IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

UNITED STATES OF AMERICA, Plaintiff,

vs

T. J. PENDERGAST, R. E. O'MALLEY, A. L. McCORMACK, Defendants.

No. 14,912.

AFFIDAVIT OF BIAS AND PREJUDICE

STATE OF MISSOURI)
) SS:
COUNTY OF JACKSON)

T. J. PENDERGAST, one of the defendants in the above entitled cause, being of lawful age and being first duly sworn, on oath says that the Honorable Merrill E. Otis, the Judge before whom this action is to be tried and heard, has a personal bias and prejudice against this affiant and in favor of the Government of the United States of America, the opposite party to this suit; that the facts and reasons for the belief that such bias and prejudice exist are as follows:

That at all times mentioned in the indictment herein there were pending in the United States District Court for the Western District of Missouri a certain case numbered No. 270, entitled: "American Insurance company, a corporation, Plaintiff, versus Ray B. Lucas (Successor in office to R. E. O'Malley, successor in office to Joseph B. Thompson), superintendent of the Insurance Department of the state of Missouri, and Roy McKittrick (successor in office to Stratton Shartel), Attorney General of the State of Missouri, Defendants", and other companion cases, numbered from 270 to 426, excepting those dismissed; that said causes were pending before a three- judge Court composed of the Honorable Kimbrough Stone, presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, the Honorable Albert L. Reeves, Judge of the United States District Court for the Western District of Missouri, and the Honorable Merrill Otis, Judge of the United states District Court for the Western District of Missouri; that it is charged in the indictment in this case that this affiant entered into a conspiracy with one R. E. O'Malley and one A. L. McCormack and with divers and sundry persons to the Grand Jury unknown; that the purpose and object of said alleged conspiracy was to

violate Section 88, Title 18 of the U. S. Code Annotated, by conspiring to commit an offense in violation of section 241 of Title 18 of the U. S. Code Annotated by endeavoring to influence, obstruct or impede the due administration of justice in said three-Judge Equity Court for the Western District of Missouri That on the 24th day of June, 1940, a Grand Jury was called before the Honorable Merrill E. Otis, one of the District Judges of the United States District Court within and for the Western District of Missouri and one of the Judges of the three-Judge Court heretofore mentioned, and the said Honorable Merrill E. Otis, as Judge of said United States District Court, among other things, charged said Grand Jury in part as follows:

"Mr. Foreman and gentlemen:

On the 29th day of May, 1939, a three-judge Court, consisting of the Hon. Kimbrough Stone, Senior U. S. Circuit Judge for the Eighth Circuit, the Hon. Albert L. Reeves, Senior U. S. District Judge for this District, and myself, in open court called upon the then United States Attorney to take steps to cause to be cited by that Court for contempt of Court any individuals whom his investigation should show had been guilty of contempt; called upon him also to present to the Grand Jury then in session, or to the next Grand Jury which should be in session, any evidence he might be able to gather which would tend to show that the crime of obstructing the administration of justice in a Federal Court had been committed. That, I say, was on the 29th day of May, 1939, a year ago.

"When the three-judge court, through its Presiding Judge, gave those directions to the United States Attorney, the Court had certain definite things in mind. Everybody knew what was in mind. Only two days before, on May 27th, and five days before that, on May 22nd, pleas of guilty to the crime of attempting to evade the payment of income tax had been made respectively by Robert Emmett O'Malley and Thomas J. Pendergast and they had been sentenced. There was every reason to believe, although as yet there had been no proof, that they and others had perpetrated an outrageous contempt upon the three-judge Court and that they and others had been guilty of the crime of obstructing justice in a Federal Court.

