United States Attorneys

Bulletin

Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.

VOL. 17 AUGUST 22, 1969 NO. 24

UNITED STATES DEPARTMENT OF JUSTICE

We want to make the United States Attorneys Bulletin as meaningful a vehicle of communication among the 93 offices as possible. In order to improve the Bulletin, we need your help. Your suggestions are welcome, particularly any specific ideas you may have about ways in which the Bulletin could be helpful to you or your brother United States Attorney.

Please submit your suggestions to James C. Borra, Executive Office for United States Attorneys.

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NEWS NOTES

ADDRESS BY A.G. TO THE AMERICAN BAR ASSOCIATION

August 13, 1969: Dallas - Attorney General John N. Mitchell said that the "over-all policy approach" of the Department of Justice has been to balance "the rights of the individual" with the "rights of society".

Speaking before the American Bar Association's annual convention, the Attorney General said that "some of our new concepts" in the law "have areas of error which ought to be corrected". But he said that "minor adjustments do not imply abandonment of a principle but rather dedication to making that principle work".

Warning against the "dangers of extremism and over-reaction", the Attorney General said that the nation "may be headed for even more tragic times, if reasonable men do not come together now in a sincere attempt to heal our differences and improve our institutions".

Explaining that his philosophy "is a question of balance and moderation in order to solve problems and . . . to ward off more extreme solutions which may be demanded", Mr. Mitchell cited three examples.

WIRETAPPING. He said:

"The basic constitutional and moral controversy stems from the conflict between the individual citizen's right to privacy . . . versus the individual citizen's right to demand that his government properly investigate those persons whose criminal activities pose a substantial danger to the general welfare . . ."

"It is undeniable that organized crime presents a substantial threat to our general welfare." . . .

"Most recognized law enforcement experts have repeatedly stated that wiretapping is our most useful tool (against organized crime) . . ."

"We decided to use Title III (of the Omnibus Crime bill) . . . because we believe that the statutory requirement of probable cause by warrant provides substantial assurance that the privacy of innocent persons will not be unreasonably invaded."

"Furthermore, I also insisted that each application and full supporting papers be personally presented to me for my evaluation."

Mr. Mitchell said that this solution to the wiretap controversy is a "middle-of-the-road position . . . not compatible with either extreme . . ."

PRETRIAL DETENTION. He said:

". . . the nation is well on its way - and rightfully so - to eliminating money bail . . . ."

"After four years of bail experiments . . . we have concluded that a prior criminal record, and the type of crime charged, are very relevant as to whether an accused will be law-abiding when released . . ."

"We have proposed to Congress . . . an amendment to the Federal Bail Act which would establish selected pretrial detention . . . only for those persons who appear to be so 'dangerous' that their release pending trial would probably result in a crime."

"We believe that in the limited number of cases where pretrial detention will be used, the right of the individual member of society to be protected from a crime will be carefully balanced against the right of a presumably innocent accused to be given his freedom pending trial - a freedom that will only be limited if there is the most overwhelming evidence that he may commit a crime when released."

CIVIL RIGHTS. He said:

"By the time we came into office, 15 years after Brown v. Board of Education, it had become quite clear that those school districts which had not desegregated voluntarily would put up a vigorous battle . . . (which) . . . would have entailed a fund cut-off and a period of financial starvation."

"In most school districts, the children who have suffered the most from a cut-off of federal funds . . . are the Negro children."

"When a school district lacks money and is controlled by segregationist school board members, the first schools to suffer in the money squeeze are the black schools . . ."

". . . we know that in many recalcitrant districts there are responsible school officials who . . . have told us repeatedly that their communities will not voluntarily end discrimination, even under the threat of a federal fund cut-off."

"... the practical defect with court ordered school cases has been, in the past, that judges and lawyers are not educators."

The Department of Justice-Health, Education and Welfare's joint statement of last Jule 3 "was calculated to achieve lawful school desegregation as quickly and as effectively as possible."

"It emphasized swift court action when voluntary negotiations failed. It emphasized keeping federal funds rather than starving school districts. It emphasized using educators . . . to plan school desegregation rather than using lawyers."

"This new program is, I believe, a totally responsible, moderate and practical way to achieve great progress in an extremely difficult problem area."

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POINTS TO REMEMBER

FEDERAL COURT TRANSCRIPT RATES

The new maximum transcript rates as approved by the Judicial Conference of September 1968 and shown in the United States Attorneys' Bulletins of November 1, and December 27, 1968, and March 28, 1969, have become effective in the following additional districts:

Guam
Illinois, Southern
Iowa, Southern
Kentucky, Western
Puerto Rico
Virgin Islands

North Carolina, Western will continue previous rates except ordinary copy to be increased from 30 cents to 40 cents per page.

