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# Articles, Reports, and Notes OF THE NATIONAL ASSOCIATION OF COUNTY AND PROSECUTING ATTORNEYS

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*Editor: Patrick Brennan, Prosecuting Attorney, South Bend, Indiana*

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## FEDERALISM AND THE CONTROL OF RADIO AND TV LOTTERIES

Thomas F. Eagleton, Circuit Attorney for the City of St. Louis, has recently completed a study of his authority to prosecute radio and television stations in St. Louis for the broadcast of lotteries and programs giving information concerning lotteries. The conclusions reached by Mr. Eagleton are of general interest to prosecutors inasmuch as they relate to restrictions on state control of the content of radio and television programs by reason of federal preemption of authority over broadcasting and federal control of interstate commerce.

"This study," Circuit Attorney Eagleton reported, "has led me to the firm conclusion that as a state law enforcement officer, I have no jurisdiction to prosecute a radio or television station for the content of the programs which it broadcasts. Control of this subject has been vested exclusively in the United States Department of Justice and the Federal Communications Commission."

Two reasons were advanced by Mr. Eagleton in support of this position. First, he pointed to the Federal Communications Act of 1934 which, he indicated, "preempted the field of regulation of radio and television. Section 304 of this Act expressly exerts federal authority over the broadcast of lotteries and similar schemes by making their broadcast a federal criminal offense. The Supreme Court of the United States has also held that the Federal Communications Commission is vested with authority to regulate lotteries on radio and television in the exercise of its power to grant and renew broadcast licenses."<sup>1</sup>

Mr. Eagleton also indicated that even if federal legislation had not comprehensively occupied the field of radio and television regulation, "state control of the content of programs would be an unconstitutional interference with interstate commerce which under Article I, Section 8, Clause 3, of the United States Constitution can be controlled only by Congress. Clearly, one state may not dictate the content of programs which by the very nature of the air waves are being broadcast across state lines into many other states. This is a subject on which the Constitution requires uniform Congressional regulation for the protection of all the states."

### FEDERAL PREEMPTION OF CONTROL

Expanding on his first premise—that the federal government has preempted the field of regulation of radio and television—Mr. Eagleton stated: "Justice Holmes . . . expressed the preemption doctrine thus: 'When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.'<sup>2</sup> . . . The test used to determine federal preemption [is] whether the 'scheme of federal regulation' is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'<sup>3</sup> . . . The use of this test leaves little doubt that Congress intended its regulation of radio and television pro-

<sup>2</sup> See *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 604 (1915).

<sup>3</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); *Pennsylvania v. Nelson*, 350 U. S. 497, 502 (1956).

<sup>1</sup> See *Federal Communications Commn. v. Amer. Broadcasting Co.*, 347 U. S. 284 (1954).

grams to be exclusive. The federal regulations expressly protect the public interest by covering licensing of stations, censorship, equal use of facilities by political opponents, obscenity and lotteries. . . ."

Circuit Attorney Eagleton added that even if the comprehensiveness of federal regulation were not conclusive, "it would seem that the question of complete federal preemption had been decided by Congress in Section 301 of the Communications Act of 1934 which provides that it is the purpose of the Act, among other things, 'to maintain control of the United States over all channels of interstate and foreign radio transmission.' It is inconceivable that [such] congressional intent . . . would be effective with each of the states of the nation imposing its own local standards for the content of broadcasts. Having relieved the states of authority over broadcasting, Congress recognized its responsibility and expressly prohibited lotteries from being broadcast by a uniform regulation to apply throughout the nation."

Mr. Eagleton also pointed out that a number of judicial decisions lend support to the position that Congress has preempted the field of regulation of broadcasting, noting in particular the *Dumont Laboratories* case,<sup>4</sup> which held that a state may not censor films used in televising programs broadcast in the state. "This situation," Mr. Eagleton noted, "is closely analogous to a state attempt to regulate the content of programs by enforcing its lottery laws against television or radio stations."

