considered on its merits in administrative proceedings. The Court carefully noted that mandamus permits judicial direction of the Secretary to exercise his discretion but not how that discretion should be exercised. It therefore stayed further proceedings on remand to the district court and permitted the parties to seek Interior's consideration of the contract on the merits.

Staff: Raymond N. Zagone (Land and Natural Resources Division)

PUBLIC LANDS

AGREEMENT TO LEASE UNSPECIFIED NUMBER OF ACRES WITHIN LARGER AREA BECAME VOID WHEN DEMISED AREA WAS NOT DESIGNATED WITHIN REASONABLE TIME.

Shriber v. United States (C.A. 10, No. 9868, July 12, 1968; D.J. 90-3-10-144)

The Government brought an action for a declaratory judgment to resolve a controversy relating to the validity of a purported lease of 100 acres within an area of 2,160 acres formerly owned by the Government's grantor. The Government sought to quiet title to this area it had acquired when it had enlarged its adjoining wildlife refuge. Appellants claimed an interest in the land by virtue of an agreement to lease, for 99 years, 100 acres "within _____section," to be designated later.

The section was never specified; neither was a more particular description of the land leased, nor any survey ever made. Half of appellants' improvements, made in connection with an unsuccessful frog farm operation, were actually made upon adjacent public domain.

The Government brought the action 13 years after the agreement was made and after appellants had failed to designate the leased area and had rejected an offer of compromise. The Court held that the lease's description was uncertain and indefinite, hence invalid, because the agreement contemplated the designation of the leased area within a reasonable time. It affirmed the district court's judgment (1) declaring that the appellants had no right, title or interest in the land, and (2) ordering appellants to remove their property and improvements from the land.

Staff: Jacques B. Gelin (Land and Natural Resources Division)

DISTRICT COURT

AIR POLLUTION

REGULATION WITHIN COMMERCE POWER OF CONGRESS; FEDERAL CLEAN AIR ACT ENFORCEMENT PROCEDURES ACCORD ALLEGED POLLUTER PROCEDURAL DUE PROCESS.

United States v. Bishop Processing Co. (D. Md., July 16, 1968; D.J. 90-1-2-804)

On July 16, 1968, Chief Judge Thomsen of the United States District Court for the District of Maryland denied defendant's motion to dismiss and rendered an extensive opinion upholding the constitutionality and procedural adequacy of the Federal Clean Air Act, 42 U.S.C. 1857.

This suit was preceded by an action initiated by Bishop Processing Company against the Secretary of Health, Education, and Welfare. The Company there sought a review by the Court of the findings and conclusions of the Hearing Board appointed by the Secretary; the Company also sought resolution of the question as to whether it was permitted a trial de novo in an

enforcement action under the Clean Air Act provision that the federal district "court shall receive in evidence * * * a transcript of the proceedings before the board and a copy of the board's recommendations and shall receive such further evidence as the court in its discretion deems proper". Chief Judge Thomsen granted our motion to dismiss that case, holding it premature and that the question tendered would be appropriately resolved in an enforcement suit. Bishop Processing Co. v. Gardner, 275 F. Supp. 780 (D. Md. 1967).

In denying defendant's motion to dismiss the instant enforcement suit, Chief Judge Thomsen finds that the movement of air pollutants across state lines constitutes interstate commerce subject to the power granted to Congress by the Constitution. In response to the arguments of lack of procedural due process in the administrative proceedings held pursuant to the Act, the Court concluded that the above-quoted provision should be so construed that at the trial of the case the findings and recommendations of the Hearing Board should be received as recommendations but not as evidence to prove disputed facts; the testimony and other evidence presented to the Hearing Board and appearing in the transcript should be considered by the Court in making its findings of fact; and that both the Government and the defendant should be given an opportunity to produce additional evidence. The Court observed that this procedure will avoid duplication of effort and conserve the time of the Court, and will preserve defendant's due process rights.

Staff: Assistant United States Attorney Theodore R. McKeldin, Jr. (D. Md.); Walter Kiechel, Jr. and Leonard L. Riskin (Land and Natural Resources Division)

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