FEDERAL CONDEMNATION HANDBOOK

Volume II of the Federal Condemnation Handbook is now being distributed to the offices of all United States Attorneys as well as to interested Government agencies. Together with Volume I, the Handbook covers both procedures up to the time of trial and, most important, in Chapter 4 of Volume II, the applicable principles of valuation. The availability of the Handbook should especially be called to the attention of the attorneys dealing with condemnation matters.

NARCOTICS

COURT OF APPEALS DECISIONS SINCE LEARY v. UNITED STATES.

Both the Eighth and Ninth Circuits have distinguished the presumption in the narcotics smuggling statute, 21 U.S.C. 174, from the presumption in the marihuana smuggling statute which was held to be unreasonable by the Supreme Court in Leary v. United States. United States v. Lugo-Baez, C.A. 8, No. 19,378 (June 20, 1969); Clayton v. United States, C.A. 9, No. 22,846 (June 9, 1969). The Ninth Circuit also distinguished the border seizure situation from the Leary situation holding that Leary does not bar prosecution of all marihuana smuggling cases under 21 U.S.C. 176a and that the statute per se does not violate the privilege against self-incrimination because of its incorporation of the invoicing provisions of the general customs law. Witt v. United States, C.A. 9, No. 23,065 (June 6, 1969). The Seventh Circuit adopted the Second Circuit's decision in United States v.

Minor, 398 F.2d 511 (1968), certiorari granted June 2, 1969, upholding the 26 U.S.C. 4705(a) order form requirement with respect to sellers of narcotics and distinguishing this statute from the marihuana tax statutes struck down in Leary. United States v. Lawler, C.A. 7, No. 16,758 (July 10, 1969).

On the other hand, the Eighth Circuit has extended Leary v. United States, applying it to 26 U.S.C. 4742 cases. Baker v. United States, C.A. 8, No. 19,388 (July 23, 1969). This issue is now pending before the Supreme Court in Buie v. United States.

With respect to cases involving the issues now pending before the Supreme Court in Minor v. United States (26 U.S.C. 4705(a)), Turner v. United States (21 U.S.C. 174 presumption), and Buie v. United States (26 U.S.C. 4742) in our dealings in the lower courts, the Department has requested the courts to postpone decisions on these questions pending the decisions of the Supreme Court. We recommend that the United States Attorneys also follow this procedure when these issues arise.

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ANTITRUST DIVISION
Assistant Attorney General Richard W. McLaren

DISTRICT COURT

CLAYTON ACT

VIOLATION OF SECTION 7 OF ACT CHARGED.

United States v. International Telephone and Telegraph Corp., et al. (D. Conn., No. 13320; August 1, 1969, D.J. 60-169-037-3)

On August 1, 1969, a civil action was filed in the U.S. District Court, District of Connecticut, under Section 7 of the Clayton Act, challenging the proposed acquisition of the Hartford Fire Insurance Company (Hartford) by the International Telephone & Telegraph Corporation (ITT).

ITT is the eleventh largest industrial concern in the United States with 1968 consolidated revenues of over $4 billion, consolidated net income of over $190 million and total assets of over $4 billion. ITT is the fourth largest employer among all U.S. Companies, employing approximately 300,000 persons. Recent acquisitions made by ITT include: Avis Rent-A-Car, second largest car rental concern in the U.S.; Continental Baking Co., the largest baking company in the U.S.; Sheraton Corporation of America, one of the two largest hotel chains in the U.S.; Levitt & Sons, Inc., one of the largest residential construction firms in the U.S.; and Canteen Corporation, one of the two largest vending machine operators in the U.S. In addition ITT has agreed to acquire Grinnell Corp., the largest manufacturer of fire protection devices in the U.S.

The complaint states that Hartford ranks fourth among the nation's property and liability insurance companies, operating under the American Agency System, and sixth among all property and liability insurance companies. In 1968, it had premium receipts of $968.8 million, net income of $53.3 million and consolidated assets of $1.89 billion.

The complaint further states that ITT and its subsidiaries paid over $30 million in insurance premiums in 1968, and that much of this insurance will, if the merger is consummated, be supplied by Hartford thus foreclosing competitors of Hartford from that market.

