LEGAL SCENE

Taking on the Goverment—Alone

Sole Practitioner Battles Way To Supreme Court and Wins

By David C. Buxbaum

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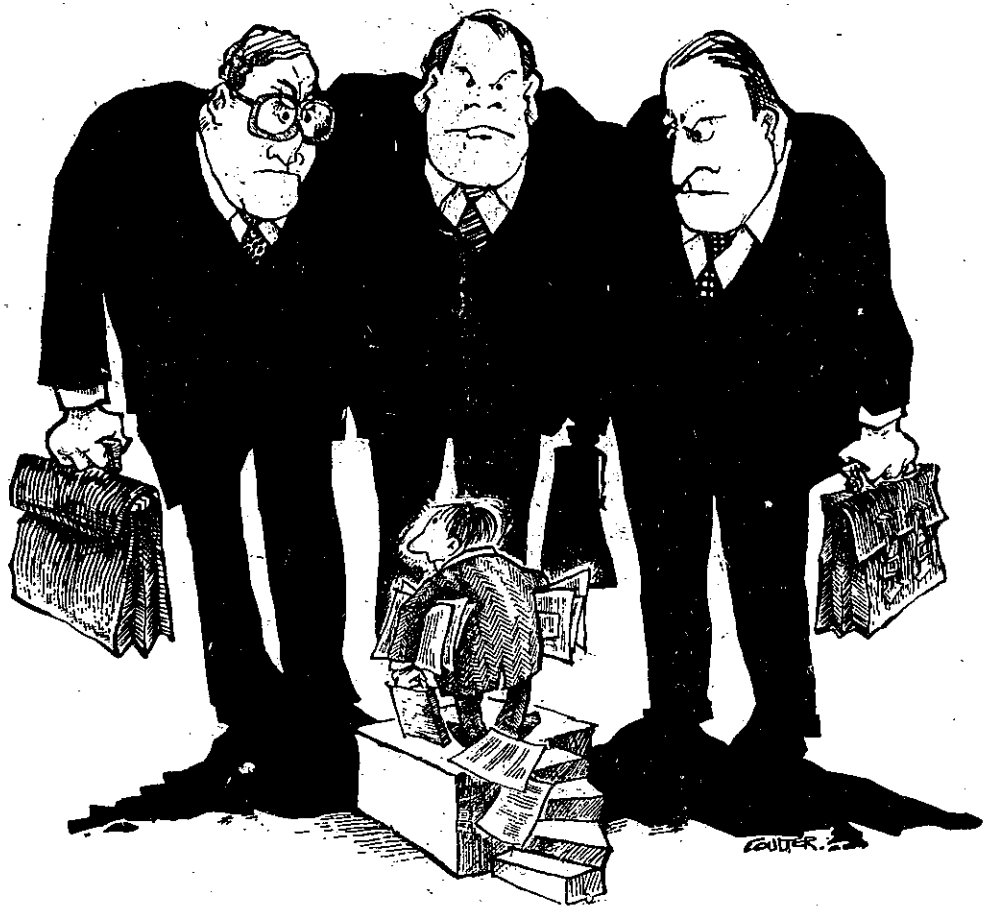

One day in early 1975, with plenty of time on my hands, I was thumbing through the *New York Law Journal* and spotted a classified help-wanted ad: a private corporation needed legal assistance in the commodities area. I had some background in securities and commodities, so I responded and soon found myself in the Fifth Avenue offices of the American Board of Trade Inc., talking with the firm's president, Arthur Economou.

I had just re-hung my shingle, this time as a sole practitioner, returning to fulltime practice of law after a fairly brief—and somewhat unsuccessful—venture into direct international trade. Economou, it turned out, had several attorneys working on various aspects of his legal problems, but wanted a lawyer to work closely and directly with him on a specific matter. At that point, I had plenty of time.

For a small office, preparing full-fledged briefs for the Supreme Court is a formidable task. Although we had expanded again, and I got some help in one brief, I continued to handle most of the writing and research myself, sometimes at a heavy personal cost.

At one point, after finding that the Court would grant no further delays, secretary Pamela Owen and I worked for 60 hours straight, without sleep, in preparing a manuscript for the printer. Because of the costs involved, we were also forced to settle for a very ordinary printing job rather than a more expensive and impressive version.

It would be my first appearance in person before the Court. By that time, I was familiar with most of the literature and cases, except for one aspect: Court of Appeal were coming down with substantial decisions on the topic right up to the time of oral argument.

The argument was to be on a cold November Monday. I made hotel reservations for the weekend at the Hay-Adams and arranged to have major new decisions delivered to my room. I spent the entire two days by myself in the room, reviewing all cases and preparing 4 x 6 cards summarizing essential portions of relevant cases.

When notified about the Monday schedule, my case—*Butz v. Economou*—was listed first. But when I reported early to the clerk's office, psy-

would lead me within two years to oral argument at the U.S. Supreme Court on a major constitutional case.

