mc

United States Attorneys

Bulletin

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

Vol. 23 March 21, 1975 No. 6

UNITED STATES DEPARTMENT OF JUSTICE

Vol. 22 March 21, 1975 No. 6

TABLE OF CONTENTS

COMMENDATION

Assistant United States Attorney Stephen G. Nelson, Southern District of California, has been commended by Clarence M. Kelley, Director, Federal Bureau of Investigation for his able and diligent prosecution of U.S. v. Harold Miller, et al.

Vol. 23 March 21, 1975 No. 6

POINTS TO REMEMBER

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS ASSUMES RESPONSIBILITY FOR THE ENFORCEMENT OF THE WAGERING TAX LAWS

The following is the substance of a letter received recently in the Executive Office for United States Attorneys from Rex D. Davis, Director, Bureau of Alcohol, Tobacco, and Firearms:

> "On December 24, 1974, the Bureau of Alcohol, Tobacco and Firearms assumed responsibility for the enforcement of the wagering tax laws which are contained in Chapters 35 and 40 of Title 26, United States Code.
>
> As you are no doubt aware, Public Law 93-499 amends the aforementioned chapters by decreasing the excise tax on wagers from 10 percent to 2 percent, by increasing the occupational tax from $50.00 to $500.00 per year, and by adding a section dealing with the disclosure of wagering tax information to assure against self-incrimination by the taxpayer.
>
> This additional responsibility will in no way adversely affect our firearms, explosive or liquor enforcement programs.
>
> We will continue to strive for quality in the preparation of significant cases for prosecution and look forward to a continuance of the mutually rewarding relationship we have enjoyed with your office."
>
> (Executive Office)

Vol. 23 March 21, 1975 No. 6

POINTS TO REMEMBER

DUAL PROSECUTIONS

Attorneys are reminded of the Departmental policy that after a State prosecution there should be no Federal trial for the same act or acts unless there are compelling Federal interests involved, in which case prior authorization should be obtained from the appropriate Assistant Attorney General having jurisdiction over the subject matter of the case. (See United States Attorneys' Manual, p.3.) The failure to observe this policy has recently led to two memoranda by the Solicitor General in the Supreme Court asking that judgements of courts of appeals affirming convictions be vacated in order to permit dismissal of the prosecution. Hayles v. United States, Sup. Ct. No. 73-6795; Ackerson v. United States, Sup. Ct. No. 74-5352.

(Office of Solicitor General)

Vol. 23 March 21, 1975 No. 6

POINTS TO REMEMBER

PROSECUTION OF OFFICERS AND DIRECTORS OF FINANCIAL INSTITUTIONS

Pursuant to Sections 1730(h), 1786(h)(1) and 1818(g)(1) Title 12 United States Code, the pertinent banking regulatory agency has the power to summarily suspend any director, officer, or any other person participating in the affairs of regulated financial institution if he is charged in any information, indictment or complaint authorized by a United States Attorney with the commission of or participation in a felony involving dishonesty or breach of trust.

In view of the fact that referrals of violations of the various banking statutes are made directly to the United States Attorney's offices, the Criminal Division is not in a position to advise the regulatory agencies when such action occurs. Accordingly, in order to assist such agencies in the effective administration of the financial institutions under their supervision, it is requested all United States Attorneys establish a policy of notifying the referring agency of the dispositon, whether by the institution of criminal proceeding or declination, of all criminal referrals involving officers, directors or persons participating in the conduct of the affairs of a financial institution.

(Criminal Division)

FIREARMS DEVELOPMENTS

"Pen" Guns and Similar Small Caliber Weapons Have Been Reclassified and Ruled to be Firearms within the Purview of the Gun Control Act of 1968

The Bureau of Alcohol, Tobacco and Firearms has recently re-examined its position with respect to the applicability of Titles I and II of the Gun Control Act of 1968 (Chapter 44, Title 18, U.S.C. and Chapter 53, Title 26, U.S.C) to small caliber weapons (commonly known as "pen" guns) ostensibly designed to expel only tear gas or similar substances or pyrotechnic signals by the action of an explosive. ATF Ruling 75-7 holds that such weapons, if readily convertible to weapons expelling projectiles by means of an explosive,

constitute a "firearm" within the meaning of 18 U.S.C. 921(a)(3)(A) and 26 U.S.C. 5845(e).

Therefore, all provisions of the Gun Control Act of 1968, i.e. licensing, prohibited classes, etc. are applicable to the above described weapons if manufactured on or after June 1, 1975. Similarly, the provisions of Title VII, 18 U.S.C. App. 1202 should be construed to apply to these weapons since the definitions of "firearms" contained in Title I and Title VII are nearly identical. In those instances in which "pen" guns are transported by the United States Postal Service, consideration should be given to a prosecution under 18 U.S.C., Section 1715, Firearms, as nonmailable.