ITT purchased approximately $550,000,000 of goods or services from domestic suppliers in 1967 with more than $100,000 being paid to more than 725 companies, including 61 of the top 100 corporations on the "Fortune 500". The complaint alleges that the power of ITT and Hartford to employ

reciprocity, or to benefit from reciprocity effect in selling insurance, will be substantially increased by the acquisition and that actual and potential competitors of Hartford may be foreclosed from competing for the insurance business of many of ITT's suppliers.

The alleged effects of the proposed merger are that: (1) actual and potential competition between the merging firms will be eliminated; (2) barriers to entry in the insurance business will be increased; and (3) this acquisition will trigger similar mergers in the insurance industry.

The complaint seeks a preliminary injunction preventing and restraining the defendants from taking any action in furtherance of the merger, and the complaint asks the court to adjudge the merger unlawful.

Staff: James Coyle, William Rowan, Richard Clinton, Bruce Posnak and Steve Aronow (Antitrust Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURT OF APPEALS

PROBATION - SENTENCE ON REVOCATION

UPON REVOCATION OF PROBATION, JUDGE IS WITHOUT DISCRETION TO IMPOSE SENTENCE LESS THAN STATUTORY MANDATORY MINIMUM ORIGINALLY IMPOSED.

United States v. Gerson Nagelberg (C.A. 2, No. 33,424, July 23, 1969; D.J. 12-51-990)

Appellant originally pled guilty to violating 26 U.S.C. 4704 which makes it unlawful to purchase, sell, dispense, or distribute narcotic drugs except in or from the original stamped package. He was sentenced in November 1965 to two years in prison, the execution of which was suspended and he was placed on probation for three years. Conviction for the offense in question carries a sentence of not less than two or more than ten years. /26 U.S.C. 7237(a)/

In November 1968 a petition was filed charging that appellant had violated his probation prior to its expiration. Upon a finding that such a violation did in fact occur an order was entered revoking his probation and putting into effect a sentence of two years in prison. The probation judge indicated that if he were not limited by the provisions of Section 7237(a) he would sentence appellant to a one-year term.

Appellant contends that under 18 U.S.C. 3653 dealing with probation the probation judge could have required him to serve the sentence originally imposed "or any lesser sentence".

The Circuit Court rejected appellants construction of Section 3653 and held that the sentencing power of the probation judge in this context is no greater than that of the trial judge. Accordingly the probation judge's conclusion that if he imposed a prison sentence it had to be the statutory minimum was correct.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys William B. Gray and Charles P. Sifton (S.D. N.Y.)

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INTERNAL SECURITY DIVISION
Assistant Attorney General J. Walter Yeagley

DISTRICT COURTS

CONTEMPT OF COURT

In the Matter of the Grand Jury and Susan Marie Parker (D. Colo., June 13, 1969; D.J. 146-7-13-164)

In February of this year, a Federal grand jury at Denver, Colorado returned a four-count indictment against Cameron David Bishop, charging him with four separate violations of 18 U.S.C. 2153(a), the wartime sabotage statute.

In continuing its inquiry into alleged violations of 18 U.S.C. 2153, which was precipitated by the destruction of public service towers in Denver and the surrounding area, the grand jury issued a subpoena for Susan Marie Parker. At her appearance before the grand jury on April 1, 1969, the witness refused on the grounds of possible self-incrimination to answer all questions propounded to her, except for preliminary identification questions. The Government then petitioned the district court, pursuant to 18 U.S.C. 2514, for an order granting her immunity and instructing her to respond. The court, after a hearing, issued the requested order. Thereafter, the witness again refused to testify, and the court found her to be in civil contempt of court.

Parker argued on appeal that her refusal to testify was justified due to the danger of incrimination in a foreign jurisdiction, Canada. In affirming the decision, the district court, the Court of Appeals for the Tenth Circuit, held that the Fifth Amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states but should not be interpreted as applying to acts made criminal by the laws of a foreign nation.

Staff: United States Attorney James L. Treece; Assistant United States Attorney James R. Richards (D. Colo.); and Paul C. Vincent (Internal Security Division)

UNLICENSED EXPORTATION OF ARMS AND MUNITIONS

CONSPIRACY TO EXPORT ARMS AND MUNITIONS WITHOUT LICENSE AND TO BEGIN MILITARY EXPEDITION AGAINST FRIENDLY NATION; ATTEMPT TO EXPORT ARMS AND MUNITIONS WITHOUT LICENSE.

United States v. Rolando Masferrer Rojas, et al. (S.D. Fla., July 8, 1969; D.J. 146-1-95-27)

On November 16, 1967 Rolando Masferrer Rojas and five co-defendants were convicted in Miami, Florida on both counts of an indictment charging them, in the first count, with conspiring to launch a military expedition against the Republic of Haiti in violation of 18 U.S.C. 960 and to export arms and munitions in violation of 22 U.S.C. 1934, and, in the count, with attempting to export arms and munitions without a license in violation of 22 U.S.C. 1934.