"The three-judge Court, speaking through its presiding judge, on May 29th, 1939, had in mind, as I have said, that an outrageous contempt had been committed against that Court and that there had been committed also the offense of obstructing justice against

the laws of the United States. But, the matter which was primarily before the three-judge court on May 29th, 1939, was what disposition should be made of the huge fund of millions of dollars which had been impounded by the three-judge court to await the decision on the merits of insurance litigation involving the validity of rates which had been prescribed by the Superintendent of Insurance. That matter, which was primarily before the Court, could not be passed upon without the hearing of much evidence. A Master was appointed to hear that evidence. He heard evidence for a period of months. After the evidence was heard, and it was heard all over the United States, it was four months or more before he could complete his report, a very difficult and highly technical task. After his report was completed, it was several months before the attorneys for the several parties had completed their briefs and could submit the case to the Court. It was submitted on the 20th day of May, 1940. It has not yet been decided.

"The three-judge Court, meanwhile, having taken cognizance of the fact that no action had resulted from the direction on May 29th, 1939, to the U. S. Attorney, and being utterly unwilling that there should not be action taken, called the acting U. S. Attorney before the Court and in open Court, speaking through the presiding judge, repeated in substance the direction which had been given first on May 29th, 1939, a year, lacking nine days, before. So you will know exactly what was said to the acting U.S. Attorney, in whom all of the Judges of this Court have the utmost confidence and whose ability they most highly respect, I shall read to you what was said, a part of it:

’It is apparent from the statement of counsel upon both sides here and there is in the evidence in this regard ground for believing that there has been a very gross imposition and fraud perpetrated in and upon this Court by at least Pendergast, O'Malley and McCormack, and there may be others. It is, therefore, evident to the members of this Court that such proceeding should be taken against any or all of those persons as may be warranted, and we feel that contempt proceedings are warranted. With that in view, it is the request of this Court that the acting U. S. Attorney shall prepare such pleadings and citations as may be necessary to cite in contempt of this Court and for contempt the three persons named and any others which an examination of this evidence, or any other knowledge which he may have or may obtain to warrant him in also including.

'The statutes of the nation make it a criminal offense to interfere with, impede or

obstruct the administration of justice in a national court. Of course, the Court has no power in itself, as no Federal Court has, to initiate criminal proceedings. That must be done through the Executive Branch, acting in turn through the Grand Jury. But, in view of the situation which is presented by this record, we request and urge the acting U. S. Attorney in this District to place before the next Grand Jury, which assembles in this Division, such facts as he may be able to acquire to ascertain whether there is sufficient basis for indictments against the three named and/or any violation of those acts.
"Then the Presiding Judge said to the acting U. S.
Attorney:

’Mr. Phelps, is your office willing to assume those duties?'

"And he answered:

'Your Honors, our office is ready and willing to assume any responsibility which this Court may ask us to take upon ourselves. I will prepare at the earliest possible time the citations you have asked for and the matters that you have asked to be submitted to the Grand Jury will be submitted to them’."

His Honor, Judge Otis, continuing his charge to the Grand Jury, quoted to them section 241 of Title 18, and Section 88 of Title 18 of the U.S. Code annotated. Then, continuing, Judge Otis, in part,said.

"I say to you that evidence may be presented to you, if the witnesses are still living, and they are still living, if they are brought here, and they can be brought here from the four corners of the nation, wherever they are - I say that evidence may be presented to you, if it is the same as is in this record (referring to and indicating the Record of testimony taken before the Special Master), which will establish, not only a violation of the statutes forbidding and punishing the obstruction of justice, but also establishing that a conspiracy was formed to violate that statute, to bring about a violation of that statute.

"I say to you gentlemen that there may he presented to you evidence that there was a fund of millions of dollars impounded by the three-judge Court, the exact amount I do not now recall. I think it was close to eight million, - certainly, it was more than six million. That fund, as I have said, was to go to the insurance companies if they won the litigation on the merits. Every cent of it was to go to them. If they lost on the merits, not one cent of it was to go to them, but all was to go back to the policyholders who contributed it,

indirectly, through the insurance companies, to the fund.

