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In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN R. PARK,

Respondent

LIBRARY
SUPREME COURT, U. S.

No. 74-215

Washington, D. C.
March 18, 1975

Pages 1 thru 47

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 74-215
JOHN R. PARK, Respondent.	:	

Washington, D. C.,

Tuesday, March 18, 1975.

The above-entitled matter came on for argument at 2:46 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ALLAN ABBOT TUTTLE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner.

GREGORY M. HARVEY, ESQ., Morgan, Lewis & Bockius, 2107 The Fidelity Building, Philadelphia, Penna. 19109; on behalf of the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-215, United States against Park.

Mr. Tuttle.

ORAL ARGUMENT OF ALLAN ABBOT TUTTLE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. TUTTLER: Mr. Chief Justice, and may it please the Court:

This case involves the issue of the standards of criminal liability under the Federal Food, Drug, and Cosmetic Act of 1938, as construed by this Court in United States vs. Dotterweich and United States vs. Wisenfeld Warehouse Company.

This is a prosecution of Acme Markets, Inc., and John Park, its president, for holding adulterated food under insanitary conditions in Acme's Baltimore, Maryland, warehouse.

The corporation, Acme, pleaded guilty prior to trial. Park, the respondent here, was found guilty by a jury after trial.

The evidence at trial of adulteration and of insanitary conditions in this case was massive. The FDA inspectors testified at trial that in the basement of the Baltimore warehouse -- and this is at page 20 of the record -- the inspectors found extensive evidence of rodent infestation in the form of rat and mouse pellets throughout the entire perimeter area and along the wall.

On the first floor of the same warehouse, during the same inspection, the inspectors found rodent excreta pellets in the meat hanging room, beside bales of Jello and throughout the Jello storage area.

QUESTION: Not mixed, I hope.

MR. TUTTLE: I'm sorry, Mr. Justice?

QUESTION: The Jello wasn't mixed, was it?

[Laughter.]

MR. TUTTLE: No.

Moreover, the inspectors found rodent urine and rodent nesting material in and around food, and live and dead rodents throughout the warehouse.

Following this inspection, Dr. Norman Kramer of the FDA wrote to Park concerning the conditions of that warehouse. And he told Park, among other things, that the inspectors had found that the warehouse was "actively and extensively inhabited by live rodents".

Mr. Kramer added, "Such reprehensible conditions obviously existed for a prolonged period of time without detection, or were completely ignored."

As a followup, in March 1972, the FDA conducted a second inspection, and it found some improvement; but it also found evidence of rodent contaminated food, rodent nesting material, and dead rodents in the warehouse.

The evidence at trial respecting Park came from the

corporate general counsel, from the by-laws of the corporation, and from Park himself.

QUESTION: Mr. Tuttle, what is the essence of the crime charged here?

MR. TUTTLE: The essence of the crime charged is the holding of food which has become adulterated through the presence of filthy material, which is a violation of -- which is in the definition of adulteration in the Act, section 342 (a)(3). There is a second violation which is also charged, and that is the holding of food under insanitary conditions, whereby it may become adulterated.

Both of the --

QUESTION: In order to find Park guilty, the jury would have had to find that he held food in this warehouse?

MR. TUTTLE: The crime -- the statute makes it a crime to hold or to -- it defines the crime in terms of the causing, the doing or the causing of any of the following acts; and among those is the holding of adulterated food.

Adulterated food is then defined in a separate section of the statute, as I have --

QUESTION: So it's causing adulterated food to be held --

MR. TUTTLE: That would be the statutory definition of the crime.

QUESTION: Mr. Tuttle, there were fines imposed

here, just fines, weren't there?

MR. TUTTLE: Yes, there were fines imposed against the corporation, which pleaded guilty. Park himself was found guilty by the jury of all counts and fined $50 a count, for a total of $250 in fines. That's the entire penalty imposed against him individually.

QUESTION: Would the government's position be any different if he had been sentenced to jail?

MR. TUTTLE: We would maintain that the statute permits such a disposition. The only difficulty might arise in terms of -- one might conceivably have more serious due process problems where there was in fact incarceration; but in terms of what the statute envisions as a possible disposition, incarceration would be a possibility.

I think, in essence, this is an easier case for the Court, because it simply doesn't raise the problem of incarceration.

QUESTION: Why would there be more serious due process problems?

MR. TUTTLE: Well, I don't believe that there would be insuperable due process problems.

