ESTOPPEL: INACTION BY JUSTICE DEPARTMENT HELD A BAR TO SUBSEQUENT CRIMINAL ANTITRUST ACTION

ALTHOUGH historically the Government could not be estopped by the acts of its agents,[1] increased Government activity has exposed the inequity of this rule where persons act in reliance on official advice. Hence courts have recently allowed the rule to be relaxed in civil and administrative proceedings.[2] In *United States v. Associated Gen. Contractors of America*,[3] however, previous Government inaction was held to be a basis for estopping the Justice Department from prosecuting a criminal action for the violation of an antitrust statute.

A trade association of building contractors was indicted in *Associated Gen. Contractors* for an alleged violation of the Sherman Antitrust Act.[4] Ten or eleven years earlier the Government had investigated the Association's bidding practices, but no indictment, warning, or statement had been issued.[5] On the basis of these facts, the federal district court for the Eastern District of Louisiana on

---

[1] See Walker-Hill Co. v. United States, 162 F.2d 259, 263 (7th Cir.), *cert. denied*, 332 U.S. 771 (1947); United States v. Globe Indem. Co., 94 F.2d 576, 578 (2d Cir. 1938); Brown v. United States, 102 F. Supp. 132, 133 (S.D. Mo. 1952). See generally DAVIS, ADMINISTRATIVE LAW § 17.01 (1959); Berger, *Estoppel Against The Government*, 21 U. CHI. L. REV. 680 (1954); Pillsbury, *Estoppel Against The Government*, 13 BUS. LAW. 508 (1958); Comment, 44 CALIF. L. REV. 340 (1956); 34 VA. L. REV. 477 (1948).

[2] See, *e.g.*, Smale & Robinson, Inc. v. United States, 123 F. Supp. 457, 465 (S.D. Cal. 1954); DAVIS, *op. cit. supra* note 1, at § 17.03; Pillsbury, *supra* note 1, at 514.

[3] 238 F. Supp. 273 (E.D. La. 1964).

[4] "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ." Sherman Act § 1, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

The Government alleged that the Association's members had "combined to advocate, use and implement a 'single bid' system" when submitting competitive bids on construction projects. 238 F. Supp. 273, 274 (E.D. La. 1964). The Association's "Bidding Rule C" provided that the members should boycott and refuse to submit competitive bids on construction projects where separate bids from subcontractors were accepted. All items necessary to complete the job had to be included in bids submitted by Association Members. *Id.* at 276 & n.5. The Government charged that this bidding rule would restrain general and subcontractors from freely competing for contracts, thereby depriving owners of building projects of the benefit of free competition. *Id.* at 276 & n.6.

[5] Evidence of the investigation was provided in a letter written by the defendant's counsel to an attorney of the Department of Justice and introduced, without qualification, by the Government when challenging the timeliness of the defendant's motion as to the legality of the grand jury. *Id.* at 279.

its own motion applied the doctrine of equitable estoppel against the Government and dismissed the indictment. While recognizing that estoppel generally is inapplicable against the Government in criminal cases, the court relied on the exception that the Government will be estopped by "some sound public policy."[6] According to the court, the Government's "acquiescence" in the Association's bidding practice had lured and induced the Association into the present violation and, if equitable estoppel were not invoked, the Government's conduct "could impair confidence on the part of our citizens in their public institutions."[7]

Federal courts have permitted estoppel as a defense against the Government if an agent thereof has been vested with authority to bind the Government and acted within the scope of his authority.[8] As an agent does not have authority to bind the Government contrary to law, it has been generally held that estoppel is not a defense in a criminal prosecution for the violation of a statute.[9] In rare

[6] 238 F. Supp. at 280. The court cited United States ex rel. Demarois v. Farrell, 87 F.2d 957 (8th Cir.), *cert. denied*, 302 U.S. 683 (1937), for the proposition that the Government may be estopped to enforce its criminal laws only by "some sound public policy, such as when its officers have induced or lured the defendant into the commission of a criminal act." *Id.* at 962 (dictum). The words lure and induce would appear to refer to the doctrine of entrapment, and, indeed, the *Farrell* case cites as authority Sorrells v. United States, 287 U.S. 435 (1932), a basic entrapment case. Entrapment applies only when officers of the law lure one into committing a crime he would not otherwise have committed. See PERKINS, CRIMINAL LAW 921-26 (1957). When the criminal design does not originate with the accused but with the government officers, the Government is estopped to prosecute. Newman v. United States, 299 Fed. 128, 131 (4th Cir. 1924). The better view in *Associated Gen. Contractors* would seem to be that the criminal design could not have originated with the Government merely because they investigated a preexisting bidding practice.

[7] 238 F. Supp. at 280. It has been suggested that confidence in the Government is more important than a flexible administration and the deterrent to the commission of public fraud provided by immunity from estoppel. See Berger, *supra* note 1, at 684, 707. Moreover, it is argned that in reality, estoppel can be applied without impairing governmental efficiency. See Comment, 44 CALIF. L. REV. 340, 341, 351 (1956).

