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COMMENDATIONS

Assistant U.S. Attorney Harry R. McCue (S.D. Calif.) was commended by FBI Director J. Edgar Hoover, and stated in part:

> He has impressed us as a devoted public servant who is always most accommodating when called upon regardless of the day or hour.
>
> Mr. McCue's practical approach to prosecution is particularly significant in view of the mounting concern over crime. In a district with one of the heaviest dockets in the country, he is never too busy to discuss individual cases with our Agents and to give detailed consideration in each instance. His concern in protecting the best interests of the Federal Government and in seeing that justice is served is nothing less than outstanding. He certainly is a credit to the Department of Justice and the United States Government.

Assistant U.S. Attorney C. Leland Hamel (S.D. Texas) was commended by the Small Business Administration, Houston, by "giving unselfishly of his time after regular working hours and a number of Saturdays and Sundays to brief and prepare legal proceedings which resulted in a settlement that will eventually lead to full recovery of Small Business Administration's claim of $375,000".

Assistant U.S. Attorney Jack Collins (D. Oregon) was commended by General Counsel, Department of the Army, for his assistance and firm support in a recent nerve gas case.

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POINTS TO REMEMBER

Costs in Criminal Cases

As a general rule, costs cannot be awarded against the United States in criminal cases absent legislative authority. In a recent criminal case, however, involving a violation of the drug laws, costs were assessed against the Government. Since the statutes involved contain no provision for assessment costs, the order was erroneous. Before any action was taken the time for appeal had passed, and the Government may now be obligated to pay these costs.

Title VI of the United States Attorneys Manual requires prompt notification to the Department upon the rendering of any decision adverse to the Government. This case points up the importance of that requirement.

United States Attorneys are urged to take particular care that, in the event that costs are awarded against the United States in a criminal case, the Department be notified promptly in order that steps may be taken to effect an appeal. See Memo No. 682 dated June 26, 1970.

Dismissal of Cases Transferred Under Rule 20

Criminal Division has received requests for authority to dismiss criminal cases from United States Attorneys in districts to which the case has been transferred under Rule 20, Federal Rules of Criminal Procedure.

It is the position of the Criminal Division that a transfer under Rule 20 to a district other than that in which the indictment was returned or the information filed is solely for the purpose of taking a plea and imposing sentence. Rule 20 should not be construed to authorize the transferee court to dismiss the indictment or information.

When a transferred case is to be dismissed, it is suggested that if a plea has been entered it be withdrawn and the case be transferred back to the district of origin. The United States Attorney in the district of origin may then submit Form 900 for authority to dismiss.

When the indictment or information which is transferred contains more than one count and pleas of guilty or nolo contendere are tendered to less than all counts or the defense asks for an agreement whereby

s[redacted]leas will be entered to less than all counts, the United States Attorney in the transferee district should contact the United States Attorney in the district of origin and obtain his approval of the proposed disposition of the case. If approval is given, the transferee court may then be asked to dismiss those counts to which no plea is made.

It is suggested that upon disposition of all transferred cases the United States Attorney in the transferee district advise the United States Attorney in the originating district of the disposition, including the date of plea and the date and sentence imposed.

(Criminal Division)

ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

SHERMAN ACT COMPLAINTS INVOLVING STEVEDORING SERVICES FILED, WITH PROPOSED JUDGMENTS.

United States v. Bunge Corp. (E.D. La., Civ. 70-1546; June 15, 1970; D.J. 60-194-92)

United States v. Archer-Daniels-Midland Co., et al. (E.D. La., Civ. 70-1545; June 15, 1970; D.J. 60-194-93)

United States v. Continental Grain Co. (E.D. La., Civ. 6733; June 15, 1970; D.J. 60-194-91)

On June 15, 1970, we filed three civil complaints charging four grain exporting companies with entering into unlawful agreements providing for exclusive stevedoring services at their grain elevators in Gulf Coast ports.

