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UNITED STATES DEPARTMENT OF JUSTICE

EDITOR'S NOTES

The editor solicits your assistance in bringing recent and significant decisions to the attention of the Bulletin readers. You may help by sending copies of slip sheet opinions which fall into the above category, to the attention of Bruce Shreves of the Executive Office for U.S. Attorneys and by noting those sections of the opinions which you believe to be of general interest to the Bulletin readers.

The following editorial was published in the Washington Post on August 16, 1968:

ORDER UNDER LAW

Richard Nixon went out of his way -- indeed, he went out of everbody's way -- to speak very harshly about the Attorney General of the United States in the course of his acceptance speech at the GOP Convention. He charged Mr. Clark with various forms of felonious softness on crime and solemnly promised that, in the event of a Republican victory at the polls, the country would have a new Attorney General next year -- more or less as though he intended to keep in office all the other Cabinet incumbents. It is not altogether suprising, therefore, that Mr. Clark should have had something to say in reply.

Mr. Clark's reply, delivered with that imperturbable calm and casualness which usually characterize his public utterances, contained no threats regarding Mr. Nixon's future but suggested that the GOP nominee get down to cases. Just to repeat the phrase "law and order", he said, may be no more than a way of avoiding any commitment to the hard tasks of bringing about order under the rule of law.

The Attorney General reiterated his own longstanding advocacy of gun control, the strengthening of local law enforcement agencies and courts of justice and a concerted attack on the social conditions that cause crime. And he remarked rather tellingly that "it is more important for the public to know what Mr. Nixon is for than who he is against." Mr. Clark has demonstrated that an Attorney General can work very vigorously for law enforcement without relaxing that scrupulous concern for the procedural protections and the constitutional rights of accused persons which constitutes the essence of a government of laws.

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NEWS NOTES

Civil Rights Activity in Fiscal Year 1968

August 12, 1968: The Department of Justice, making employment discrimination a chief target, expanded its civil rights litigation to cover the nation in fiscal 1968. Attorney General Ramsey Clark said the Civil Rights Division brought 23 suits under the equal employment section of the 1964 Civil Rights Act during the year ending July 1, fifteen of the cases being filed in the north and west. Also during fiscal 1968 the Department filed its first northern school cases and its first northern voting rights case, as well as bringing the first federal fair housing suit in the nation's history. Mr. Clark said that housing, education and employment would be given highest priorities in nationwide civil rights enforcement during the coming months.

Record Number of Merger Suits Filed

August 14, 1968: The Department of Justice in fiscal 1968 filed a record number of suits challenging business mergers. The Department filed 20 anti-merger suits during the fiscal year, compared with the previous high of 17 in fiscal 1965, and in addition a number of major companies called off merger plans in the face of threatened court action by the Department. Fiscal 1968 also was marked by an unusually high number of Government victories in civil antitrust cases, the elimination of interlocking directorates by major corporations, and a set of guidelines setting forth merger enforcement standards.

First Arrest Under New Wiretapping Law

August 11, 1968: The Government has made its first arrest under the wiretapping and eavesdropping prohibitions of the Omnibus Crime Control and Safe Streets Act of 1968, which the President signed into law June 19. The FBI arrested David Leguado of Hewlett, N. Y. at the Minneapolis airport for violation of Section 2512 of Title 18 of the U.S. Code, which prohibits a private individual from interstate transportation of devices designed for wiretapping or eavesdropping.

ANTITRUST DIVISION

Assistant Attorney General Edwin M. Zimmerman

DISTRICT COURT

CLAYTON ACT

PAPER MANUFACTURERS CHARGED WITH VIOLATING SECTION 7 OF ACT.