QUESTION: Would that be a foundation for a distinction that is illustrated by the Argersinger case, for example?

MR. TUTTLE: That's a good example, where the Court held that there had to be counsel where there was going

to be any incarceration, but it was sufficiently fair to have a prosecution without counsel where the disposition was a crime merely.

QUESTION: Really what you're saying is there are hard cases like that --

QUESTION: That's exactly what he's saying.

MR. TUTTLE: Well, I'm saying that we don't reach that difficult situation, and I would say that I don't consider it an insuperable problem for the government. I think that there have been criminal penalties imposed under this Act which have included incarceration.

Typically they have involved individuals who had a more intimate involvement with the violation than occurred here. But the statute certainly would permit incarceration.

The fact of the matter is that in violations of this sort district courts are disinclined to impose penalties including imprisonment, and none were in fact imposed in this case.

QUESTION: What are the maximum allowable statutory penalties?

MR. TUTTLE: Well, for a first offender, it carries a maximum allowable penalty of $1,000 or one year in jail.

QUESTION: So that possibly he could have been sentenced to jail for five years?

QUESTION: Yes; five counts.

MR. TUTTLE: Five counts, that's right. If he were given consecutive sentences on every count.

Again, that's not what happened, and I don't think it presents the problem that this Court need resolve at this juncture.

I was speaking about the evidence respecting Park himself in the case.

The by-laws of the corporation give Park general and active supervision of the affairs, business, offices, and employees of the company. Park himself took the stand and acknowledged his responsibility in sanitation matters. He said sanitation, quote, "is a thing I am responsible for in the entire operation of the company."

More generally, Park said --

QUESTION: Well, that's true of almost everything else in the company, isn't it?

MR. TUTTLE: I was about to quote him on everything else in the company, Mr. Justice. He said: Actually I am responsible for the entire organizational structure of the company.

And he went on to say that: "For any result that occurs in the company, I am ultimately the chief executive officer and therefore responsible."

I think that his particular responsibilities with respect to sanitation were an important element of the

government's proof at trial, including the notice that he had received of prior violations, and the notice that he received of the first four violations involved in this charge.

QUESTION: Well, this is a principal part of your case, I take it, that he was president and the president has responsibilities.

MR. TUTTLE: That is a principal part of the case. The essence of the responsibility that he has lies in his duties under the by-laws, and his powers to deal with the problem that the law defines.

QUESTION: And you rely on Dotterweich, don't you, Mr. Tuttle?

MR. TUTTLE: We rely -- we find this case governed by Dotterweich, as did, I should say, the trial court.

QUESTION: Well, anything the corporation could be convicted for, I take it then, that Park could be?

MR. TUTTLE: Under the Food and Drug Act, yes.

QUESTION: Or any other crime -- or any other crime, if that's what the --

MR. TUTTLE: Well, it would depend, of course, on the nature of the crime, but it's weak.

QUESTION: Well, I know, but if that's what the criminal law said, then --

MR. TUTTLE: Well, if that's what the criminal law says; but the fact is that the Food and Drug Act is rather a

specific piecs of legislation, creating, we believe, special duties on people who deal in foods and drugs.

QUESTION: Oh, I don't know, you say that -- but you nevertheless say that the president of the company can be held to have committed this crime because he's president of it.

MR. TUTTLE: Well, but many criminal laws require scienter, as this law does not.

QUESTION: Well, I agree with you.

MR. TUTTLE: In that case, the corporation might be guilty by virtue of the knowing conduct of some subordinate other than the president. The president would not be guilty because he would not have the knowledge which would be an element of the offense.

Our case rests almost entirely on the special nature of these laws.

QUESTION: What if the -- what would be the constitutional violation if they had indicted you for this crime? You would just say, Well, I didn't do it. I mean, I wasn't there, I'm not responsible, wasn't even connected with the corporation. I suppose you'd just say it's --

MR. TUTTLE: Well, of course I would --

QUESTION: There's no difference between you and Park, but he's president of the company.

MR. TUTTLE: And I had no responsibility with respect to that problem. The law imposed no duty on me. I'm

not in the business. I didn't undertake to go into the business of handling dangerous drugs, dangerous medical devices or food. I simply have -- the law has not laid that obligation upon me, and consequently can't hold me responsible if a problem occurs in Acme.

QUESTION: Well, let's bring it closer to this situation. Suppose it was the vice president in charge of sales? They would have a rather difficult time making a case out against him, wouldn't they?

MR. TUTTLE: Well, --

QUESTION: Under the statute.