The Bunge complaint alleged that since 1962 the company and Southern Stevedoring Co., Inc. of New Orleans, named as a co-conspirator in the complaint, have engaged in a conspiracy to monopolize and unreasonably restrain the stevedoring of grain at the Bunge export grain elevator at Destrehan, Louisiana, the principal grain export location in the United States.

Pursuant to contract, Bunge granted to Southern the right to act as the exclusive stevedore at the elevator, and Bunge has undertaken by various means to persuade and induce ship owners and charterers loading at the Bunge elevator to designate Southern as stevedore.

The suit also charged that Bunge has taken steps to make it impossible for outside stevedores to compete with Southern at the Bunge elevator, and as a condition of accepting a ship at its elevator for loading, Bunge required ship owners who are entitled to select stevedores to agree to designate Southern for grain-loading.

The complaint against Archer-Daniels-Midland and Garnac, joint owners and operators of the only other grain elevator in Destrehan, charged that since 1963 the companies have required all ship owners

who are entitled to select stevedores to enter into contracts obligating them to hire T. Smith & Son, Inc., a New Orleans based stevedoring company, as stevedore as a condition of accepting the ship at the elevator for loading.

The complaint against Continental charged that since 1965 the company has required the hiring of Atlantic & Gulf Grain Stevedoring Associates for stevedoring work at its Beaumont elevator.

The Federal Maritime Commission, in enforcing the Shipping Act, has consistently struck down similar exclusive stevedoring arrangements whenever such arrangements affected common carriers. In order to avoid FMC jurisdiction, Bunge and ADM-Garnac excluded common carriers from loading at their elevators, and Continental made its exclusive stevedoring arrangement applicable only to non-common carriers. Thus, the three antitrust suits serve to plug a loophole.

The proposed consent decrees would enjoin the four companies from directly or indirectly conditioning the loading of grain at their elevators upon the hiring of a particular stevedore. Although each of the complaints is directed against a single elevator, the proposed decree extends to all grain elevators owned or operated by the companies in the United States.

The United States is the world's leading grain exporter, and two-thirds of U.S. grain exports are shipped from elevators along the Gulf Coast.

Staff: Kenneth C. Anderson (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

SUPREME COURT

WRONGFUL DEATH - ADMIRALTY

ACTION FOR WRONGFUL DEATH MAY EXIST INDEPENDENT OF A STATUTE.

Moragne v. States Marine Lines (Sup. Ct., Oct. Term 1969; No. 175, June 15, 1970; D.J. 61-17M-100)

Edward Moragne, a longshoreman engaged in duties traditionally performed by seamen (Seas Shipping Co. v. Sieracki, 328 U.S. 85), was killed while working aboard the vessel PALMETTO STATE while that ship was on the navigable waters of Florida. Moragne's widow sued the vessel. Moragne's employer was impleaded by the vessel owner. The district court dismissed the claim for unseaworthiness on motion of the vessel owner and the employer.

On appeal, the Fifth Circuit affirmed. It held, following The Tungus v. Skovgaard, 358 U.S. 588, that (1) in accordance with the traditional rule at common law, established for the admiralty in The Harrisburg, 119 U.S. 199, no wrongful death action can exist unless a statute creates it, (2) no Federal statute creates for the admiralty a cause of action for wrongful death caused by unseaworthiness (except the Death on the High Seas Act, 46 U.S.C. 761 et seq., which creates a cause of action only for wrongs committed on the high seas and thus not for those, like the present, that occur on the navigable waters of a state), (3) in the absence of a statutory cause of action, the admiralty looks to the law of the state on whose waters the wrong occurred, and (4) (after certifying the question to the Florida Supreme Court) the law of Florida does not permit recovery for wrongful death caused by breach of the obligation to provide a seaworthy vessel.