United States v. The Mead Corp. (S. D. Ohio, Civ. 3576; July 8, 1968; D. J. 60-0-37-811)

United States v. Hammermill Paper Co. (D. Mass., Civ. 68-597-C; July 8, 1968; D. J. 60-0-37-924)

On July 8, 1968, civil actions were filed against The Mead Corporation in the Southern District of Ohio at Dayton and against Hammermill Paper Company in the District of Massachusetts at Boston. The complaint against Mead charged that Mead, one of the largest domestic companies engaged primarily in the production and sale of paper and paper products, had violated Section 7 of the Clayton Act by acquiring outright six paper wholesaler chains and a substantial interest (in two cases approximately 50 per cent) in six other such wholesalers in the past 10 years. Hammermill, the fifth largest manufacturer of printing and fine papers in the United States was charged with violating Section 7 by its acquisition of two paper wholesaler chains. Both complaints alleged that in recent years there has been a trend of acquisition of paper wholesale distributors by major paper manufacturers, and cited acquisitions by Mead and Hammermill as significant parts of that trend.

The complaints charged that the acquisitions may result in foreclosure of other paper manufacturers from the substantial market represented by these acquired wholesalers. Also alleged was the tendency of such acquisitions to trigger similar acquisitions by other manufacturers, causing increased industry concentration, and the competitive advantage accruing to these companies over manufacturers which do not own wholesalers with no manufacturing facilities.

Similar suits were filed against Kimberly-Clark in 1964, which resulted in that company being required to divest West Coast merchant houses acquired from Blake, Moffitt & Towne, and against Champion Papers Incorporated, attacking Champion's acquisitions of the Carpenter and Whitaker paper

merchant chains. The latter action is pending in the Federal District Court in Omaha.

Staff: Raymond M. Carlson, Jon D. Hartman and Julius Tolton (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

RECENT DEVELOPMENTS IN CIVIL SELECTIVE SERVICE CASES

In cases brought for injunction or declaratory judgment by Selective Service registrants seeking to challenge I-A classifications or orders to report for induction, the Department's position is that, except where a mandatory exemption has been established (see discussion of Oestereich below), 50 U.S.C. App. §460(b)(3) bars judicial review except as a defense to a criminal prosecution. See Moskowitz v. Kindt, 273 F. Supp. 646 (E.D. Pa 1967), aff'd 394 F. 2d 648 (C.A. 3, 1968); Carpenter v. Hendrix, 277 F. Supp. 660 (N. D. Ga. 1968); Johnson v. Clark, 281 F. Supp. 112 (D. Ariz. 1968); Breen v. Selective Service Board No. 16, 36 U.S.L.W. 2597 (D. Conn. 1968). Should the registrant submit to induction, the registrant may obtain judicial review of his classification through a petition for habeas corpus. In the above-cited cases and the great majority of unreported actions, courts have denied injunctions and dismissed actions to review draft classifications prior to the time set for induction.

A few judges, however, have found Section 460(b)(3) not to be a bar to review, and the status of these cases may be of interest to those of you responsible for this type of litigation. In Petersen v. Clark (N.D. Calif., Civil No. 47888), Judge Zirpoli held §460(b)(3) unconstitutional as a violation of due process of law. However, the court did not issue an injunction restraining induction since plaintiff had already refused to submit to induction. The court also did not issue an injunction restraining the pending criminal prosecution against the plaintiff, which is scheduled to begin on August 26. Neither 28 U.S.C. § 1291 nor § 1292 authorizes an appeal to the Court of Appeals since the district court did not issue a final decision or an interlocutory order granting or refusing an injunction. The Solicitor General declined to appeal directly to the Supreme Court pursuant to 28 U.S.C. § 1252 because in the absence of any injunction restraining induction or criminal prosecution there was no restraint against any official of the United States.

In another case in the same district, Gabriel v. Clark (N.D. Calif., Civil No. 49419), Judge Harris held Section 460(b)(3) unconstitutional and issued an injunction enjoining the registrant's induction. Here the Solicitor General has authorized a direct appeal to the Supreme Court pursuant to 28 U.S.C. §1252. In dismissing two similar cases, Judge Burke of the same district has declined to follow Petersen and Gabriel and has held Section 460(b)(3) constitutional. Paulekas v. Clark (N.D. Calif., Civil No. 49617); Cavagnero v. Clark (N.D. Calif., Civil No. 49623).