(Criminal Division)

Vol. 23 March 21, 1975 No. 6

POINTS TO REMEMBER

Joint Federal-State Wetlands Protection Effort

The office of the United States Attorney for the Eastern District of North Carolina has found that an important part of its effort to protect valuable wetland resources has been the establishment of a joint state-federal committee for cooperative investigation and enforcement of wetland matters. The North Carolina State/Federal Wetlands Enforcement Committee is comprised of representatives of the United States Attorney's office, the U.S. Army Corps of Engineers (permitting and investigative sections), the Fish and Wildlife Service of the Department of the Interior, the regional Environmental Protection Agency office, the National Marine Fisheries Service, the state Attorney General's office, and the state Department of Natural and Economic Resources (Marine Fisheries Service Division, Environmental Management Division, Enforcement Division). Regular committee meetings to exchange information, discuss common problems, and plan investigation and enforcement efforts have reduced duplication of effort by the various agencies involved and have fostered inter-agency cooperation, with the result of more vigorous and effective enforcement of laws for the protection of wetlands. A similar program has been established in the District of Maryland, and several other United States Attorneys have expressed interest in forming such joint state-federal committees. Information on the program is available from Thomas P. McNamara, United States Attorney for the Eastern District of North Carolina.

(Lands and Natural Resources Division)

OFFICE OF U.S. ATTORNEY - EASTERN DISTRICT OF VIRGINIA
United States Attorney David H. Hopkins, Jr.

TRAVEL ACT - USE OF COMMERCIAL BRIBERY UPHELD

FOURTH CIRCUIT UPHOLDS THE USE OF NEW YORK COMMERCIAL BRIBERY STATUTE AND FEDERAL STATUTE PROHIBITING PAYMENT OF COMMISSION TO BANK OFFICER FOR PROCURING LOANS (18 USC Section 215) AS INCLUDED WITHIN THE GENERIC TERM BRIBERY USED IN THE TRAVEL ACT.

United States v. Louis Pomponio and Charles J. Piluso (C.A. 4, Nos. 74-1667 & 74-1668, Feb. 7, 1975; D.J. 51-79-259)

The principal officers and attorneys of an integrated, family owned, high-rise office building construction empire in Arlington, Virginia were indicted for violation of the Travel Act (18 USC Section 1952) and conspiracy for paying more than $300,000. to the Vice President of the Royal National Bank in New York City for the purpose of influencing his conduct relative to the awarding and administration of more than $100 million in construction loans. The loans were made by the Bank to corporations owned or controlled by the three Pomponio brothers, Louis, Jr., Peter and Paul and their attorney, Charles J. Piluso. The payments were made by personal checks of Mr. Piluso, and corporate checks from some of the same corporations which received the construction loans. The checks were given to the Bank official in his office in New York in person by Louis Pomponio, Jr. and Mr. Piluso and were drawn on Virginia banks. The payments also included a Lincoln Continental automobile which was delivered to the New York apartment of the Bank official by one of the Pomponio organization's chauffers. The unlawful activity alleged was in violation of Title 18, United States Code, Section 215 and the New York commercial bribery statute, both misdemeanors. Mr. Piluso was tried first before one district judge and a jury, found guilty and sentenced to two years in prison, from which he appealed. Louis Pomponio, Jr., was tried before another district judge and jury and found guilty. Although both defendants were convicted of two Travel Act Counts and a conspiracy to violate Title 18, United States Code, Section 1952, the conviction of Louis J. Pomponio was arrested on the defendant's motion, with the trial court holding that Section 215 and the New York commercial bribery provision did not come within the unlawful activity definition of Section 1952. The government appealed the arrest of judgement, which was consolidated with Mr. Piluso's appeal from his conviction. On appeal, as in their pretrial motions,

the defendants contended that neither commercial bribery nor the receipt pf commissions or gifts by a bank official constituted "unlawful activity" witnin the purview of Section 1952. The basis for this contention was that the word "bribery" used in the Travel Act was intended to mean bribery in the classic sense of the common law, which was limited to the corruption of public officials in the administration of the public trust and did not apply to similar conduct by private persons.