Upon the plaintiff's petition the Supreme Court granted certiorari. On its own motion the Court invited the United States to participate as amicus curiae, and requested the parties to consider the question of whether The Harrisburg should be overruled. We argued in our brief that the commonlaw rule that wrongful death actions could not exist independently of a statute was based on highly questionable grounds, that it produced anomalous and indefensible results (i.e., an injury that left the victim living was actionable, but one that killed him was a wrong without a remedy), that the almost universal creation by

legislatures of actions for wrongful death evidenced an overwhelming rejection of whatever policy arguments could be made against allowing recovery, and that the body of admiralty law should provide for vindication of the right of a seaman to work on a seaworthy vessel in cases where the victim dies as a result of his injuries as well as those in which he lives.

In a unanimous decision the Supreme Court reversed. Following the analysis presented in our brief, the Court held that the rule that there was no common-law action for wrongful death was based on the "felony merger" doctrine, an ancient English rule which has never had any application in American law, and that no sound policy existed for denying a remedy where a tort that would have been actionable had the victim lived causes the victim's death. The Court thus suggested that The Harrisburg had been wrongly decided to begin with. Nonetheless it found that it did not have to reach that question because, as we had stressed in our brief, the near-universal creation by legislatures of remedies for wrongful death firmly established that there was no reason to deny recovery. Finally, the Court rejected the claim that in passing the Death on the High Seas Act Congress had actively intended to leave for definition by state law alone the right to an action for wrongful death upon the territorial waters of the states.

Staff: Alan S. Rosenthal and Daniel Joseph
(Civil Division)

COURTS OF APPEALS

GOVERNMENT EMPLOYEES

EMPLOYEES OF FEDERAL AGENCY (AND A UNION REPRESENTING THEM) WHO HAVE BEEN SUBJECTED TO SEPARATION OR REDUCTION IN GRADE DUE TO REDUCTION-IN-FORCE MAY MAINTAIN AN ACTION CHALLENGING, AS VIOLATIVE OF CIVIL SERVICE LAWS, AGENCY'S DETERMINATION TO OBTAIN SERVICES BY CONTRACTING WITH PRIVATE FIRMS INSTEAD OF USING ITS OWN EMPLOYEES.

Lodge 1858, American Federation of Government Employees, et al. v. Thomas D. Paine, Administrator, NASA, et al. (C.A. D.C., No. 22,006; decided April 21, 1970; D.J. 145-177-29)

Six NASA employees and a Government employees' union instituted this action challenging a proposed reduction-in-force at the Marshall Space Flight Center in Alabama on the ground that NASA had been

contracting out to private industry many functions which could and should have been performed by Government employees. The plaintiffs asserted that imposing a reduction-in-force on Government employees while service support contract employees doing similar work remained on the job violated the civil service laws. At the time this action was filed, the administrative appeals of the individual plaintiffs to the Civil Service Commission were pending. The district court dismissed the complaint on the grounds that "the Court may not enjoin a Government agency from discharging any of its employees" and that the adversely affected employees had not exhausted their administrative remedies.

The plaintiffs appealed. The Government's position in the Court of Appeals was (1) that the individual plaintiffs could not maintain the action because they had failed to exhaust their administrative remedies and (2) that the union had no legal rights it could assert in its own behalf and could not, by claiming to represent its members, avoid the exhaustion requirement which barred their action. In addition, the intervenor National Council of Technical Service Industries (an organization of private firms which supply manpower to various Federal agencies through service support contracts) asserted that the employees and the union lacked standing to challenge the service support contracts and the deployment of personnel thereunder in that they possessed no legal interest protecting them from such job competition.

Just before argument of the appeal, the Commission denied the plaintiff's administrative claim. The Court of Appeals reversed, one judge not participating and Judges Robinson and Tamm writing separate concurring opinions. With respect to the standing issue raised by the intervenors, Judge Robinson, applying the test enunciated in Ass'n of Data Processing Serv. Org. v. Camp, 397 U.S. 150, found that the statutes "limiting NASA's employment of contractor employees arguably brings its civil service employees within the zone of interests it protects". He also concluded that the Union had standing to assert the interests of its employee members. Judge Robinson went on to reject the Government's claim of non-exhaustion on the ground that the decision rendered by the Commission during the pendency of the appeal removed any non-exhaustion obstacle that may have existed and thus made a remand for district court resolution of the case appropriate. Judge Tamm wrote a brief concurrence.