#### BURDENING INTERSTATE COMMERCE

The second ground for Mr. Eagleton's conclusion that states have no power to control the content of programs broadcast by radio or television is based upon the constitutional power of the federal government to control interstate commerce. Turning to this point, he stated: "The Commerce Clause of the Constitution is recognized as giving rise to the principle that no state may burden interstate commerce even in the absence of federal occupation of a field.<sup>5</sup> . . . The need for national uniformity in the regulation of radio and television broadcasts is obvious in view of the multiplicity of state laws, many of a conflicting nature, which would burden the use of the air

waves in interstate communication. One state from which programs originated could by the local peculiarities either of its laws or of those who interpret its laws arbitrarily decide the listening habits of the entire country . . . Both the authorities<sup>6</sup> and the obvious threat of chaos in multiple regulations of interstate broadcast programs lead to the necessary conclusion that state imposition of program control by enforcement of lottery laws would burden the interstate transmission of information which is commerce. . . . If present laws are inadequate, Congress must supply the remedy. If present enforcement is inadequate, the problem is one for the Department of Justice and the Federal Communication Commission."

#### ABSTRACTS OF RECENT CASES\*

**Counsel Inadequate in Capital Case Because State Bar Dues Were Unpaid**—The defendant was convicted of murder and sentenced to death for the heinous killing of a child. On a petition for rehearing, he showed that his court-appointed counsel had been delinquent in paying his state bar association dues, and thus his name had been stricken from the rolls of attorneys. This, the defendant claimed, disqualified the lawyer from practice so that he had been denied his constitutional right to counsel. The Texas Court of Criminal Appeals set the conviction aside on this basis and held that the defendant had a right to a qualified, practicing attorney. *Martinez v. State*, 318 S.W. 2d 66 (1958).

The court premised its argument on a state statute and on both the state and federal constitutions, which require the appointment of counsel in capital cases. This requirement, it said, meant a duly qualified, practicing attorney, whereas here the attorney appointed by the court to represent the defendant was not at that time authorized to practice law in the state. The right of an accused to counsel was considered a valuable right conferred on individuals by society, and it was held error for the trial court not to follow the mandatory provisions of the state statute which prohibited all persons not members of the State Bar from prac-

<sup>4</sup> *Allan B. Dumont Laboratories v. Carroll*, 184 F.2d 153 (3d Cir. 1950).

<sup>5</sup> See *Southern Pac. Co. v. Arizona*, 325 U. S. 761, 779 (1945).

<sup>6</sup> Cases cited and discussed in Mr. Eagleton's report are: *Fisher's Blend Station v. State Tax Commn.*, 297 U. S. 650 (1936); *Station WBT v. Poulnot*, 46 F.2d 671 (E.D.S. Car. 1931); *Whitehurst v. Grimes*, 21 F.2d 787 (E.D. Ky. 1927).

\* Prepared by Francis A. Heroux, Senior Law Student, Northwestern University School of Law.

ting law. The court concluded that any other holding would nullify the entire State Bar Act.

The dissent questioned the true justice of the majority holding, which set aside a conviction in a capital case wholly without regard to the competency, experience, skill, and ability of the lawyer. Furthermore, the defendant's counsel was actively engaged in other cases and he had only to pay his delinquent dues to have his name restored to the roll of practicing attorneys.