MR. TUTTLE: -- that would of course depend upon the organizational structure of the business and his responsibilities. I would --

QUESTION: Assuming that the normal function of a sales vice president is to see that the goods are sold and not how they're produced, particularly.

MR. TUTTLE: I would agree; we would have to discuss what the function of it was. But if one spoke about the accountant or the lawyer for the corporation, in-house lawyer who had no responsibilies in the organizational structure for this problem, then he would probably not hold a responsible relation to the violation.

Now, the concept of the responsible relation I want to develop later in my argument, because it is the essence of

what Dotterweich teaches, the jury must find in order to find an individual responsible for a violation.

QUESTION: Can the chief executive officer -- the chief executive officer, unless it's in a very unusual situation, is always going to be, have a responsible relation, if he happens to be the chief executive officer of a company that makes or warehouses products that are subject to the Food and Drug Act.

MR. TUTTLE: I would say except in the most unusual situation, he would be in a responsible relation. It is -- one could conceive --

QUESTION: By definition or ipso facto, whatever you want.

MR. TUTTLE: If he was not, it would be by virtue of some kind of limitations on his power, which would have placed the power somewheres else in a general manager or some other person who was at the apex of --

QUESTION: The chief executive officer of the corporation, and if the corporation can be found guilty, as my brother White says, then inevitably so can he be. If he is in fact the chief executive officer.

MR. TUTTLE: Well, I --Mr. Justice, I agree with that, subject to the limitation that we have to look at laws of this kind.

QUESTION: Yes. Your argument in this case. We're

talking about the Food and Drug, these Food and Drug laws.

MR. TUTTLE: Yes.

QUESTION: That's as much of a concept of responsibility as you need in this case.

QUESTION: Right.

QUESTION: You don't need to develop it any, do you?

QUESTION: No.

QUESTION: That's the end of it. That's your argument.

MR. TUTTLE: Well, that I would be a sufficient basis for the sending of the case to the jury. I do think that the line of command and the relationship that the individual has to the violation or to the prohibited conditions, is something that the government would ordinarily want to show in its case in chief, because the question is committed to the jury on the instruction that if the individual is to be found guilty, it will be by virtue of his responsible relation to the problem which would be --

QUESTION: Well, if he's the chief executive officer of the corporation, he inevitably has a responsibility with relation to that problem or any other corporate problem. Isn't that correct?

MR. TUTTLE: I would say in most instances it might be as --

QUESTION: In every instance.

MR. TUTTLE: -- Mr. Justice, you are aware, in the Wisenfeld decision, you adumbrated a possibility that a corporate executive -- well, that was a case, of course, involving a corporation; but raised for us the suggestion that there might be situations where the corporate executive, be he somewhat lower in the chain of command, or the chief executive might be powerless to deal with the problem, and that might be a matter of affirmative defense that he could assert.

MR. CHIEF JUSTICE BURGER: We'll resume there in the morning.

[Whereupon, at 3:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., Wednesday, March 19, 1975.]

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 74-215
JOHN R. PARK, Respondent.	:	

Washington, D. C.,

Wednesday, March 19, 1975.

The above-entitled matter was resumed for argument at 10:10 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ALLAN ABBOT TUTTLE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner.

GREGORY M. HARVEY, ESQ., Morgan, Lewis & Bockius, 2107 The Fidelity Building, Philadelphia, Penna. 19109; on behalf of the Respondent.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will continue with arguments in 74-215. Mr. Tuttle, you may proceed when you're ready.

ORAL ARGUMENT OF ALLAN ABBOT TUTTLE, ESQ.,

ON BEHALF OF THE PETITIONER -- Resumed

MR. TUTTLE: Mr. Chief Justice, and may it please the Court:

Yesterday I argued that a corporate officer with a responsible relation to a condition of adulteration may be charged with a violation of the Federal Food, Drug, and Cosmetic Act. I also argued that a chief executive officer, or a president of a corporation, generally has the power and the responsibility to place him in a responsible relation to a condition of violation.

This, I think, is accurate as far as it goes, but it only states half of the equation.

The other half of the equation is the matter of affirmative defenses. The evidence we have been discussing is evidence which the government submits is sufficient to establish a prima facie case. Beyond that there is the question of defenses which an otherwise responsible corporate executive might be able to raise.

I want to discuss this morning the question of defenses, but I can only do so in the context of the statutory

scheme that Congress has created.