"Now, the evidence will show, it will justify the inference that the insurance companies, just before the cases were to be decided on their merits, were not so certain that they would win on the merits and get all of the fund. There was a possibility they would lose and get none of it. They preferred to have a substantial part of it rather than none of it and to have that substantial part now rather than at the end of the litigation and at the end of an appeal which might take years. I say the evidence will justify that inference. They wanted 80% of the fund now rather than to run a chance of getting none of it. The evidence will prove that.

"The evidence will justify the inference that one whose name is Charles Street - I am calling names today - who was the agent of the insurance companies and had been their agent for years; they had great confidence in him. The evidence is that he met with the insurance companies, their Executives, and said he thought he could obtain a settlement of this litigation whereby the insurance companies would get 80%. They authorized him to effect such a settlement. I do not say, and I do not believe, that they had any idea that he would undertake to effect the settlement by illegitimate means. They authorized him to effect a settlement. He decided he would do it. If he could not do it otherwise, he would do it by illegitimate means.

"Thereafter, there was a conspiracy, the evidence will show, if the evidence in this record is submitted to you, between Street and at least three others, those who were named by the three-judge Court. A conspiracy to do what? A conspiracy to obstruct the due administration of justice in the United States three-judge Court. How was that to be done? It was to be done by obtaining a so-called agreement of settlement between the companies and the Superintendent of Insurance, by obtaining it by bribery, by the payment of a huge fund contributed by the insurance companies to the Superintendent of Insurance and to others who had influence with the superintendent of Insurance. That was the conspiracy, in part, to obtain such a settlement and to obtain from the United States District Court by the false representations to the Court that there had been an honest settlement, to obtain a decree from the Court giving 80% of the money to the insurance companies.

"But that was not all of the conspiracy which the evidence will show. Such a

conspiracy, even if accomplished, would be of no value if that was all. The conspirators knew that, if the Court had the slightest inkling that the settlement was the result of bribery and corruption, the decree would not be entered. And they knew, furthermore, that, if the Court ever discovered that the settlement had been obtained by corruption and bribery, they would set aside the decree in a minute and demand the return to the custodian of the Court of whatever had been paid out under the decree. They knew that. So the conspiracy went further. They conspired together, not only that they would obtain the decree from the Court, but they would, by affirmative acts, prevent the Court ever from discovering that the decree was bottomed upon a corrupt settlement obtained by bribery. That was necessary if the conspiracy was to have any value to the conspirators or to the insurance companies. It was necessary that it should be continued and that the conspirators, by affirmative acts, should prevent the discovery of the fact that the settlement was bottomed upon corruption and fraud, so the conspirators agreed together.

"The evidence will show it, if it is the same evidence that is in these books, if it is the same evidence that I know may be produced."

Affiant says that the books referred to by the Court in the last quoted part of his charge were the Volumes of testimony taken by the Honorable Paul V. Barnett as Special Master appointed by the Court and that there was no evidence in said record or said books to support the statements of the Court in that regard.

Continuing his charge, Judge Otis said:

"The evidence will show that the conspirators agreed, not only that money should be paid - that was one of the necessary steps, that money should be paid to the superintendent of Insurance - but they agreed that this man street - Street now is deceased - should conceal from his principals, the insurance companies, what this money was being used for. They knew very well that, if the Executives of the insurance companies ascertained the money they had contributed had been used in bribery and corruption of individuals who had litigation pending in the Court, they knew perfectly well that the Executives might reveal that fact at once. They might not want to run the risk of being mixed up knowingly in such an affair. They certainly would not have desired to run that risk.

"So, these conspirators agreed that Street, by affirmative acts, should conceal even from the insurance Executives for what purpose the money was to be used which they were contributing to him. They agreed that it should be done in this way, that he should say to them:

'Gentlemen, I need $100,000.00 or $200,000.00, or $300,000.00 from the insurance companies.'

"There were around one hundred of them, I think, one hundred Insurance companies. It was not so much from each company. They agreed that, if the Executives should say to him:

'Well, what do you want this money for?’ he should say:

'I want it for legitimate expenses, for legal expense.'