Staff: Ralph A. Fine (formerly of the Civil Division)

UNIFORM TIME ACT OF 1966

NEW TIME ZONE BOUNDARY FOR INDIANA, PUSHING BACK SUNSET IN MOST OF THE STATE DURING THE SUMMER MONTHS TO 9:30 P.M. (EDT), UPHELD AGAINST ATTACK BY DRIVE-IN MOVIE OWNERS.

Allied Theatre Owners of Indiana v. Volpe (C.A. 7, No. 17,866; decided May 22, 1970; D.J. 145-18-36)

Historically, most of the State of Indiana has observed Eastern Standard Time during the entire year, with some fifteen counties around Gary and Evansville observing Central Standard Time in the winter months and Central Daylight Time in the summer months. This pattern of time observance did not change even in 1961 when the ICC redefined the boundary so that it divided Indiana approximately in half, because the statute then in force contained no enforcement provisions.

Confronted with such varying patterns of time observance throughout the nation, Congress enacted the Uniform Time Act of 1966, 15 U.S.C. 260 et seq. (Supp. V), "to promote the adoption and observance of uniform time within the standard time zones prescribed by * * * this /Act/". The Act divides the territory of the United States into eight time zones, specifying the meridians upon which the mean solar time for each zone is to be based, and directs the Secretary of Transportation to define "/t/he limits of each zone * * *, having regard for the convenience of commerce and the existing junction points and division points of common carriers engaged in interstate or foreign commerce * * *". Unlike the 1918 Act it replaced, the 1966 Act requires the observance of advanced (daylight) time between April and October of each year, unless a State by law exempts the entire State from such observance of advanced time, and empowers the Secretary to enforce the mandatory observance of advanced time through application to a U.S. district court for an injunction or other appropriate remedy.

In defining the time zone boundary through Indiana, the Secretary conducted informal rule-making proceedings in which he twice solicited comments from all interested Indianans on proposed locations. Each time he admonished that he would not be concerned with adherence to or exemption from advanced time, since that was provided for by the Act. Finally, the Secretary issued his decision, effective April 27, 1969 (when advanced time was to go into effect nationally), placing most of Indiana in the eastern time zone, except for 12 counties in the Gary and Evansville areas, which were placed in the central time zone.

Thereafter, in the last week of March, 1969, the theater owners brought suit for injunctive relief to restrain enforcement of the new boundary, alleging that the Secretary had been arbitrary and capricious and had exceeded his authority under the Act. They also moved for a preliminary injunction, on the ground that enforcement of the new boundary would irreparably harm their movie business by requiring the observance of advanced time, thereby causing "a large part of the public, which is conditioned to attend motion pictures after dark", to cease patronizing theaters and by providing viewing time sufficient for only one showing of a feature movie, instead of the customary two showings, in drive-in theaters. The district court, acknowledging that theater owners are harmed every time the clock is advanced, nevertheless denied their motion. Pointing to the advanced time provisions of the Act and taking judicial notice of the facts that the Indiana Legislature had passed exemption legislation but that the Governor had vetoed it, the court concluded that the theater owners' grievance was with the Governor rather than with the Secretary. The court also found that the Secretary's decision was made in accordance with the Act and that it was not arbitrary or capricious.

On appeal, the Secretary defended his action by pointing out, among other things, that in drawing the new boundary he had moved the prior (1961) boundary only about 2^{o} longitude to the west from the middle of the State. In reply, the theater owner stated that "/i/f the Secretary really believes this, then his ignorance is more abysmal than has heretofore been suspected" and emphasized the fact that "/t/he old 1961 boundary was never observed, * * * /but/ existed only as a matter of ICC record". Despite these arguments, the Court of Appeals affirmed.