During the early stages of the trial, defense counsel, through cross-examination of Government witnesses, attempted to create the impression that the Central Intelligence Agency was involved in the plot to invade Haiti. This line of cross-examination by defense counsel followed a technique which has been used frequently in cases involving violations of the neutrality laws. In a number of these cases the defendants have attempted to inject, through cross-examination, the possible involvement of the CIA, although such a contention was without any merit.

At trial the United States Attorney moved that defense counsel be proscribed from introducing the issue of CIA involvement by innuendo. He advised the court that in the event that the defense laid a foundation for examining into CIA activities, the Government would produce a qualified witness from the CIA who would testify that the CIA was in nowise involved in this matter. The court ruled that, in the absence of a proper foundation, questions on cross-examination by defense counsel which suggested Government involvement in the plot could be propounded only in the absence of the jury, at which time the court would rule on the relevancy of the testimony in response to such questions. Any testimony held to be admissible could then be heard by the jury.

In affirming the convictions of the defendants on July 8, 1969, the Court of Appeals for the Fifth Circuit cited, with approval, the above procedure. The Court of Appeals stated:

> This solution preserved the defendants' constitutional right to an extensive cross-examination

and at the same time protected the prosecution from having its case prejudiced by the jury drawing unfair inferences having no basis in fact. The solution safeguarded national security and protected the nation from unfair, unwarranted inferences that might have jeopardized our relations with a friendly country.

Staff: United States Attorney William A. Meadows, Jr.; Assistant United States Attorney Lloyd G. Bates (S.D. Fla.); John H. Davitt, James P. Morris, and H. Yale Gutnick (Internal Security Division)

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Shiro Kashiwa

DISTRICT COURTS

INDIANS

INDIANS CIVIL RIGHTS ACT OF 1968; JURISDICTION OF THE COURTS.

Spotted Eagle v. The Blackfeet Tribe (D. Mont., No. 2780; July 7, 1969, D.J. 90-2-14-116)

Nine Blackfeet Indians, suing in their own behalf and in behalf of all persons similarly situated, brought this action against the Tribe and its officials, the City of Browning, Montana, and the Secretary of the Interior and other Interior officials. The complaint is lengthy, 47 pages. It complains of procedures in the Tribal Court. It is alleged that the accused were not advised of their right against self-incrimination or right to counsel and were not allowed to be represented by professional attorneys of their choice. Plaintiffs complain of conditions in the tribal jail, alleging overcrowding, particularly during Indian celebrations and on days on which welfare checks are distributed, unsatisfactory and unsanitary conditions in drunk tanks, and generally inadequate facilities. The jail is operated jointly by the Blackfeet Tribe and the City of Browning. The plaintiffs alleged they had been denied their constitutional rights as well as rights guaranteed them by the Indians Civil Rights Act of 1968.

Plaintiffs seek a permanent injunction against trials in the Tribal Court which do not protect their constitutional and civil rights, and the levying of excessive fines and the imposition of excessive sentences. They ask the abatement of the tribal jail as a nuisance*/ and actual and punitive damages in the amount of $5,000 each.

All defendants filed motions to dismiss for lack of jurisdiction and for failure to state a claim. The court dismissed as to the Secretary of the Interior and other federal officials without separate opinion, on the

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*/ In 1968, while this action was pending, Congress appropriated funds for the construction of a new tribal jail. Apparently, it will not be constructed until late this year or 1970. Jail conditions for the Blackfeet are admittedly inadequate and the delay in constructing the new jail is unfortunate.

ground that it is not alleged that these officials have taken any action against the plaintiffs. Plaintiffs are given 20 days to amend to allege a conspiracy involving the federal defendants, with the admonition that "if such allegations are made counsel signing the complaint had better be prepared to indicate to the court the reason for believing there is some good ground to support such allegation".

The City of Browning also was dismissed from the action without separate opinion, on the ground that there is no allegation that the City has done anything to any of the plaintiffs other than maintain the jail jointly with the Tribe and that as to the City of Browning this is not a class action.

The court handed down a rather lengthy opinion with respect to the claims asserted by the plaintiffs against the Tribe and its officials in which it deals separately with the various contentions made by the plaintiffs. The court holds that the Civil Rights Act of May 31, 1870, is not applicable, on the ground that it was a Civil War measure concerned with the rights of recently liberated Negroes and also because its application was limited to "all persons within the jurisdiction of the United States". Under conditions existing circa 1870, this did not include Indians. Elk v. Wilkins, 112 U.S. 94, 102 (1884). That Act has no bearing on relationships between an Indian tribe and its members.

