COMMENTS

NON-DISCLOSURE OF COMPLAINANTS' NAMES IN SCHOOL DESEGREGATION CASES: TITLE IV OF THE CIVIL RIGHTS ACT OF 1964

United States v. School Dist. No. 1, 40, F.R.D. 391 (D.S.C. 1966)

Title IV of the 1964 Civil Rights Act[1] permits the Attorney General to bring desegregation suits against local school boards "in the name of the United States" provided, among other requirements,[2] he believes the aggrieved persons cannot "initiate and maintain appropriate legal proceedings."[3] Satisfied that the various requirements were met, the Attorney General commenced this action against the Lexington County School Board. The Board, stating it could not prepare its defense, posed numerous interrogatories,[4] some of which the government refused to answer. The contested questions sought the name or names of the complainants and the nature of the complaint.[5] The government based its refusal to answer on subsection (b) of Title IV, which declares that a person is unable to initiate and maintain appropriate proceedings ". . . whenever he [the Attorney General] is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property."[6] This provision, the government argued, was intended to protect the complainant by concealment, allowing suit to be brought in the name of the United States.

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1. 42 U.S.C. § 2000c—6 (1964).

2. The Act also requires that the Attorney General: 1) receive a written complaint signed by parents stating that their children are being denied the equal protection of the laws, 2) believe the complaint is meritorious, 3) believe the action will "materially further the orderly achievement of desegregation of public education," 4) notify the school board of the complaint, 5) certify that he believes the school board has had a "reasonable time to adjust the conditions." 42 U.S.C. § 2000c—6(a) (1964).

3. 42 U.S.C. § 2000c—6(a) (1964).

4. *See* FED. R. CIV. P. 33.

5. A third question challenged the basis upon which the Attorney General determined the complainants' inability to initiate and maintain a suit. In sustaining the government's refusal to answer, the court followed precedent. *See* United States v. Junction City School Dist. No. 75, 253 F. Supp. 766 (W.D. Ark. 1966). It would have been difficult to draw a contrary conclusion because the House Judiciary Committee's Report states: "It is not intended that the determination on which the certification was based should be reviewable." 1964 (U.S.) CODE CONG. & AD. NEWS 2355.

6. 42 U.S.C. § 2000c—6(b) (1964).

The court ordered the government to answer.[7] Finding no reference to reprisals in desegregation cases to date, the court reasoned that there was no basis for the concealment provision of the statute. Earlier cases involving non-disclosure were not directly in point. Moreover, the purpose and scope of pre-trial discovery demanded that this information be made available to the defendant school board.

The court's decision raises three problems: congressional intent, troublesome langauge in earlier cases, and the scope of discovery. In his address to the Senate introducing the 1964 Civil Rights bill, the then Senator Hubert H. Humphrey stated:

> The bill requires the Attorney General to state in his complaint that in his judgment the persons who complained are unable to initiate or maintain appropriate legal proceedings. These statements by the Attorney General will not be subject to challenge either by the defendants or by the court. *Under no circumstances will the Attorney General be required to reveal the names of the particular complainants.*[8]

This unequivocal language is the sole statement about the non-disclosure provision. Congress accepted it without further debate. One federal court, after considering this provision, said:

> Section 407 of the Civil Rights Act of 1964 clearly expresses the legislative intent that the Attorney General be vested with exclusive and final determination of the sufficiency of the complaint. Thus, the Attorney General need not detail the facts behind the certificate nor disclose the names or identity of the person or persons complaining to him. The legislative history of the Act leaves no doubt that such was the contemplation of Congress.[9]

But in *School Dist. No. 1,* the court questioned the need for concealment. Although it found no reprisals in desegragation cases, the court went on to say that even if there were reprisals, the "United States court is now available for the protection of the complainants."[10] What this precisely means remains obscure. But the legislative intent to protect complainants from disclosure is apparent. One need hardly be reminded of the violence in connection with civil rights activities in Little Rock, Birmingham, Selma, Montgomery, Grenada, Bogalusa. Conceding for the sake of argument, however, that there have been no reprisals so far, and adequate "protection"

7. Such an order is authorized by FED. R. CIV. P. 37.

8. United States v. School Dist. No. 1, 40 F.R.D. 391, 393 (D.S.C. 1966), citing 110 CONG. REC. 6543 (1964) (emphasis added).

9. United States v. Junction City School Dist. No. 75, 253 F. Supp. 766, 768 (W.D. Ark. 1966).

10. United States v. School Dist. No. 1, 40 F.R.D. 391, 394 (D.S.C. 1966).

may be available, the court still is second-guessing Congress and acting as a super-legislature.