A discussion of the duties or defenses under the Act would be meaningless without an understanding of the special nature of the Federal Food, Drug, and Cosmetic Act.

The 1938 Act deals with the distribution of all foods, drugs, cosmetics, and medical devices; matters which vitally affect the health of every citizen.

No person need enter the food business or the cosmetic business, or the business of distributing medical devices; but on those who do, Congress has imposed the very highest duty of care.

Dotterweich teaches, for instance, that Congress imposed upon those who deal in these vital commodities the risk of acting at hazard, rather than putting that risk upon consumers who are, for the most part, totally helpless with respect to any violations.

Speaking of this legislation in Smith v. California, this Court said: "The public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors, in fact an absolute standard which will not hear a distributor's plea as to the amount of car he has used."

These standards, which are embodied in the provisions of law we are discussing today, are vitally important since they deal with and govern the distribution of life-giving and

life-saving drugs and medical devices, as well as foods. The Act thus imposes the highest duty of care known to the law, and it imposes upon those in a responsible position a duty to seek out possible violations, to prevent them from occurring, and correct them when they do occur.

The reason for this is evident. Congress has judged that it is intolerable that there should be filth in our food or poison in our drugs or malfunction in our vital medical devices. It is for the failure to exercise this high duty of care and the failure to prevent the occurrence of violations that Congress imposes liability on corporate officers with a responsible relation to violations.

Thus, in Dotterweich, in the Dotterweich case, the president of the Buffalo Pharmacal Company was held responsible for the shipment of under-strength digitalis, even though the under-strength characteristic of the digitalis occurred in the manufacture and not in the distribution, which was the business that Dotterweich was in.

It's for this reason that we believe that where there is a showing of a responsible relation to the violation and a showing of a violation that the government has established a prima facie case.

Now, that brings me to the matter of affirmative defenses.

In the Wiesenfeld decision this Court suggested that

an official might be in a position to raise a defense of powerlessness with respect to a violation.

Now, I may have caused some confusion yesterday in discussing the term "power". Of course, if power is viewed as authority merely, every chief executive officer has power. But power is something more than that. Power is the capacity to effect conditions in the world, and somebody with titular power, bending every effort to compliance, may, nonetheless, be unable to prevent some kind of violation.

Now, this Court has not articulated and not delineated the parameters of a possible defense of powerlessness. And it's our submission that this is not the case to do it in.

Because however that defense may be conceived, on our view of the evidence Park didn't raise it.

Park's effort to establish that he reasonably relied on the advice of subordinates is refuted by the evidence in this case.

QUESTION: Well, can you -- can you imagine or visualize any president and chief executive officer of a corporation being able to raise it? How can the chief executive officer of a corporation say, "I'm sorry, I can't -- I have no control over this corporation"?

MR. TUTTLE: He could not, of course say, "I have no control over the corporation".

QUESTION: Well, "I have no control over it in this

respect." I mean, he just can't say that.

MR. TUTTLE: In respect to a single instance, or in respect to the wilful conduct of a single individual, it's possible that the defense could be raised.

Now, my feeling is that I don't know what the parameters of this defense might be, and if I were to engage in hypotheticals, it would be only that. Because this case presents an articulation of an attempt to defend on the ground that Park was entitled to rely upon his subordinates; that he was entitled to rely upon his organizational structure and his system for dealing with sanitation problems.

And the evidence -- yes?

QUESTION: Do you think the case might be different after -- if the case dealt with the first violation in the context of Mr. Justice Stewart's question?

MR. TUTTLE: Well, I would say, first of all -- and I hope to have time to get to this -- that this case should be looked at in the context of the FDA criteria for prosecution. And they have in -- the Act specifically appoints or requires the Secretary to exercise discretion and not to prosecute for minor violations; or, rather, permits him not to prosecute for minor violations.

And consistent with this, the FDA does not. And with respect to individuals, it is the FDA's policy only to prosecute individuals who, after they have received notice of

a problem, have failed to take action that might correct it.

So, if we're speaking about a theory of criminal liability, I would say that a corporate executive without notice of a condition, if it was a condition which he could have corrected, would still be responsible. But the fact is the FDA doesn't prosecute unless they have a good deal more.

And, as I say, this statute is unique in that it contemplates and specifically writes into the statute the exercise of prosecutorial discretion.

QUESTION: To get back to what you were speaking about a moment ago, I take it that the United States would not think that an executive would be shielded from liability under the statute if he --even though he could demonstrate that he had a reasonably calculated system to effect acceptable results.