Staff: Alan S. Rosenthal and James C. Hair
(Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURTS OF APPEALS

NARCOTICS AND DANGEROUS DRUGS

IMPORTATION CONTRARY TO LAW FROM A NON-CONTIGUOUS FOREIGN COUNTRY.

Herbert Charles Petley v. United States (C.A. 9, No. 23,879; June 5, 1970; D.J. 12-12C-192)

Upon their arrival in Hawaii from Tokyo, appellant and his wife discovered some of their baggage had not arrived. They requested it be forwarded to Los Angeles where they would claim it. Since the baggage had not gone through Customs in Honolulu, it had to be inspected in Los Angeles. The search revealed two plastic bags containing hashish.

Appellant was convicted after a jury trial of knowingly receiving, concealing, and facilitating the transportation and concealment of hashish in violation of 21 U.S.C. 176a.

The conviction was challenged on the ground, among others, that appellant was actually tried and convicted on the theory of smuggling, a charge neither made nor proved against him. Appellant claimed he engaged in no conduct after importation which would be construed as receiving, concealing, or facilitating. The Ninth Circuit concluded that the marihuana was illegally imported when it arrived in Honolulu and appellant facilitated its transportation when he claimed his baggage in Los Angeles.

An essential element of a 21 U.S.C. 176a violation is that the importation is contrary to law. To show this, the Court of Appeals had previously relied on 19 U.S.C. 1461, 1484, 1485, and 1459. However, 19 U.S.C. 1461 and 1459 are confined to merchandise from any "contiguous country" whereas this case deals with an inportation from Japan. But there are various sections, including 19 U.S.C. 1498, 1496, 1624 and 1497, which do apply to importations from foreign countries that are not contiguous. 19 U.S.C. 1497 provides: "Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was not required, shall be subject to forfeiture . . ."

Leiser v. United States, 234 F.2d 648 (1st Cir. 1956), cert. denied 352 U.S. 893, found these forfeiture claims applicable to importation of merchandise from a non-contiguous foreign country where there was failure to declare. The Court of Appeals found that the record showed appellant did not declare the marihuana and "inferentially tried to talk the Customs officer at the Los Angeles airport out of inspecting the baggage . . ." Therefore, the hashish was subject to forfeiture and this was held to be clear proof of importation "contrary to law".

Staff: Former United States Attorney Wm. Matthew Byrne, Jr. (C.D. Calif.)

RETROACTIVITY OF LEARY.

Tyrone Delnore Houser v. United States (C.A. 6, May 27, 1970; No. 20053; D.J. 12-74-1882)

The sole question before the Court of Appeals was whether the rule of Leary v. United States, 394 U.S. 6 (1969), should be retroactively applied. The appellant in December, 1968, pleaded guilty to a charge he had transported and concealed four pounds of marihuana without having paid the transfer tax, in violation of 26 U.S.C. 4744(a)(2).

Agreeing with the decision of the district court in applying the criteria set forth in Stovall v. Denno, 388 U.S. 293, 297 (1967), the Court of Appeals, quoting the trial judge, held:

> The Court has considered these criteria, and believes that (a) the purposes outlined in the Supreme Court's decision in Leary will be adequately served by applying them prospectively, so as not to require judicial review of earlier cases; (b) law enforcement agencies have obviously relied on earlier cases upholding the constitutionality of this section; and (c) the impact of unlimited retroactivity upon the administration of justice would be unfavorable.

Staff: United States Attorney Charles H. Anderson (M.D. Tenn.)