Two earlier cases, *Natchez v. Special Separate School Dist. No. 1120*[11] and *United States v. Junction City School Dist. No. 75*,[12] both had language suggesting that the identity of the complainants and the nature of the complaint were immaterial to the "issues"[13] or the "action"[14] and need not be disclosed. But these cases were distinguished in the instant case on the ground that they did not directly involve the issue of disclosure, so that the conflict between liberal discovery and its implicit restriction in Title IV was not considered in them. If the words "issues" or "action" referred only to the issues presented through that stage of the trial, then the distinction drawn in *School Dist. No. 1* would be meaningful. The identity of the complainants would not be necessary when deciding a motion to dismiss—the motion dealt with in both the *Natchez* and *Junction City* cases. However, those courts might have been referring to to the ultimate issues to be presented in the cases, meaning that identities would never have to be revealed.

In refusing to give effect to the federal act, the court in *School Dist. No. 1* considered the scope of discovery but stopped its inquiry without fully exploring exceptions to discovery. Unquestionably the purpose of the Federal Rules 26-37 is full disclosure of any *relevant* information other than privileged information or work product.[15] The defendant's question seeking the identity of the signers and the nature of the complaint could not be termed irrelevant. It then must be decided whether the information fits one of the exceptions, privilege or work product. The latter simply is not applicable here. But there are numerous forms of privilege, one of which, informer's privilege, should be carefully considered. This privilege is well

11. Unpublished report cited and quoted in United States v. School Dist. No. 1, 40 F.R.D. 391, 394 n.6 (D.S.C. 1966).

12. 253 F. Supp. 766 (W.D. Ark. 1966).

13. Unpublished report cited and quoted in United States v. School Dist. No. 1, 40 F.R.D. 391, 394 n.6 (D.S.C. 1966).

14. United States v. Junction City School Dist. No. 75, 253 F. Supp. 766, 768 (W.D. Ark. 1966).

15. FED. R. CIV. P. 26-37; 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 641 (Wright ed. 1961); 4 J. MOORE FEDERAL PRACTICE ¶ 26.02[1] (1963); Wright, *Discovery*, 35 F.R.D. 39 (1963). As Justice Douglas has stated, "Modern instruments of discovery serve a useful purpose . . . . They together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958).

recognized in criminal cases,[16] and in civil cases as well.[17] It may be generally stated as "the government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law."[18]

The court in *School Dist. No. 1* stated: "No commentary has been *called to the attention of the court* where the competing demands of the federal rules have been considered, balanced against any need for secrecy, and denied."[19] This must be true. The fact is, however, that such cases do exist.

Arguably, the "informer" in desegregation cases is substantially like the informer in an action brought under the Fair Labor Standards Act of 1938.[20] In these cases, after an employee complains to the Department of Labor about a violation of the Act, the Secretary is authorized to bring suit in his own name.[21] After suits have commenced, employers, as part of the discovery process, have sought the names of the employees who complained. The Secretary has successfully raised the privilege to protect the informers' names.[22] In *Wirtz v. Continental Finance & Loan Co.*,[23] the court reasoned that employees are "particularly susceptible to the fear of retaliation," so that to obtain the information needed to insure compliance with the Act, the government must assure informers that their names would not be divulged. Summarizing the factors to be considered concerning informer's privilege, the court stated:

> This privilege may be invoked where a balancing of conflicting policy considerations shows that the public interest in protecting the flow of information outweighs the individual's rights to prepare his defense. If this type of weighing of conveniences is warranted in an action where the defendant may be subject to criminal penalties, it goes without saying that it is appropriate where only civil remedies are sought.[24]

16. Roviaro v. United States, 353 U.S. 53 (1957); People v. Durazo, 52 Cal. 2d 354, 340 P.2d 594 (1959). For a full review of the cases, see Annot., 76 A.L.R.2d 262 (1961).

17. 2A W. BARRON & A. HOLTZOFF, *supra* note 15, § 651.1; 4 J. MOORE, *supra* note 15, ¶ 26.25 [6.—2].

18. 2A W. BARRON & A. HOLTZOFF, *supra* note 15, § 651.1.

19. United States v. School Dist. No. 1, 40 F.R.D. 391, 395 (D.S.C. 1966) (emphasis added).

20. §§ 1-19, ch. 676, 52 Stat. 1060-69, *as amended*, 29 U.S.C. §§ 201-19 (1964).

21. 29 U.S.C. § 217 (1964).

22. Wirtz v. Continental Fin. & Loan Co., 326 F.2d 561 (5th Cir. 1964); Wirtz v. B.A.C. Steel Prod., Inc., 312 F.2d 14 (4th Cir. 1962); Mitchell v. Roma, 265 F.2d 633 (3d Cir. 1959); Mitchell v. Neylon, 27 F.R.D. 438 (D. Neb. 1960). *Contra*, Fleming v. Bernardi, 1 F.R.D. 624 (N.D. Ohio 1941).

23. 326 F.2d 561, 563 (5th Cir. 1964).