MR. TUTTLE: I don't --

QUESTION: More specifically, I would gather you would not say it would be a defense if he proved that he gave a specific order -- he knew about the situation, and he gave a specific order to the warehouse superintendent to take these steps by day after tomorrow; and the superintendent testifies in the case he just completely refused to do it, he had something else to do, and he just didn't want to do it that way. He just refused.

MR. TUTTLE: All right. I think that that would probably not be a defense. Although the -- I would say that

that is -- that would be a jury question. He could say, he could attempt to persuade a jury that he was powerless in this regard.

In our view, --

QUESTION: Well, everything is a jury question in a criminal case.

MR. TUTTLE: Excuse me, Mr. Justice?

QUESTION: Well, everything is a jury question in a criminal case. You can always argue to the jury on something, but that doesn't necessarily mean what the law is.

MR. TUTTLE: Well, that's true, but this statute, I think, is -- as the Court viewed it in Dotterweich, really does envision the commitment of some of these issues to the judgment of the jury; as Your Honors are aware, the Court refused in Dotterweich to articulate exactly what the parameters of the offense were, preferring to leave this matter to the judgment of prosecutors, to the guidance of trial judges, and the judgment of juries.

QUESTION: Well, I take it, you think that the instruction that was given here was all right in this case and would be all right in any case.

MR. TUTTLE: The instruction that was given here was not all right. In my view, Mr. Park woefully failed to do what he ought to have done in these circumstances.

QUESTION: But the instruction to the jury.

MR. TUTTLE: Oh, I'm sorry, I meant -- I was thinking of the instructions that Mr. Park gave.

QUESTION: No, no. No, no. The instruction to the jury.

MR. TUTTLE: The instruction to the jury, I believe, was appropriate, and in fact if you compare it with the instruction in Dotterweich, which this Court approved, I think you will find that it follows the instruction in Dotterweich.

I don't have time this morning to read line for line the two instructions, but they are in our brief and the Court can compare them.

QUESTION: Under that instruction, I take it, the jury would be entitled to conclude that solely because a man is the chief executive officer of a company and has responsibility in the broadest sense, he can be held criminally liable for any kind of a failure to comply with the statute.

MR. TUTTLE: If he has failed to make out an affirmative defense.

QUESTION: Well, I still don't understand the affirmative defense. Unless it is to suggest that if a chief executive officer proves affirmatively, he has the burden of going forward and proves to the jury that he's wholly incompetent and ineffective and doesn't -- and should be fired from his job, there is no affirmative defense.

MR. TUTTLE: Well, if he proved that he had a

system which had always worked, and through some malfunction in the system or the machinery, which he could not have dealt with, and which no system could control, he would have perhaps shown that he was powerless with respect to that violation.

I don't think Park -- all Park did here was to hand the matter to subordinates, he didn't discuss the matter with the vice president in charge of the Baltimore division, and he took no steps to see that his instructions were complied with, or the compliance was achieved.

In consequence, we don't think, whatever the defense might be, it was made out here.

With the Court's permission, I'd like to reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Harvey.

ORAL ARGUMENT OF GREGORY M. HARVEY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. HARVEY: Mr. Chief Justice, and may it please the Court:

Respondent believes that the issue in this case is whether an individual may be convicted of a criminal offense without proof of any personal wrongdoing by that individual, solely because of the individual's position as president of a corporation.

Now, I would not dwell on that point if it did not

appear to me that overnight the government has somewhat retreated from its agreement with the questions asked by Mr. Justice Stewart and Mr. Justice White yesterday as to whether that was not in fact the government's position.

I'm surprised that that retreat has occurred. I might refer you, in the green amicus brief, at page 17, the footnote at the bottom, what I believe to be an authentic quotation from Peter Barton Hutt, the assistant general counsel of HEW responsible for these matters, sitting at counsel table today, in which he says that the only exceptions he has in mind to that rule are the presidents, quote, "who spend their entire lives down in Florida and let some other guy run the company."

I think that is the government's position. It was certainly the government's trial theory, and the difficulties which the Fourth Circuit saw in this case arise from that having been the government's trial theory.

I'll just make a few references to what does appear in the record.

The indictment refers only -- it was an information in five counts, not an indictment. The information refers only to Park as president.