The Court of Appeals recognized that although bribery was originally so circumscribed, it pointed out that the states and the Federal government have by statute extended the generic concept of bribery into areas of private conduct. The Fourth Circuit ruled that such private bribery appropriately falls within the ambit of the Travel Act, reasoning that"'there can be no question but than any crime of bribery involves moral turpitude' [United States v. Esperdy, 285 F. 2d 341, 342 (2nd Cir. 1961)] . . . and we discern no reason why the Congress in using the term "bribery" intended that it be limited to the corruption of public officials." The Court of Appeals found the situation presented here regarding the meaning of bribery in the Travel Act controlled by the Supreme Court decision in United States v. Nardello, 393 U.S. 286, 292-293 (1969), which held that the companion term "extortion" as used in the Travel Act was used in its generic sense rather than the common-law meaning of extortion and was applicable to private persons.

Petitions for Rehearing and Suggestions for Rehearing En Banc were denied by the Court of Appeals and Petitions for Certiorari to the Supreme Court have been filed.

This is the fist Court of Appeals decision on the use of commercial bribery as a predicate for a Travel Act prosecution. Any questions on the use of such commercial bribery statutes should be directed to Assistant United States Attorneys Frank W. Dunham, Jr., or Thomas K. Moore in the Alexandria Division of the Eastern District of Virginia (Phone: 703-836-662J or -0880).

Staff: United States Attorney David H. Hopkins, Assistant United States Attorneys Frank W. Dunham, Jr., and Thomas K. Moore, Eastern District of Virginia

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

JURY FINDS LABEL COMPANY GUILTY OF FIXING THE PRICE OF PAPER LABELS IN SHERMAN ACT CASE.

United States v. Litton Business Systems, Inc., (Cr. 74-367-CBR; January 20, 1975; DJ 60-17-4)

On January 20, 1975, jury trial of the captioned case commenced in the United States District Court for the Northern District of California.

The Information in this case alleged a combination and conspiracy among the defendant and co-conspirators to fix the price of paper labels. The co-conspirators included eight other label manufacturers and eight of their officers who had been indicted by a federal grand jury. These corporations and individuals pleaded nolo contendere and, with the exception of Michigan Lithographing Co., had been sentenced by Judge Charles B. Renfrew prior to the commencement of this trial. See United States v. H. S. Crocker Co., Inc., et al., Cr. No. 74-182-CBR (N.D. Cal.).

Jury selection took one half day, with the defendant having 12 peremptory challenges and the Government having 8. Twelve regular and four alternate jurors were selected.

The Government's principal witness was Frank Ostrofe who had held the position of national label sales manager for the H. S. Crocker Co. Mr. Ostrofe had maintained detailed notes (numbering in excess of 300) describing his price fixing activities with his competitors, including the defendant. Many of these notes were introduced into evidence over the objections of the defendant. Mr. Ostrofe testified for a total of 5 days, 2 1/2 on direct examination and 2 1/2 on cross examination.

The defense conducted a vigorous cross examination of

Mr. Ostrofe attacking both his motives in maintaining these notes and his veracity.

The remaining evidence introduced by the Government consisted primarily of the testimony of other co-conspirators, including several of those who had pleaded nolo contendere, and documents obtained from label customers which were used to corroborate Mr. Ostrofe's testimony and notes. The testimony of these other witnesses clearly established the existence of the overall conspiracy. Only one of the other co-conspirators, however, was able to identify the defendant as being a member of the conspiracy. Therefore, we also called two employees of the defendant, who previously testified before the grand jury. These witnesses were very evasive in their responses and consequently we read their grand jury testimony to them in order to "refresh" their recollections and to impeach their present testimony. The grand jury testimony of these witnesses established that the defendant sought price information from its competitors prior to bidding in order to avoid price cutting and thereby prevent any price retaliation by its competitors.

The defense called only 4 witnesses for rather limited purposes and instead relied on attacking the credibility of the Government's witnesses in their closing argument.

After 5 hours of final argument and 1 1/2 hours of jury instructions, the jury began deliberations at 5:00 PM on February 3rd and continued until 7:00 PM when they retired for the evening. They resumed deliberating at 8:30 AM the following morning. At 10:00 AM, pursuant to the jury's request, the testimony of the defendant's general manager who had been called by the Government was re-read to the jury in open court. Twenty minutes after hearing this testimony again, the jury returned a verdict of guilty.

Judge Renfrew has set March 19th for sentencing the defendant as well as sentencing Michigan Lithographing Co., the last defendant to plead nolo contendere.

Staff: J.E. Waters, Edward P. Henneberry and Michael B. Green, Don Overall and John Young

* * *

DISTRICT COURT

SHERMAN ACT

COURT DENIES MOTION TO DISMISS COMPLAINT ON GROUNDS OF MOOTNESS IN SHERMAN ACT CASE.