In Oestereich v. Local Board No. 11, 280 F. Supp. 78 (D. Wyo. 1967), aff'd 390 F. 2d 100 (10th Cir. 1968), cert. granted, 36 U.S.L.W. 3443 (May 20, 1968), the Local Board declared the registrant, a divinity student who would ordinarily be exempt from service or training by 50 U.S.C. App. § 456(g), deliquent for failure to carry his draft card and to report his current status, reclassified him I-A, and ordered him to report for induction. The two lower courts denied the registrant injunctive relief pursuant to Section 460(b)(3). The registrant petitioned for certiorari, and the Solicitor General, in a memorandum filed with the Supreme Court, stated that Section 460(b)(3) does not apply in the instant case wherein the Local Board acted contrary to an express statutory exemption. The Supreme Court, however, granted certiorari. In his petition for certiorari (see 37 U.S.L.W. 3005), Oestereich challenged the constitutionality of Section 460(b)(3), the deliquency regulations (32 CFR § 1642), and the regulation requiring each registrant to have his draft card in his personal possession at all times (32 CFR §§ 1617.1 and 1623.5).

In Kimball v. Selective Service Board No. 15, 283 F. Supp. 606 (S.D.N.Y. 1968), the registrant, who had been granted a 2-A occupational deferment prior to his reclassification as I-A, requested an injunction restraining his induction. Judge Tenney granted the injunction on the ground that the Solicitor General's reasoning in Oestereich applies to Kimball. We have filed a notice of appeal. Judge Tenney refused to accept the distinction that a deferment, unlike an exemption, is specially subject to Selective Service rules and regulations. (See 50 U.S.C. App. § 456(h)). There is support for our position in Shiffman v. Selective Service Local Bd. No. 5, and Zigmond v. Selective Service Local Bd. No. 16, 36 U.S.L.W. 3451 (May 27, 1968), wherein the Supreme Court denied applications for stays of induction to registrants with occupational and student deferments.

In order to maintain a uniform position by the Department, we request that the following procedure be followed:

1. The concession made by the Solicitor General in the Oestereich case applies only to exemptions granted by statute. Accordingly, in all other cases, you should continue to urge lack of jurisdiction based on 50 U.S.C. App. 460(b)(3).

2. In cases where a statutory exemption is claimed, an inquiry should be made to Selective Service to determine whether or not it agrees that the plaintiff would be entitled to the exemption but for his delinquency. In the event the exemption status is disputed, you should continue to urge lack of jurisdiction under 50 U.S.C. App. § 460(b)(3). For cases in which selective service boards have questioned the claimed exemption, see Eagles v. Samuels, 329 U.S. 304 (1946); as to the scope of review of the board's decision, see Witmer v. U.S., 348 U.S. 375 (1955); Cox v. U.S., 332 U.S. 442 (1947).

3. In those cases in which Selective Service agrees that plaintiff is qualified for an exemption except for his delinquency and the plaintiff applies for an injunction restraining his induction, you should not object to the entry of a stay of induction so long as the injunction has a definite termination date (for example, until 10 days after the Supreme Court renders its decision in Oestereich).

CONTRACTS

CLAUSE IN SMALL PRINT IN GOVERNMENT CROP AND CHATTEL MORTGAGE HELD BINDING.