[8] Smale & Robinson, Inc. v. United States, 123 F. Supp. 457, 464, 465 (S.D. Cal. 1954); see Federal Crop Ins. v. Merrill, 332 U.S. 380 (1947); In the Matter of Higginbotham, 221 F. Supp. 839, 840 (W.D. Pa. 1963); Berger, *supra* note 1, at 687-88.

The distinction is often made between acts of the Government in its proprietary capacity and those in its sovereign capacity, estoppel applying in the former instance but not in the latter. See cases cited in Berger, *supra* note 1, at 681 n.7. However, if absence of agency authority is the basis of immunity from estoppel, the form in which the Government functions should be immaterial. See Federal Crop Ins. v. Merrill, *supra* at 384; Berger, *supra* note 1, at 686.

[9] McDonald v. United States, 89 F.2d 128, 138 (8th Cir.), *cert. denied*, 301 U.S. 697 (1937); United States v. Bridges, 86 F. Supp. 922, 929 (N.D. Cal. 1949); Sigmon v. Commonwealth, 207 Ky. 786, 789, 270 S.W. 40, 42 (1925). See Smale & Robinson, Inc. v. United States, *supra* note 8, at 464; United States v. Shubert, 14 F.R.D. 471, 474

instances, however, estoppel has been invoked against state and federal governments where the facts indicate reliance on an express opinion or statement of advice sought by the defendants.[10] Nevertheless, the *Associated Gen. Contractors* case is the first case in which estoppel in a criminal action has been predicated on Government *inaction*. As such, it appears contrary to a decision of the Supreme Court that the Government cannot be estopped from instituting criminal antitrust proceedings even though government agents aware of the facts have remained silent and taken no action.[11] On the basis of this analysis alone, it would appear that the court's

(S.D.N.Y. 1953); Western Surgical Supply Co. v. Affleck, 110 Cal. App. 2d 388, 392, 242 P.2d 929, 932 (Dist. Ct. App. 1952); Camenetti v. State Mut. Life Ins. Co., 52 Cal. App. 2d 321, 326, 126 P.2d 165, 168 (Dist. Ct. App. 1942).

Even if the person most directly injured consented to the offense, its character as a public wrong cannot be changed, and the public cannot be prevented from obtaining the redress to which it is entitled. See State v. Burnette, 242 N.C. 164, 170, 87 S.E.2d 191, 195 (1955); Davis v. State, 70 Tex. Crim. 524, 531, 258 S.W. 288, 290 (1913); Martin v. Commonwealth, 184 Va. 1009, 1018-19, 37 S.E.2d 43, 47 (1946).

[10] See Cox v. Louisiana, 379 U.S. 559 (1965) (conviction under antipicketing statute precluded by reliance on express advice of local police official); People v. Ferguson, 134 Cal. App. 41, 24 P.2d 965 (Dist. Ct. App. 1933) (conviction for violation of state securities law reversed because of reliance on advice of Commissioner of Corporations); Arnold Constable Corp., 55 F.T.C. 577 (1958). In Western Surgical Supply Co. v. Affleck, 110 Cal. App. 2d 388, 242 P.2d 929 (Dist. Ct. App. 1952) the California court, although not expressly overruling *Ferguson*, rejected the notion that penal laws could be waived by estoppel.

[11] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225-28 (1940). Charged with price fixing in violation of § 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958), the defendant offered evidence to prove that the Petroleum Administrative Board knew of and acquiesced in their buying programs. The Court held this evidence would provide no immunity to the defendant. Perhaps this case can be distinguished from the instant case, in that during the beginning of the *Socony conspiracy* §§ 3 (a) and 5 of the National Industrial Recovery Act exempted any code or agreement approved by the President from prosecution for violation of the antitrust laws. 310 U.S. at 225-27, 228 n.60. The Court noted that the defendants could not plead the Government's acquiescence as a bar to prosecution because Congress had specified the only method of securing immunity which would suffice. However, under § 2 (c), the NIRA grant of immunity was terminated before the conspiracy, and the Court did not consider the posibility that this would revive estoppel.

The *Associated Gen. Contractors* court did not consider *Socony* until its opinion on the Government's motion for reconsideration, 238 F. Supp. 273, 283 (E.D. La. 1965). In distinguishing this case, the court stated that the presence of a special immunity provision suspending application of the antitrust laws would have alerted the defendant that his conduct was forbidden in the absence of obtaining formal immunity, whereas in the present case the defendants could not be expected to know of their violation. This reasoning seems erroneous in that it assumes the *Socony* defendant could have been expected to determine that his activity was in violation of the antitrust laws and would require the special immunity. See United States v. Socony-Vacuum Oil Co., *supra* at 227; *cf.* United States v. E.I. DuPont DeNemours & Co., 353 U.S. 586, 590 (1957); Baltimore & Ohio Ry. v. Jackson, 353 U.S. 325, 330-31 (1957); United States v. Borden Co., 308 U.S. 188, 202 (1939).

application of the law to the facts of this case was technically erroneous.