* * *

INTERNAL SECURITY DIVISION
Assistant Attorney General J. Walter Yeagley

COURTS OF APPEALS

ELECTRONIC SURVEILLANCE; APPEALABILITY OF STAY ORDER UNDER 28 U.S.C. 1291 AND 28 U.S.C. 1292 (a) (1)

David T. Dellinger, et al. v. John N. Mitchell, et al. (C.A. D.C., No. 23931, May 27, 1970; D.J. 145-11-71)

On May 27 the Court of Appeals for the District of Columbia Circuit denied the plaintiffs' motion for summary reversal and expeditious treatment in Dellinger, et al. v. Mitchell, et al. This is a civil action seeking injunctions against electronic surveillances and damages for past surveillance on the grounds of the legal arguments made by the Government in the anti-riot criminal case in Chicago concerning the constitutional power to conduct such surveillances for national security purposes. The district court, finding that the case and the criminal case in Chicago presented overlapping and repeated issues, had granted the Government's motion for a stay of all proceedings pending determination of the issues concerning electronic surveillance as presented in the Chicago criminal case. This matter will now proceed through the regular appellate timetable.

In addition to arguing that the district court had properly exercised its discretion, the Government opposed the emergency appeal on the grounds that the district court's stay order was not a final decision of the district court within the meaning of 28 U.S.C. 1291, and was not an order granting or releasing an injunction within the meaning of 28 U.S.C. 1292(a)(1), and the stay order was therefore non-appealable. This jurisdictional question will now be considered in the regular appeal.

Staff: Robert L. Keuch (Internal Security Division)

CIVIL DISTURBANCE INFORMATION: DEPARTMENT OF THE ARMY INTELLIGENCE ACTIVITIES

Tatum, et al. v. Laird, et al. (C.A. D.C., No. 24,203; June 12, 1970; D.J. 145-15-186)

The Court of Appeals for the District of Columbia denied on June 12th a motion for summary reversal in Tatum v. Larid. The Court also denied the Government's motion for summary affirmance and this matter will proceed through the regular appellate timetable. This was

a civil action to enjoin the Secretary of Defense and particularly the Department of the Army from gathering by lawful means, or from maintaining or using in their intelligence activities, any information including public information, relating to potential or actual civil disturbances, street demonstrations or other allegedly "lawful and peaceful civilian political activity". The district court granted our motion to dismiss on April 22, 1970, dismissing the action with prejudice on the grounds that the complaint failed to state a claim upon which relief could be granted, showed no unconstitutional action, alleged no unlawful action on the part of the defendants, showed no threats to plaintiffs' rights and produced no justifiable controversy. Of relevance to this matter is the fact that the New Jersey State Appellate Court in a recent decision in the case of Anderson v. Sills overruled a lower state court holding that the Attorney General of that state could not require the police departments to make reports of incidents and individuals in relation to civil disturbances. The lower state court's decision in Anderson v. Sills has been the primary authority relied upon by the plaintiffs in the Tatum case.

Staff: Kevin T. Maroney, Benjamin C. Flannagan
(Internal Security Division)

DISTRICT COURT

SABOTAGE

SABOTAGE INDICTMENTS RETURNED FOR BURNING OF ROTC BUILDING.

United States v. Joel Achtenberg & Napoleon Bland, Jr. (E.D. Mo., D.J. 146-7-42-293)

On May 28, 1970, a Federal grand jury sitting in St. Louis returned an indictment charging defendants with sabotage (18 U.S.C. 2153) and destruction of Government property (18 U.S.C. 1361) for their parts in the depredation of the ROTC facility at Washington University in St. Louis on May 4th and the early morning hours of May 5th of this year.

Achtenberg, an employee of the University, has been identified as one of the leading activists on the campus in an anti-ROTC campaign.

Following a campus rally protesting United States involvement in Cambodia and the deaths of four Kent State students, a mob marched on the ROTC buildings. A small group including Achtenberg and Bland then set fire to the Air Force ROTC building causing its partial destruction.

The indictment is the second returned for sabotage in connection with the destruction of ROTC facilities. The first was also returned in St. Louis for an earlier burning at Washington University.

Staff: United States Attorney Daniel Bartlett, Jr.; Assistant U.S. Attorney Jerry J. Murphy (E.D. Mo.); and Brian K. Ahearn (Internal Security Division

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