United States v. Oregon State Bar, (Civ. 74-362; February 20, 1975; DJ 60-423-27)

On February 20, 1975, Judge Morell E. Sharp, from the Western District of Washington, sitting by designation of the Ninth Circuit in this case, denied a motion to dismiss the Government's complaint based upon mootness. The denial was without prejudice and with permission for the defendant to renew its motion after the Supreme Court's decision in Goldfarb is handed down. (Goldfarb v. Virginia State Bar and Fairfax County Bar Ass'n, 355 F. Supp. 491 (E.D. Va. 1973), aff'd in part and rev'd in part, 497 F. 2d 1 (4th Cir. 1974), cert. granted, 42 L. Ed. 2d 178.) Judge Sharp also stayed all further discovery in the case pending the Supreme Court's decision in Goldfarb. The Court's decision followed both written briefs and oral argument by counsel for the parties.

The alleged mootness arose from the action which defendant's Board of Governors took on December 13, 1974 to withdraw and cancel its current suggested fee schedule, notify all of defendant's members of said withdrawal and cancellation, and in addition advise these members that "the Oregon State Bar does not sponsor or recommend the use of any fee schedule." Citing Steffel v. Thompson, 39 L. Ed. 2d 505 (1974), the defendant contended that an "actual controversy" no longer existed; citing DeFunis v. Odegard, 40 L. Ed. 2d 164 (1974), the defendant additionally contended that the District Court in Oregon could no longer affect the rights of the litigants. The Government simply distinguished these cases on their facts and asserted that neither of defendant's contentions were applicable.

The defendant also argued that it had been unfairly singled out as the guinea pig for the Government's enforce-

ment program against bar associations generally and that the Government's insistence upon a court-ordered judgment in the case only added "insult to injury." The Government countered this argument by reviewing the time frame during which its CID was issued (June 25, 1973), the complaint had been filed (May 9, 1974), and defendant's recision had taken place (December 13, 1974). The Government also argued (1) that dismissal of the case at this juncture would accord the defendant a standard of relief not granted to any other defendant under comparable circumstances, (2) that the composition of defendant's Board of Governors changed every year so that the decision taken on December 13, 1974 could be abrogated at any time, and (3) that the defendant had never agreed with the Government's view that the publication and distribution of a suggested fee schedule was a per se violation of Section 1 of the Sherman Act. In connection with the latter point, the Government pointed out that in its brief the defendant had erroneously cited a recent Ninth Circuit case, Kline v. Coldwell, Banker & Co., CCH Trade Regulation and Reporter ¶75,436, for the proposition that the printing and circulation of an advisory fee schedule among the members of an association does not violate the Sherman Act. In fact, the Ninth Circuit in Kline reaffirmed its previous holding in other cases that such activity does constitute a per se violation by the association but that a higher standard of proof is required to obtain damages against the individual members of that association. The Government also offered an affidavit of its counsel which showed that defendant's counsel and some of defendant's members had been active in attempting to persuade a local probate judge in Oregon to adopt a new fee schedule.

Although at first symapathetic to defendant's arguments, Judge Sharp took a recess during the oral argument to re-read the Kline case and the affidavit of Government's counsel. After the recess, in anouncing the terms of his decision, Judge Sharp warned the defendant through defendant's counsel that he would regard any effort to promulgate new fee schedules by private attorneys (whether subsequently adopted by local probate judges or not) as violative of the Court's decision and order denying defendant's previous motion for summary judgment.

Staff: James E. Figenshaw and David W. Raub

* * *

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Wallace H. Johnson

COURTS OF APPEALS

MARINE RESOURCES

SECRETARY OF THE INTERIOR HAS POWER AKIN TO POLICE POWER TO TEMPORARILY SUSPEND LESSEE'S OPERATIONS IN INTERESTS OF CONSERVATION, BUT HE MAY NOT REVOKE LEASE RIGHTS AS A TAKING; CASE SEEKING TO COMPEL SECRETARY TO PERMIT INSTALLATION OF DRILLING PLATFORM REMANDED FOR ADDITIONAL EVIDENCE TO DETERMINE WHETHER SECRETARY'S WITHDRAWAL OF PRIOR PERMISSION TO INSTALL DRILLING PLATFORM WAS LAWFUL.

Union Oil Co. v. Morton (C.A. 9, No. 72-1692, Feb. 24, 1975; D.J. 90-1-18-948).