"And then they agreed that, If that were not satisfactory, as they knew it might not be satisfactory to some insurance Executives, he should go further. They agreed that he should say to the insurance Executives:

'Well, when the litigation is all finished, I will furnish you an accounting. It will show exactly how the money was used.'

"They agreed that he should make that representation to the insurance companies but they agreed that he should never make the accounting. The evidence will show that and the evidence will show that he never did make the accounting, that he continued affirmatively to decline to furnish an accounting although he had promised to furnish the accounting. The evidence will show that.

"The evidence will show, gentlemen, more than that, if the evidence is such as I am certain exists and can be produced. The evidence will show that these conspirators agreed among themselves that, to prevent any discovery of what had been done, of what methods had been employed to obtain the settlement that was the basis of the decree of the Court and to make it impossible that the Court would learn the truth and would set aside the decree and would recall the money from the insurance companies, they agreed that, if any one of them ever was put under inquisition by any public officer, he would deny any knowledge of the whole transaction, would assert that he had no knowledge of it. They agreed to that.

"And the evidence will show that as late as a few weeks before the indictment

charging attempts to evade income tax were returned, long after October 25th, 1956, not only one, but two of these conspirators affirmatively denied that they knew anything at all about what was then suspected, namely, that the settlement had been obtained by corruption and fraud. One of them—his name was McCormack—was called before the U. S. Attorney and subjected to the most stringent questioning and he affirmatively denied over and over again that any such thing as was now suspected had taken place. That was in furtherance of the conspiracy to conceal. He was called before the Grand Jury, I believe the evidence will show, and there he said he knew nothing. And then, perhaps due to the Grrat earnestness and the great capacity and ability of the U. S. Attorney, he changed his mind and told the truth.

"The evidence will show, I am sure that evidence will be found to show that another of these conspirators, when it was suspected that he had some connection with this affair, was interviewed by representatives of the Press. In carrying out the conspiracy, he denied to representatives of the Press that he had any knowledge whatever of any corrupt settlement.

"Those were affirmative acts of deception, practiced for the purpose of preventing the discovery that the settlement upon which the decree was bottomed was corruptly obtained. These were affirmative acts of deception, these and others, which were for the purpose of making effective the conspiracy, for the purpose of continuing the obstruction of justice which had been brought about, and those affirmative acts of deception happened long after October 25th, 1936, and far within a period of three years looking back from the present date.

"So, I say to you, gentlemen of the jury, since the matter has thus been called to your attention, that there is no statute of limitations which will prevent the prosecution of such an indictment as you will return if you return an indictment. If the evidence is such, as I believe it is and as I believe it will be presented to you, no statute of limitations will prevent the prosecution of an indictment charging conspiracy, or an indictment charging the substantive offense of obstructing justice.

"If a man is charged with the offense of obstructing a public road because he has built a fence across the public road, that offense continues as long as the fence remains in the public road, and that statute begins to run when the obstruction is removed, not when

it is set up. Similarly, if one is charged with obstructing the administration of justice in the United States Court, the statute of limitations does not begin to run when the obstruction was created but begins to run when it is no longer maintained. Although you are not concerned with the matter, I say to you also that it is my considered opinion that there is no statute of limitations that prevents prosecution before the three-judge Court of the offense of contempt if it is bottomed upon the same facts as those I have just now outlined to this Grand Jury."

Affiant says that there was no evidence of any kind before Judge Otis or in his possession that this affiant and his co-defendants had entered into any agreement of any kind that they, or any of them, would, if questioned, make any denials of any kind for any purpose; that there were no such facts contained in the evidence given in the hearing before Judge Paul v. Barnett, Special Master, and that there was no fact or circumstance or evidence before Judge Otis to base this part of the charge upon except, perhaps, the fact that A. L. McCormack, testifying before a Grand Jury then investigating alleged tax evasion, denied that he had received any money at any time from any of the insurance companies involved or from any person; and, perhaps, rumor that one of the defendants herein had denied to a newspaper reporter any knowledge of any fraud connected with the settlement of said insurance case; but that these facts stated by the Court to the Jury as proved facts were based simply upon rumor and conjecture.