From a policy point of view, some might urge that the decision was justifiable because criminal sanctions are inappropriate measures for antitrust violations in that the uncertainty regarding the law's proscriptions should limit antitrust enforcement to constructive measures which would "alter the business situation rather than punish unwitting violators."[12] However, the criminal sanctions of the Sherman Act have withstood constitutional challenges based on vagueness,[13] and it is believed that the Justice Department institutes criminal actions only where the law is clear, well settled, and the facts reveal a flagrant offense.[14] Moreover, in the *Associated Gen. Contractors* case the Justice Department alleged that the bid-rigging practices of the Association were tantamount to a group boycott,[15] which has been clearly delineated as a per se violation of the act.[16]

Thus, the court's decision in *Associated Gen. Contractors* rests primarily on the court's determination that the defendants had justifiably relied to their detriment on the previous inaction of the Government. The opinion failed to consider, however, many reasons why the Government might be unwilling or unable to prosecute an antitrust case. Inaction at an earlier stage may have been necessitated by evidentiary problems, or the extent of commerce affected by the violation may not have been sufficient to merit protracted litigation.[17] Moreover, it is physically impossible for the Justice

[12] See SCHWARTZ, FREE ENTERPRISE AND ECONOMIC ORGANIZATION 21 (2d ed. 1959). Since the Sherman Act is written in broad terms and modern market patterns are complex, it may be difficult for a businessman to predict in advance whether a projected practice will violate the act. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 349 (1955).

[13] See Nash v. United States, 229 U.S. 373, 376-77 (1913); United States v. New Departure Mfg. Co., 204 Fed. 107, 114 (W.D.N.Y. 1913); United States v. Winslow, 195 Fed. 578, 583-84 (D. Mass. 1912), *aff'd*, 227 U.S. 202 (1913); United States v. American Naval Stores Co., 186 Fed. 592, 593 (S.D. Ga. 1909).

[14] See KINTNER, AN ANTITRUST PRIMER 21 (1964); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 351 (1955).

[15] See 238 F. Supp. at 276.

[16] See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211, 212 (1959); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 350 (1955); SCHWARTZ, *op. cit. supra* note 12, at 20; Spivack, *Antitrust Enforcement In The United States: A Primer*, 37 CONN. B.J. 375, 381 (1963).

[17] In recognition of these problems, the Department of Justice has no authority to give advisory opinions. One objection raised to proposals that this policy be changed is that any such advisory opinion would be of little value. It would have to be limited to facts known at the time and would be "subject to revision in the light of subsequent developments." ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 367 (1955).

Department to police all potential abuses, and the Department often has to rely upon the threat of criminal prosecution as a deterrent to future violations.[18] Assuming that the defendants here were engaged in a group boycott, decisions of the Supreme Court in 1958 and 1959 should have been sufficient to notify them that their conduct was suspect.[19] In fact, the civil complaint in the instant case for an injunction alleged that the illegal activity dated from at least 1947, whereas the criminal indictment alleged that the illegal activity commenced in 1958.[20]

Reliance on Government inaction or silence, therefore, would seem too equivocal in antitrust cases to sustain a finding of equitable estoppel. The court's assertion that prosecution might impair public confidence in government institutions seems to be more than balanced by the public interest in enforcement of the antitrust laws.[21]

---

[18] See Spivack, *supra* note 16, at 380.

[19] See Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211, 212 (1959); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); *cf.* United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948) (dictum).

[20] See Memorandum In Support of Government's Motion For Reconsideration of Decision, pp. 3-4; Memorandum of Defendant's In Opposition To Government's Motion For Reconsideration, pp. 5-6. The latter date would have been five or six years after the alleged investigation.

[21] Estoppel would seem particularly inapplicable where the Government seeks to execute a policy affected with the public interest. See DAVIS, ADMINISTRATIVE LAW § 17.04 (1959). In suggesting the adoption of a statute providing for estoppel against the Government, one author has stated that there are some laws which should not be affected. He felt the antitrust laws in particular "have a history which militates against this kind of reform." See Newman, *Should Official Advice Be Reliable?—Proposals As To Estoppel And Related Doctrines In Administrative Law*, 53 COLUM. L. REV. 374, 387 & n.70 (1953).

It has also been said that public policy would prohibit the enforcement of a contract which violates the antitrust laws and that estoppel may not be invoked to thwart those statutes. Standardbred Owners Ass'n v. Yonkers Raceway, Inc., 35 Misc. 2d 1081, 1083, 232 N.Y.S.2d 346, 350 (Sup. Ct. 1962).