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**Defendant In Court Must Be Informed Of His Rights**—The defendant was arrested for driving his automobile while intoxicated. He was brought before a justice for a hearing on this charge; however, the justice believed the defendant to be under the influence of intoxicants and not in full possession of his faculties. The defendant was committed to the county jail, to remain there until he sobered up. On the following day, he was brought before the justice who advised him of his rights and the nature of the crime, heard the case, and found him guilty. On appeal, the defendant claimed he was not *immediately* informed of his rights. The County Court in the State of New York agreed and reversed the conviction and remitted the fine. The court held that the justice was under a duty to immediately inform the defendant of the charge against him and of his right to counsel, even though the instructions would be useless because the defendant was intoxicated. *People v. Wright*, 178 N.Y.S. 2d 535 (1958). The court stated that although it might seem that a justice should not accept a plea from a defendant who is intoxicated, and that instructions regarding such a plea and the effect thereof would be futile, the state statute was quite explicit upon the point; so that when a defendant is brought before a magistrate he must be "immediately" informed of the charge and of his right to counsel. These rights were considered substantial and not subject to omission irrespective of whether or not the defendant was in a condition or state of mind to actually comprehend what the court says.

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**Attorney General's Right To Defend State Trooper**—A state trooper was charged with driving at a speed greater than was reasonable. The prosecution was privately instituted and privately conducted. At the trial, the attorney general

of the state appeared as counsel for the defense and the individual prosecuting the suit immediately moved to strike the attorney general's appearance. The Supreme Court of New Hampshire denied the motion, holding that it was a proper exercise of the attorney general's discretion to appear as counsel for the state trooper. *State v. Swift*, 143 A. 2d 114 (1958).

In reaching its conclusion, the court stated that the powers of the attorney general in New Hampshire are broad and numerous. He must supervise all criminal causes pending before the state courts, and he must represent the state in causes in which the state is interested. These duties include the discretionary right to dismiss any pending cause upon the entry of a *nolle prosequi*. Concomitant with his power to dismiss a suit is the right to decide, as in this case, that the exoneration of an official by public trial is in the public interest. If this is so, there can be no reason to question his authority to appear for the state trooper, because the officer is an official of the state.

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**Tape-Recording Of Testimony Given To Grand Jury Is Permissible**—A recording machine was used to record the testimony given by witnesses at a grand jury hearing. Thereafter, the defendant was indicted, but he moved to set the indictment aside on the grounds that the use of the recorder was improper. The Kentucky Court of Appeals allowed the indictment to stand, holding that the recording of grand jury testimony was not prohibited by statute and, since the defendant was not prejudiced by the recording, he could not complain. *Greenwall v. Commonwealth*, 317 S.W. 2d 859 (Ky. 1958).

A Kentucky statute provides that only members of the grand jury can be present during its deliberation or voting. This is for the purpose, of course, of shielding the grand jury proceedings from public scrutiny. The court construed this objective rather narrowly, however, and stated that the recording of witness testimony before the deliberations is not within the ban of the statute.

While upholding the tape recording, the court elicited a strong *caveat* for its future use. It said that the use of a recording device in a grand jury inquiry is an unorthodox practice and is not to be commended, because there is a risk of unauthorized disclosure and embarrassment. Furthermore, there are many situations in which the use of the re-

ording would be unfair to the defendant and would substantially prejudice his rights.

One judge dissented, because he claimed that there was no statutory authorization for the use of the device. Furthermore, he expressed anxiety over the possibility that this holding might open the

door to other new devices. "The next innovation," he said, "will be a motion picture camera with a sound attachment—or maybe even television."

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(For other recent case abstracts see pp. 568 and 621)

## NOTES

The Association's next annual meeting will be in Milwaukee, Wisconsin during the three day period of July 30, 31 and August 1, 1959. On the following Monday, August 3rd, in nearby Chicago, Northwestern University School of Law will begin its five-day Short Course for Prosecuting Attorneys. Four full tuition scholarships have been made available to our Association for award to its members. The selection of recipients will be based upon (a) the member's interest and activity in the

Association and (b) financial need for such assistance as, for instance, where the county he represents cannot or will not defray the cost of his attending the course. Any member interested in applying for one of these four tuition scholarships should write to the Association's Chairman of the Scholarship selection committee: John G. McCutcheon, Prosecuting Attorney, Pierce County, 305 Courthouse, Tacoma, Washington.