A Young Enterprise

American Board of Trade, it appeared, was a young enterprise struggling to recover from extremely adverse publicity over two years generated by actions of the Commodity Exchange Authority, an arm of the U.S. Agriculture Department. The company had attempted several innovative marketing stratagems—narrowing the spread between bid and asked prices to zero, cutting prices on silver and foreign currency commodities and offering spot rather than future options—which had aroused the ire of Commodity Exchange Authority officials.

Almost two years before my initial meeting with Economou, the company's attorneys had filed a $32 million damage suit against several Agriculture Department officials. The complaint charged them with issuing, knowingly, false press releases about Arthur N. Economou Inc.'s financial condition, with shortcutting administrative procedures to still the free speech of the company's officers, and with improperly distorting audit reports to injure the reputation of the plaintiffs.

No discovery had commenced on the case; to all appearances, it was moribund. After reviewing the file, I moved to amend the complaint, broadening the constitutional charges, and served interrogatories on the defendants.

During this maneuvering, a letter arrived from an assistant U.S. Attorney suggesting that the action be deemed abandoned because of lack of prosecution. After receiving the interrogatories, the government moved to dismiss on grounds that all government employees enjoyed absolute immunity if they were acting within the scope of their authority.

After a hearing, the government's motion was granted by U.S. Judge Lloyd F. McMahon of the Southern District of New York.

Indeed, several federal district and appellate courts had held federal officials absolutely immune from suits for damages for violation of an individual's constitutional rights, provided they were operating within the perimeters of their responsibilities as government officials. Although it was clear that federal officials, pursuant to *Bevins v. Six Unknown Agents of Federal Narcotics Bureau,* 456 F.2d 1339 (2nd Cir. 1972) were liable for their constitutional violations under the Fourth Amendment, it was far from clear that the Court would support an overall extension of liability of federal officials for damages on so-called constitutional torts; it was similarly unclear whether acts within the scope of an official's authority created liability for suit.

No Sympathy

The trial judge's action, dismissing the complaint without permitting discovery, showed no sympathy for our cause of action. My client, who had other lawyers available and who did not know me well, was understandably less than pleased with the initial results. I told him that I nonetheless thought we stood a reasonable chance on appeal. After consultation with other lawyers, he permitted me to take the appeal.

At this point, I was still a sole practitioner, and did all preparation for the appellate brief on my own. The client was new, and I obviously felt in a precarious position. Even though the Court of Appeals brief was time-consuming and my hourly billing rate was modest—about $45 per hour—I didn't want to create the impression that I was using the new relationship to acquire extraordinary fees. So I sent no bill for some of the work.

Unfortunately, I was to be in China when the appellate argument was staged. Another New York attorney, Lewis M. Steel, Esq., argued the case before a U.S. Second Circuit panel of Walter R. Mansfield, William H. Timbers and Thomas J. Meskill. Even though the court erroneously listed me as a member of Steel's firm, I was exceptionally pleased: the Court's decision was favorable to my client in every respect.

The government decided to petition for *certiorari* in an attempt to reverse the Court of Appeals. The District Court, initially unfavorably disposed to our case, granted the government's application for a stay of all proceedings, including discovery, pending filing and disposition of the petition for *certiorari.*

Another Crisis

At this point, another crisis occurred. My client saw that the matter was reaching a critical point; he suggested that he might engage additional counsel, perhaps a major law firm, to associate with me at the Supreme Court level.

I balked. Although I was no longer alone in my law office by that point, I planned to handle the case myself, and felt it would be extremely difficult to educate another counsel on the points involved. We had been consistently right in predicting the flow of the case, and I finally declared that I would proceed only if I was sole counsel.

Fortunately, American Board of Trade permitted me to go forward.

We decided to keep our *cert* reply short, showing only why, at this stage of the proceedings, *certiorari* should not be granted.

A few weeks later, we received word that the Supreme Court had granted *certiorari* and clearly wanted to come to grips with this issue directly. It was the one time in the case that I was surprised.

uled last that day, and hoped that this was not a reflection of the Court's regard for the issues involved. During the morning, I sat in the attorney section, half-listening to other arguments and reading my note cards.

While most attorneys at the Court were accompanied by partners, associates or clients, I realized I was to be the only person in court that day representing the respondents.

I also learned that I would be opposed by Deputy Solicitor General Daniel Friedman, the official who had successfully argued *Barr v. Mateo* at the Supreme Court in 1969. *Barr* (360 U.S. 564, 1969) was the last landmark case on the issues presented, and it was the case I was attempting to "distinguish." Solicitor General Wade McCree later told me that Friedman who handled himself very well, had virtually never lost an argument before the U. S. Supreme Court.
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(Ed. note: That may have been gamesmanship. A source close to Friedman, now Chief Judge of the Court of Claims, said that Friedman won perhaps 60 of the 80 cases he argued in 19 years at the Solicitor General's office.)

Spectators' seats were full during the entire day, although the area reserved for attorneys was relatively empty except for lawyers preparing to argue. When the final case of the day was called, however, the entire courtroom filled up: numerous government attorneys appeared, many of them shaking hands with Mr. Friedman and indicating their interest and solidarity with the Justice Department in this particular matter.

The oral argument was exceedingly lively. Justice Byron White in particular began asking numerous questions, and much to my surprise, I was faced with

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