24. *Id.*

This balancing principle is not confined to Fair Labor Standards cases. When defendants have sought to discover the names of persons who complained to the government about civil anti-trust violations, courts have sustained the government's refusal to answer interrogatories on grounds of privilege.[25] As one court stated: "The principle involved was the protection from disclosure of the identity of informers to the Government of violations of statutes designed to prevent public wrong. . . . In an extraordinary case, perhaps, this principle may have to yield to the requirements of pretrial discovery or compulsory disclosure . . . but this is hardly such a case."[26] Because the court in *School Dist. No. 1* does not discuss the facts of the case or consider the possibility of privilege, one cannot say whether *School Dist. No. 1* is such an extraordinary case.

Privilege, an exception to pre-trial discovery, has two exceptions itself. First, if the names of the complainants are already known or have been revealed through disclosure of other facts, there is no reason for granting the privilege.[27] Second, if the names are going to be revealed at the trial or the complainants will appear to testify, the information must be made available during discovery.[28] It is possible that in such a case the government would use the complainants at trial, so that the names would not be privileged. If the government insisted on the privilege, but later tried to present the complainants, the court might either refuse to allow them to testify or grant the defendants sufficient time for discovery, *i.e.*, delay the trial.[29] However, it may be just as possible for the government to refrain from any use of the complainants at the trial. It is submitted that the court should have recognized the possibility of a privilege, inquired into the possible use of the informers at trial, then weighed the considerations on each side before reaching its decision. The court says that privilege from discovery is recognized only to the extent that the material is privileged at trial. This is true, but informer's privilege is recognized at trial.[30]

25. United States v. Lorain Journal Co., 92 F. Supp. 794 (N.D. Ohio 1950), *aff'd*, 342 U.S. 143 (1951); United States v. Kohler Co., 9 F.R.D. 289 (E.D. Pa. 1949). *See also* Cardox Corp. v. Olin Mathieson Chem. Corp., 23 F.R.D. 27 (S.D. Ill. 1958) (patent infringement); United States v. Matles, 19 F.R.D. 319 (E.D.N.Y. 1956) (naturalization cancellation).

26. United States v. Lorain Journal Co., 92 F. Supp. 794 (N.D. Ohio 1950), *aff'd*, 342 U.S. 143 (1951).

27. Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958); 4 J. MOORE, *supra* note 15, ¶ 26.25 [6.—2].

28. Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265 (E.D.N.Y. 1943); 4 J. MOORE, *supra* note 15, ¶ 26.25 [6.—2].

29. *See* United States v. Lorain Journal Co., 92 F. Supp. 794 (N.D. Ohio 1950), *aff'd*, 342 U.S. 143 (1951).

30. UNIFORM RULES OF EVIDENCE 36; C. MCCORMICK, EVIDENCE § 148 (1954); 8 J. WIGMORE, EVIDENCE § 2374 (McNaughton rev. 1961).

Wigmore states "that the government has [informer's] privilege is well established, and its soundness cannot be questioned."[31]

The court rebuffs the government's assertion that the defendant did not require this information for its defense, saying that it "does not, unfortunately, possess such welcome powers of clairvoyance. In that lack the quiet voice of common sense warns that fair play may suffer if the wolf is to say what is best for the lamb."[32] One cannot assume the bad faith of a defendant in asserting need for the information—even in a desegregation suit aimed at a dual school system. The preparation of a case may vary depending on the type of discrimination or segregation charged: dual school systems, segregated schools within one system, or segregated classrooms within one school building. If a court doubts a defendant's assertion of need, it seems reasonable to inquire into this need in the same way the court might probe plaintiff's claim of privilege.

The government has decided to answer the interrogatories as ordered by the court rather than suffer dismissal and appeal.[33] There may be several reasons for this course of action: the government may not have feared reprisals in this locality, it may have decided that it must use the complainants at the trial, it may not have wished to delay this suit unless absolutely necessary. These are all matters of strategy whose importance is restricted to this particular case. They do not necessarily indicate any policy to be followed by the government in future cases.

It is possible that, based on its experience to date, the government does not feel that it needs to rely on concealment in these cases. But it appears there will be many more desegregation cases. David Seely, Assistant United States Commissioner for Education, recently said of the Deep South's[34] attitute toward school desegregation: "They are trying to get away with as little as possible."[35] He estimated that more than 95 per cent of the Negro students in the Deep South still attend all-Negro schools.[36] Against this background and against the background of violence which seems endemic to civil rights problems, Congress deemed the non-disclosure device necessary.

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31. 8 J. WIGMORE, *supra* note 30, § 2374.

32. United States v. School Dist. No. 1, 40 F.R.D. 391, 394 (D.S.C. 1966).

33. Letter from Terrell L. Glenn, United States Attorney for the Eastern District of South Carolina, to the *Washington University Law Quarterly*, Nov. 21, 1966.

34. "Deep South" refers to five states: South Carolina, Georgia, Mississippi, Alabama, and Louisiana. Nelson, *Civil Rights Law Enforcement Problems Remain in 5 States*, St. Louis Globe Democrat, Nov. 24, 1966, at 20G, col. 1.

35. *Id.*

36. *Id.*