Affiant further says that on Tuesday, June 25th, 1940, the Honorable Merrill E. Otis called said Grand Jury before him and gave to them an additional charge, in which he said:

"Mr. Foreman and Gentlemen, since you were charged on yesterday morning, I have been furnished by the Court reporter with a transcript of the charge and I have read it carefully. Having read it, it has seemed to me that I should supplement it briefly. I do that now, so that there never can be any justification for a suggestion by any person that the charge was not fair and proper.

Over and over again in the charge I said to you that any indictment returned by you must be bottomed upon evidence produced before you. I want to say that once more. I do say it once more and I say it emphatically. And because I called specifically to your attention possible offenses connected with the insurance litigation before the three-

judge federal court, I say to you specifically in that connection that no indictment should be returned unless it is bottomed upon evidence produced before you, reasonably tending to show that offenses have been committed.

"In connection with my discussion of possible offenses connected with the insurance litigation I said that if the evidence which had been presented to the three-judge court was produced before you it would tend to support certain conclusions. I assumed it would be produced before you. Of course, I do not know that that evidence will be produced before you. I do not know that witnesses will testify before the Grand Jury as they have heretofore testified. So I say to you again and I say it emphatically that any indictment must be bottomed on the evidence produced before you. No indictment can be bottomed on evidence produced before the three-judge court unless it also i3 produced before you, nor upon my interpretation of that evidence, nor upon any evidence whatsoever except that produced before you.

"In my charge I mentioned certain individuals by name. It would have been farcical not to have done so, since those names have been blazoned forth in headlines for months and now for years in this connection. What was said in open court by the presiding judge of the three- judge court has been published over and over again and is a matter known to all men in this district. Not to have mentioned names would have been to imitate the ostrich and to suggest that honorable and intelligent grand jurors had no more perception or knowledge than ostriches which hide their heads in the sand. Because, however, I thought it was proper to mention the names which, without my mentioning them, already were present in the minds of every juror, I now say to you and say emphatically that no indictment should be returned against any person, mentioned or unmentioned in the charge, unless the evidence produced before the Grand Jury warrants the indictment."

(The foregoing constitutes, almost in its entirety, the charge of the said Merrill E. Otis and the parts omitted in no way change or modify the charge set out herein.)

Affiant further says that the Honorable Merrill Otis believes, and has publicly expressed the belief, that the affiant entered into a conspiracy to bribe the defendant, Emmett O’Malley, as Insurance Commissioner of the state of Missouri, to enter into a fraudulent settlement of said insurance rate cases pending in said three- judge Court and

to deceive and mislead said Court and to practice a fraud upon it and upon the three-judges comprising said Court, including the said Merrill E. Otis; and that affiant, in so doing, committed a contempt and wrong against said Court and the Judges thereof and unlawfully, fraudulently and deceitfully caused them innocently and unwittingly to approve a fraudulent settlement of said cases and that in so doing he willfully acted unjustly, unfairly and dishonorably toward said Court and the Judges thereof and willfully placed them in a false position before the public; and that, by reason thereof and all of the foregoing, the Honorable Merrill E. Otis has a personal bias and prejudice against this affiant. WHEREFORE, affiant prays that the Honorable Merrill E. Otis proceed no further herein and that another Judge be designated in the manner provided by law.

T. J. Pendergast

Subscribed and sworn to before me this 21 day of August, 1940. My commission expires March 26, 1944.

Ella M. Sprague

Notary Public said County and State.

CERTIFICATE OF COUNSEL

John G. Madden and R. R. Brewster, Attorneys-of-Record for Thomas J. Pendergast in the above entitled cause, do hereby certify that the above affidavit and application are made in good faith.

John G Madden

RR Brewster

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AFFIDAVIT OF BIAS AND PREJUDICE Of T. J. Pendergast

(Original)

FILED 9:35AM AUG 21 1940
A. L. ARNOLD, Clerk
MC Hawkins, Deputy