Likewise, 28 U.S.C. 1985 has no application. It also is a Civil War statute aimed at those who conspire to deprive persons of equal protection of the laws and of privileges and immunities under the laws. This statute would come into play, if at all, only if a tribe discriminated among its members.

The court holds that 18 U.S.C. 241 and 242 provide criminal sanctions but create no civil liability.

The Fourteenth Amendment is directed at the states, and an Indian tribe is not a state.

The court then discusses the Indian Civil Rights Act of 1968. Notwithstanding the fact that each individual is claiming less than $10,000, the court finds jurisdiction as against the Tribe and its officials, under 28 U.S.C. 1343(4), and that the remedy of habeas corpus provided in the Act is not exclusive. The court states:

> The conclusion reached is that the Court does have habeas corpus jurisdiction; does have equitable jurisdiction over the tribe and its officers; does have pendant jurisdiction over the judges and officers of the tribe as individuals insofar as

the claims for damages are concerned. The motion to dismiss for want of jurisdiction is therefore denied.

Staff: Assistant United States Attorney Robert T. O'Leary (D. Mont.)

INDIANS

TREATY FISHING RIGHTS - STATE REGULATIONS FOR CONSERVATION.

Richard Sohappy v. McKee A. Smith (D. Ore., No. 68-409); United States v. State of Oregon (D. Ore., No. 68-513, July 8, 1969, D.J. 90-2-0-642)

Following the decision of the Supreme Court on May 27, 1968, in Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392, the United States instituted an action against the State of Oregon in an effort to obtain a judicial decision defining the extent of treaty fishing rights of certain Indian tribes having usual and accustomed fishing locations on the Columbia River off their reservations and to the extent to which those rights are subject to state control for conservation purposes. This action was consolidated with the Sohappy case instituted by individual Indians. The rights of the Indians are based upon a number of treaties entered into between the tribes and the United States in 1855.

On July 8, 1969, Judge Belloni handed down his final opinion (a preliminary opinion had been dictated by him on April 23). The court upheld the right of the State to regulate Indian off-reservation fishing, as had several earlier decisions. The court held, however, that such regulation must be necessary for the conservation of fishing, must not discriminate against the Indians, and must meet "appropriate standards". The court found existing state regulations improper, in that the State has contended that, except for access over private lands and exemption from the payment of license fees, the Indian treaties accorded the Indians no rights not held by non-Indians. The State had declined to give the Indian treaty fishing rights any separate consideration and had contended that it could not accord the Indians any rights not accorded non-Indians.

The court held that the State must allow the Indians a fair share of the harvestable fish and at their usual and accustomed places. The State had recognized two classes of fishing rights, sports and commercial. The court held the State must add a third class, Indian treaty fishing. The State may not nullify the Indian right by subjecting it to some other state

objective or policy. The state regulations may be only that required to accomplish the needed limitations on the harvest of fish. The court did not attempt to prescribe the particular regulations to be enforced by the State, which it realized must be based upon conditions existing during each season.

The court expressly refrained from deciding whether any authority exists in the Federal Government or the tribes to prescribe regulations that would govern Indians in the exercise of treaty-secured fishing rights. Final judgment has not been entered.

Staff: Assistant United States Attorney Michael L. Morehouse (D. Ore.); Associate Regional Solicitor George Dysart, Department of the Interior

PUBLIC LANDS

LACK OF WAY OF NECESSITY.

United States v. American Land Co., et al. (C.D. Cal., No. 68-1119-FW, March 12, 1969; D.J. 90-1-10-819)

In an action to recover possession of public lands and for injunction, the defendants contend they have an easement of necessity across the public lands on the theory that their title descends from the Southern Pacific Railroad which was the original grantee of the defendants' lands from the United States. The court held that the defendants' desire to have a particular road which shall commence from a particular point on the existing public highway in the Palm Springs, California area and which will have its other terminus end at Highway 74, was hardly an instance of a way of necessity. The defendants have failed to show that any of the parcels to which they claim an interest is entirely landlocked. The fact that defendants desire a road over easily accessible terrain, rather than over rugged terrain, does not add to their rights. Citing: Bully Hill Copper Mining and Smelting Co. v. Bruson, 4 Cal. App. 180.

Staff: Assistant United States Attorney Thomas H. Coleman (C.D. Cal.) and Felthan Watson (Land & Natural Resources Division)

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