United States v. Kenyon Farms, Inc. (C.A. 9, No. 21832; July 17, 1968; D. J. 136-22-301)

This action was brought by the United States against an Idaho corporate farm (Kenyon Farms) for conversion of potatoes and other crops on which the Farmers Home Administration held a crop and chattel mortgage to secure an FHA loan. When the mortgage was executed, the borrower was a tenant on a farm owned by one Whiteley in Idaho; the property was specifically described in the mortgage. In small print the mortgage also covered the borrower's interest in "all crops that may be * * * grown within two (2) years * * * on any other lands owned, leased or controlled by the Borrower in the county(ies) identified hereinafter or in any other county(ies) in the State of Idaho." The borrower subsequently became a tenant on a farm owned by Kenyon Farms in the same Idaho County. When Kenyon Farms sold the borrower's interest in crops grown on their property and applied the proceeds to various unsecured debts of the borrower, the Government sued Kenyon Farms for conversion.

The district court ruled that the omnibus clause in the mortgage, quoted above, did not constitute notice to Kenyon Farms of the Government's claim because it was in "very small print". The Court of Appeals reversed, holding that the clause gave adequate notice to Kenyon Farms and was fully sanctioned by Idaho law.

Staff: Walter H. Fleischer (Civil Division)

EMPLOYEE DISCHARGES -- UNIVERSAL MILITARY TRAINING AND SERVICE ACT

FBI EMPLOYEE ENTITLED TO TRIAL IN ORDER TO DETERMINE WHETHER SPENDING NIGHT IN SAME BED WITH GIRLFRIEND CONSTITUTED "CAUSE" FOR DISCHARGE UNDER THE ACT.

Thomas Henry Carter v. United States (C.A.D.C., No. 20,694; July 26, 1968; D. J. 145-12-1039)

Appellant was an FBI clerk who was discharged for "conduct unbecoming an employee of this Bureau" after he admitted that a girlfriend had spent several nights in his bed. When the FBI refused to allow him to resign instead of being dismissed, he brought this action for reinstatement and back pay; appellant conceded during the court proceedings, however, that he did not actually wish to be reinstated. The district court granted the Government's motion for summary judgment, and the employee appealed.

The Court of Appeals, while noting that appellant had no rights under the Civil Service laws or the Veterans Preference Act, held that he was entitled to a trial in the district court to determine whether his firing was for "cause" under Section 9(c) of the Universal Military Training and Service Act, 50 U.S.C. App. 459(c). That Act applied since he had been discharged from the service less than one year before the dismissal; the district court was held to have jurisdiction under 28 U.S.C. 1346(a)(2).

The Court of Appeals stated the general test for "cause" as "whether the employer acted reasonably". This question must be determined in light of (1) the reasonableness of discharging an employee for conduct of this type, and (2) whether fair notice was given that such conduct would be grounds for discharge. Stated another way, the court said that the FBI had the "burden of showing objective conduct on the part of the employee that satisfies some objective standard of cause." It held that these questions were for the trier of fact, and remanded the case for trial.

Staff: United States Attorney David G. Bress and Assistant United States Attorney Thomas Lumbard (D.D.C.)

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

SECTION 401 OF ACT INVALIDATES CERTAIN UNION ELECTION PRACTICES; NEW ELECTION MUST BE HELD UNDER SECTION 402; UNION HAS NO RIGHT TO JURY TRIAL.

Wirtz v. National Maritime Union of America (C.A. 2, No. 32,376; July 29, 1968; D.J. 156-51-784)

The Court of Appeals for the Second Circuit, affirming the district court decision, has (at the instance of the Secretary of Labor) invalidated certain union practices as being in conflict with the various requirements of Section 401 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481. Since these practices also "may have affected the outcome of an election" under Section 402(c)(2) of the Act, a new election was ordered by the Court.

Preliminarily, the Court dismissed the union's contention that it was entitled to a jury trial under the Seventh Amendment. The union argued that

the Secretary's action was in the nature of a common law quo warranto proceeding. The Court held that the action was entirely equitable, "an integral part of the remedy provided by Congress that the court 'direct the conduct of a new election under supervision of the Secretary'," and therefore not analogous to an action challenging the right to hold public or corporate office.