In February 1968, four oil companies leased a tract in Santa Barbara Channel for which they paid over $61 million plus royalties for the right to drill for oil and gas. Union Oil then erected two drilling platforms, A and B, and in September 1968, requested permission to erect platform C on the tract. Permission was granted, but on January 28, 1969, before Union could erect platform C, a well on platform A blew out causing the disastrous Santa Barbara oil spill. Subsequently, the Secretary of the Interior, stating that installation of platform C would be inconsistent with protection of the environment of Santa Barbara Channel, withdrew permission. Union filed suit to enjoin the Secretary from interfering with its lease rights and to direct him to permit installation of platform C. In November 1972, just before trial, the Secretary issued a statement of reasons specifying the environmental concerns leading to his decision to erect platform C. After trial, the district court affirmed the Secretary's order and dismissed Union's complaint.

On appeal, the Ninth Circuit reviewed a lessee's lease rights and the Secretary's authority over lease operations as follows: (1) it rejected Union's claim that any regulation which denied it the right to erect platform C amounted to a breach of the lease provision giving it the right to erect all platforms "necessary or convenient to full enjoyment" of the rights granted by the lease. Congress, it explained, had authorized the Secretary to amend existing

rules and regulations whenever he deems it necessary for the conservation of natural resources; (2) it reaffirmed its holding in Gulf Oil v. Morton, 493 F.2d 141, that NEPA and Section 5(a)(1) of the OCS Act direct the Secretary to conserve all resources on the shelf, not merely the mineral resources; (3) Section 5(a)(1) of the OCS Act and 30 C.F.R. sec. 250.12 authorize the Secretary to temporarily suspend lease operations for conservation purposes, but not to revoke lease rights. In authorizing leases of publicly owned resources, Congress has granted the Secretary regulatory power akin to police power, but it has not by implication conferred upon him powers to condemnation; (4) an open-ended suspension of Union's right to install a drilling platform would amount to a pro tanto cancellation of its lease; and (5) the court then explored the Secretary's six stated reasons for denying Union's application, concluding that four of them amounted to a weighing of conflicting interests he should have undertaken before issuing the lease. These reasons could not support a temporary taking. Two reasons given, however, might justify a suspension, but because it considered the vague assertions of potential risks advanced in the Secretary's 1972 statement were totally inadequate to enable the court to decide whether his action was justified, or whether he had deprived Union of its property rights, the court vacated the district court's order and remanded to enable it to receive additional evidence, including an amended justification by the Secretary for his suspension. The district court could then decide whether these justifications were appropriate under the regulations, and then determine whether, under the arbitrary and capricious test of the APA, the Secretary was taking Union's property rights. If the Secretary's action does not constitute a taking, the court of appeals wrote, Union's complaint should be dismissed; otherwise, his order should be set aside as beyond his statutory powers. Meanwhile, the court declined to enjoin the Secretary from interfering with the oil companies' operations.

Staff: Jacques B. Gelin, Myles E. Flint and Andrew F. Walch (Land and Natural Resources Division) and Henry J. Bourguignon (formerly of Land and Natural Resources Division).

ADMINISTRATIVE LAW-CIVIL PROCEDURE

SCOPE OF REVIEW OF DENIAL OF FOREST SERVICE PERMIT; EFFECT OF ALLEGATIONS IN COMPLAINT.

Ness Investment Corp. v. U.S. Dept. of Agriculture, et al. (C.A. 9, No. 73-2415, Feb. 21, 1975; D.J. 90-1-1-2286).

The court held that whether or not parties filled the qualifications for a Forest Service permit was a matter broadly left to agency discretion and not a matter for court review. The court did find law to apply on the issue of rights of successors to the lands occupied by their predecessors. However, on that point, the court found no bona fide claim upon which relief could be granted, applying Schilling v. Rogers, 363 U.S. 666 (1960), and looking behind the allegations of the complaint where they were obviously meritless in light of evidence in the record. This is an important exception to the proposition that, in the absence of a trial, the allegations in the complaint are assumed true and correct.

Staff: Carl Strass (Land and Natural Resources Division).

ENVIRONMENT

NEPA; HIGHWAYS; LACHES; PRELIMINARY INJUNCTION.

Royal Steubing v. Claude S. Brinegar (C.A. 2, Nos. 278, 336, Feb. 13, 1975; D.J. 90-1-4-828).

The court of appeals affirmed a preliminary injunction restraining further construction of a bridge across Lake Chautauqua in Western New York, pending an EIS. The construction was at an early stage. Laches, under the circumstances, the court said, should not bar preliminary relief, although the complaint had been filed 15 months after completion of demolition of buildings on the bridge approaches. The court emphasized the public interest

represented, the purposes of NEPA, and the early notice that an EIS might be necessary. DOT was designated as the agency to prepare the EIS.

Staff: Assistant United States Attorney S. Donald O'Connor (N.D. N.Y.), Eva R. Datz (Land and Natural Resources Division).