The government's response to Park's motion for a bill of particulars stated -- it's in the Appendix at 14 and 15 -- that the government's evidence, quote, "would not show that the defendant personally performed the acts", close quote,

charged in the information, but, quote, "will simply show the defendant was a corporate officer who, under law, bore a relationship to the receipt and storage of food which would subject him to criminal liability", and then citing the Dotterweich decision.

QUESTION: At some point, I take it, you're going to tell us how the instruction here deviated from or fell short of the instruction approved in Dotterweich?

MR. HARVEY: Yes. Certainly. And I'll go to that right now. I think that is important.

The instruction approved in Dotterweich contained the critical language that the jury was to determine whether the acts had occurred under Dotterweich's supervision. That's the key sentence in the charge.

I think that charge has to be placed in the context of the entire Dotterweich trial. Both sides have disagreed somewhat on that, but the record is, of course, available to you. Both sides have quoted from it.

The issue tried in the Dotterweich case was not whether or not Mr. Dotterweich was responsible for what had occurred, he was the principal witness defending the position, both of the corporation and of himself, that no violations whatsoever had occurred.

And, as we've pointed out, and the Fourth Circuit found important, repeatedly in his testimony Mr. Dotterweich

and his counsel used the personal pronoun "I" or the personal pronoun "you" to refer to what the corporation had done in respect of the claimed violations.

There was, throughout the testimony, almost an identity between the two. And I believe that that explains the jury verdict. The jury received evidence showing that Mr. Dotterweich, "I", "you", as he referred to himself or as his counsel referred to him, had done these things and was mystified as to what, if anything, the corporation had done. Therefore, they convicted Dotterweich and not the corporation.

In the context of that defense theory, in which the corporation denied all liability and Dotterweich was the principal spokesman for the corporation, the very short portion of the charge which deals with Dotterweich's personal liability was entirely appropriate. It was all that his counsel could possibly have asked for, and there was no objection to the charge.

I think that charge is not an appropriate guideline for a case such as this case, in which the corporation pleaded guilty, prior to trial, and there was no dispute that violations had occurred. Instead the question was whether John Park was responsible for those violations.

I think that was the problem which occurred.

QUESTION: Mr. Harvey, what instruction did you offer on this point?

MR. HARVEY: The instruction which was offered by the defendant was, on this point, merely the instruction that his status as chief executive officer was not alone enough to convict him. It's quoted in the government brief.

There is some history, however, which explains how that occurred.

The trial judge throughout, at various -- at every critical stage of the proceeding, had indicated that he believed that under Dotterweich the case must go to the jury, regardless, almost, of the evidence which had been presented.

There was a colloquy in chambers concerning the charge. It is referred to in the record. But on the particular point, as to the appropriate instruction concerning responsibility, there was very vigorous exception taken to the charge. It appears in the record at Appendix sixty --

QUESTION: Well, all the instruction you suggested was this bland one about responsibility. That you concretely presented to the court.

MR. HARVEY: There was nothing concretely presented to the court, Mr. Justice, because the court had indicated very strongly that he would not allow anything except what the --

QUESTION: That relieves you of the responsibility of presenting it and making your record?

MR. HARVEY: No, it doesn't relieve -- it does not

relieve counsel of the necessity of taking exception to the charge as given. And that was very vigorously done.

And the trial court, at page 63 of the Appendix, cut off any further discussion of that exception, saying, quote, "You have your objection", unquote. Which I think in this context has some substantive importance. He did not wish to hear further about that point, because he believed that under Dotterweich he was required to give an instruction in the language taken from the opening sentences of Mr. Justice Murphy's dissent.

And that was the theory of the prosecution in the trial court, and the theory which the government had urged and which the trial court accepted.

QUESTION: Do you want us to say that the government tried it on the wrong theory?

MR. HARVEY: I want you to say, as the Fourth Circuit said, that the government not only tried it on the wrong theory, that is, that the president could be held criminally liable merely by reading the corporate by-law and by presenting the Delaware Corporate Franchise Tax returns to show that he was president, that that made out a case in chief; and that, to take a charge from Mr. Justice Murphy's dissent in Dotterweich was not a proper charge in this case. Because --

QUESTION: Well, just follow Judge Craven, to find that responsibility was shown.

MR. HARVEY: I don't think that in this case the matter can be dealt with as one of harmless error, in which you disregard several sentences of the charge and then find on the basis of the entire record that Mr. Park had been found guilty.

I think that you can find that the government was correct, that the president is to be guilty solely because of his status as president, but that would -- that would imply approving the charge, and perhaps the charge did not go far enough.