The Court then held that the union rule requiring candidates for office personally to obtain nominating forms and the necessary endorsements violated the statutory requirement of Section 401(e) that "a reasonable opportunity shall be given for the nomination of candidates". Its reasons were: (1) that the requirement was unreasonable in light of the fact that many members served on ships and thus had little chance to obtain the necessary forms and endorsements; (2) that the provision was enforced in a manner which discriminated against non-administration members; and (3) that it violated the union's own constitution.

The union also had a prior office requirement which in effect barred a member of less than ten years standing from running for national office. Less than one percent of the members were eligible to run under this rule. The Court held the rule unreasonable (see Section 401(e) of the Act) under Wirtz v. Hotel, Motel and Club Employees Union, Local 6, 36 U.S.L.W. 4519 (June 3, 1968), where the Supreme Court had invalidated an eligibility rule having a similar effect.

Finally, the Court of Appeals held that Section 401(a), requiring the election of "officers" every five years in the case of a national union, undercut the union's attempt to bypass the election of various officials who it claimed were not covered by this provision in the Act. In so holding, the Court adopted a broad reading of the statute in order to prevent some two-thirds of the positions in the union from being filled by appointment rather than by election. The union's practice was held not to be in keeping with "the public interest in free and democratic union elections".

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Michael D. Hess and Patricia M. Hynes (S.D.N.Y.)

SELECTIVE SERVICE ACT

EXCLUSION OF NEGROES FROM LOCAL DRAFT BOARDS DOES NOT DEPRIVE BOARDS OF POWER TO ACT IN CASES INVOLVING NEGRO REGISTRANTS.

Cleveland Sellers v. McNamara (C.A. 5, No. 24,654; July 23, 1968; D.J. 145-15-114)

In this case, Cleveland Sellers, a Negro, sought to restrain his induction into the Armed Forces on the ground that Negroes had been systematically excluded from the local draft boards in South Carolina, where his local board was located, and Georgia, where he had been ordered to report for induction. He argued that draft boards should be analogized to juries, which cannot convict if Negroes are systematically excluded. The district court denied a preliminary injunction, and this appeal followed. Sellers was denied a stay pending the outcome of the appeal, and the induction order thus went into effect. Sellers refused to submit to induction, and while the appeal was under submission he was tried and convicted for violation of the Selective Service Act.

The Court of Appeals affirmed the denial of a preliminary injunction, in reliance on its decision in Cassius M. Clay, Jr., a/k/a/ Muhammad Ali v. United States, C. A. 5, No. 24,991 (May 6, 1968), where it was held that exclusion of Negroes from draft boards was not a defense to a criminal prosecution for failure to submit to induction. Judge Tuttle filed a separate opinion stating that, were he not bound by the decision in the Clay case (in which a petition for rehearing en banc was denied), he would hold that the Selective Service Act and the Constitution prohibit the exclusion of Negroes from draft boards in areas where a substantial portion of the draft-age population is Negro, and that this question may be raised in a civil injunctive suit.

Staff: Robert V. Zener (Civil Division)

SUBPOENAS

COURT ORDERS RETURN OF DOCUMENTS IN CUSTODIA LEGIS TO OWNERS, DESPITE OUTSTANDING CONGRESSIONAL SUBPOENA.

McSurely v. Ratliff (C. A. 6, No. 18,638; July 29, 1968; D. J. 233279-154)

Alan and Margaret McSurely were prosecuted in the state courts of Kentucky for violation of the State Anti-Sedition Law. In connection with this prosecution, state and local authorities searched their home and seized a large number of books, papers and personal possessions. The search and seizure were in all likelihood in violation of the Fourth Amendment. The McSurelys immediately commenced a federal court action to enjoin the prosecution. A three-judge federal court held that the Kentucky statute violated the First Amendment and had been pre-empted by federal statutes. Accordingly, it enjoined the prosecution, directing the Commonwealth Attorney to hold the material that had been seized from the McSurelys pending the sixty-day appeal period. During that period, an investigator from the Permanent Sub-committee on Investigations of the Senate Committee on Government Operations inspected some of the seized documents and received copies of them.