And I think really, unless you accept the government's slight retreat, as I see it, either you should approve the charge and perhaps imply it could be strengthened, or you should follow the Fourth Circuit: require a new trial and give guidance, which the trial courts appear to respondent to need after the passage of time since the Dotterweich decision, as to what the standard is.

But I don't think the harmless error approach is appropriate, nor do I think the government urges that upon you, either.

QUESTION: I take it you think the Fourth Circuit properly characterized the infirmities of the charge as given?

MR. HARVEY: Yes, I think the Fourth Circuit did. And I think the Fourth Circuit has laid down a very broad standard as to the type of evidence which would be appropriate

to establish, on a retrial, that John Park was responsible for the violations charge, tying him, as the Fourth Circuit required, to the violations rather than tying him merely to the corporate hierarchy.

I think it is -- it's a very broad standard. It will not be an easy case to win on retrial. I hardly think that the Fourth Circuit has made it difficult to convict presidents who are in fact responsible for the violation.

QUESTION: Well, wasn't the trial judge tending to draw on Mr. Justice Frankfurter's majority opinion, when he dealt with the concept of shared responsibility in the business process?

Mr. Justice Frankfurter said: Whether an accused shares responsibility in the business process, resulting in unlawful distribution, and so forth.

MR. HARVEY: The -- part of the charge is taken from the opinion of this Court by Mr. Justice Frankfurter. The critical portions, in our view, and I refer to page 61 of the Appendix, the critical portions are those opening sentences, just below the middle of the page, where the court says, "Thirdly, that Joh R. Park held a position of authority in the operation of the business of Acme Markets", and then that sentence is repeated against in the next paragraph.

That language comes directly from the dissent. Of course, if this Court believes that that fairly characterizes

the dissent, and you choose to reaffirm Dotterweich, then that charge is good.

It appears to us that it is bad, and in the government -- that portion of it is bad, and in the government's reply brief, the government seems to concede that that first sentence is not a satisfactory statement of the rule. That's at page 4 of the reply brief.

QUESTION: Mr. Harvey, isn't it quite possible that a discussion may be perfectly appropriate for an appellate opinion and nonetheless not afford a suitable basis for charging the jury?

MR. HARVEY: I think that's exactly what happened here, and I urged that strongly on the Court of Appeals, that language was taken from a Frankfurter opinion which was technical language, language intended for lawyers; it was, in the second part of the charge, used to instruct a jury. And I think it is very difficult to understand how a lay jury could have made any sense of that second paragraph of the charge in this case. And for that reason, just quoting from the opinion.

QUESTION: What do you mean by the second paragraph?

MR. HARVEY: All right, by that I mean --

QUESTION: Page 61?

MR. HARVEY: -- I really mean what appears on page 62 of the Appendix. It's the --

QUESTION: The one that says "However, the fact that" --

MR. HARVEY: "However, the fact" and so on.

QUESTION: Yes, "is a chief executive ... does not require a finding of guilt."

MR. HARVEY: Right.

And then it's the next sentences that are very, very difficult --

QUESTION: "Responsible relationship to the issue."

MR. HARVEY: Right.

And that's language from the Frankfurter opinion. I think it's very difficult to --

QUESTION: Well, that, but that does -- that does what -- perhaps it's difficult, as you suggest, but that does go a little beyond merely the fact that he was chief executive officer, doesn't it?

MR. HARVEY: Oh, yes, it does.

QUESTION: It says that even though he is, the government still has to prove that he had something called a responsible relationship to the issue?

MR. HARVEY: That's correct. That is -- that responsible relationship is nowhere defined.

QUESTION: That's what you -- what trial counsel tried to have defined. Unsuccessfully.

MR. HARVEY: That's what trial counsel was concerned

about.

QUESTION: Yes.

MR. HARVEY: And also concerned about the opening sentences.

Now, if you compare this charge with the charge in Kool?, I think it's difficult to find that, with these two opening sentences, this could be harmless error. And I've --

QUESTION: But, under this charge, I would suppose if the jury concluded that this particular chief executive officer had responsibility for this area of the company's business, it could find him guilty for no reason other than the fact that he was the chief executive? Or that --

MR. HARVEY: I don't think it has to --

QUESTION: The disclaimer is that the -- that fact that the defendant is president and a chief executive officer doesn't require a finding of guilt.

MR. HARVEY: Yes, both sides tend to believe that what the judge actually said was "president and chief executive officer", and that the transcript is not correct on that point.