The Chairman of the Subcommittee, Senator McClellan, then issued a subpoena duces tecum to the Commonwealth Attorney, requesting the production of all documents in his possession relating to the McSurelys' membership in various civil rights organizations. Identical subpoenas were served upon Mr. and Mrs. McSurely and the United States Marshal. The subpoenas were issued in the course of the Subcommittee's investigation into riots and civil disturbances. After issuance of the subpoenas, the appeal period expired without an appeal by the state from the order enjoining prosecution of the McSurelys.

The McSurelys then filed a motion for return of the documents; the district court denied this motion and ordered the Commonwealth Attorney to cooperate with the Subcommittee staff in obtaining copies of the documents. The McSurelys' direct appeal to the Supreme Court was dismissed for lack of jurisdiction. They then appealed to the Court of Appeals for the Sixth Circuit, arguing that the subpoenas were invalid under the First and Fourth Amendments.

The Court of Appeals, in a brief opinion, ruled:

> The single issue now before this Court is whether the District Court erred in refusing to return to their owners documents which were seized in aid of a prosecution under an unconstitutional statute, now that the time for appeal has expired. We conclude that this question must be answered in the affirmative. The business of the District Court in this case has been completed. The right of the Court to retain possession of the seized documents, which include no contraband, has expired.

The Court refused to pass on the questions raised concerning the validity of the subpoenas served upon the McSurelys, and stated that its decision was without prejudice to the right of the Senate Committee to enforce the subpoenas against the McSurelys.

Staff: Robert V. Zener (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

DISTRICT COURT

FEDERAL FOOD, DRUG, AND COSMETIC ACT

GENUINE DIFFERENCE OF OPINION AMONG EXPERTS ON QUESTION OF GENERAL RECOGNITION OF SAFETY AND EFFECTIVENESS OF DRUG ESTABLISHES THAT DRUG IS NOT GENERALLY RECOGNIZED AS SAFE AND EFFECTIVE.

United States v. "Furestrol" (N. D. Ga. July 21, 1968; D. J. 22A-19-20)

The United States proceeded under the Federal Food, Drug, and Cosmetic Act (21 U. S. C. 334) to seize and condemn a shipment of "Furestrol Vaginal Suppositories", alleging that "Furestrol" was a "new drug" illegally shipped in interstate commerce since there was no approved new drug application effective for "Furestrol" (21 U. S. C. 321(p), 355). The claimant, Norwich Pharmacal Company, admitted the interstate shipment and lack of an approved new drug application.

The contested issue was whether "Furestrol", a combination of an estrogen and an antibacterial agent, was a new drug within the meaning of 21 U. S. C. 321(p). Government expert witnesses testified that, in their opinion, Furestrol was not generally recognized among qualified experts as effective for its intended uses. Witnesses for the claimant testified that in their opinion, based on the nature of the disease to be treated and the ingredients used, the drug is generally recognized as safe and effective for use as labeled.

The court (Morgan, D. J.) found Furestrol to be not generally recognized among qualified experts as safe and effective for its intended use and, therefore, to be a "new drug" within 21 U. S. C. 321(p)(1). The court followed the precedents of Merritt Corporation v. Folsom, 165 F. Supp. 418 (D. C. 1958); and United States v. Trim Cigarettes, 178 F. Supp. 847 (N. J 1959), that a disagreement among the experts on the question of general recognition establishes that a drug is not generally recognized as safe and effective for its intended use. The court considered the only factual issue to be whether there was a genuine difference of expert opinion.

Staff: United States Attorney Charles L. Goodson; Assistant United States Attorney Beverley B. Bates (N. D. Ga.)

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