But if you go back to the opening sentences, there is nothing in those sentences to the effect that the authority and responsibility has to be in relation to the offenses. That's the language on page 61. And it's that language on page 61 which the Court of Appeals found most prejudicial.

QUESTION: Well, do you -- do you say that the -- the language at the top of page 62 of the Appendix --

MR. HARVEY: Yes, Your Honor?

QUESTION: -- the language"had a responsible relation to the situation, even though he may not have participated personally"; do you say that that goes beyond Dotterweich, or that it is --

MR. HARVEY: No, I say that does not go beyond Dotterweich. I think that is very bad language in which to instruct a jury so that the jury understands what the issue is. I think it's the error of taking language from an appellate opinion and using it directly as a jury instruction which I was discussing with Mr. Justice Rehnquist.

QUESTION: But the words, "had a responsible relation", does that not mean clearly, had a relationship of responsibility?

Any difficulty with reading it that way?

MR. HARVEY: Well, it can be understood that way.

QUESTION: "Can be"?

MR. HARVEY: Yes.

QUESTION: In what other way could it be understood?

MR. HARVEY: I should make clear that I would not -- has this portion of the charge been given without the language which appears on page 61, it is, in my opinion, certain that the Fourth Circuit would not have reversed. It's

the language on page 61 that is the language which seemed to be critical.

QUESTION: Specifically which language, if I may ask?

MR. HARVEY: Yes. The language is "Thirdly, that John R. Park held a position of authority in the operation of the business of Acme Markets, Incorporated."

And then repeated again in the next paragraph, given as a summary of the elements which the jury must find.

I think it's as a summary that is an important factor.

That language comes directly from the government's third request for charge, which appears in the Appendix at page 72, and it is also quoted directly from Mr. Justice Murphy's dissent.

QUESTION: Well, do you question that Mr. Park held a position of authority in the operation of the business of Acme Markets?

MR. HARVEY: I do not question that he did. He was selected to be prosecuted because he was chief executive officer. Therefore, we contend that this sentence amounts to a directed verdict of guilty: select the man who is chief executive officer, tell the jury that if he has a position of authority and responsibility he may be convicted. He is convicted. That's what we object to.

QUESTION: Wasn't he also made aware of what was going on?

MR. HARVEY: Well, the government has -- the government made him aware, but the only count which charges conduct occurring after the letter to Mr. Park is conduct which the government factually cannot prove occurred after that letter.

In other words, the fifth count.

QUESTION: Well, was it -- did you put on evidence that he wasn't made aware?

MR. HARVEY: No, I didn't -- we didn't --

QUESTION: But that was in your possession, wasn't it? Park was in your possession.

MR. HARVEY: He was made aware officially by the government of the conditions. They're in -- four counts occurred before that notice; the fifth count was discovered in an inspection which occurred after the notice. But the government cannot prove that the violation occurred after the notice. It was discovered after the notice, but that timeframe in which the rodents gnawed that particular package may have occurred three weeks before the notice.

That's why the government makes no distinction.

QUESTION: Did Mr. Park put on testimony as to what he did to correct the situation?

MR. HARVEY: Yes, he did. And the testimony is

in the Appendix, that he delegated to the appropriate persons the resolution of the problem.

QUESTION: Which he could only do if he had the responsibility to do it. Right?

MR. HARVEY: Well, the responsibility -- he acknowledged the general responsibility. He had also received specific notice from the government, and I think he reacted reasonably to that notice.

But that, I think, does not go to the question of the charge, which is the only matter on which the Fourth Circuit reversed.

We argued there was not sufficient evidence. They never reached that point, and did order a new trial.

Now, I'd like to turn briefly to the constitutional limitations which this case may present, depending upon whether the Court desires to, as respondent believes, go substantially beyond Dotterweich.

I would urge first that this Court's determination of whether a prosecution under the Act is subject to ordinary criminal constitutional limitations should not depend, either on the absence of a sentence of imprisonment or on the relatively light fine which was imposed by the trial judge.

It would be ironic if the light fine was used to justify the conviction, because the light fine reflects the trial court's view of the weight of the government's case, as

the trial court commented. It was $50 a count, with a maximum -- against a maximum of $1,000 a count.

I think, second, the Court should consider that the government desires to have all the benefits of a criminal conviction, the government in its reply brief, at pages 9 and 10, urges that it must have criminal sanctions to enforce this Act.

And I think this Court should therefore hold the government to that. If the government wants the stigma of a criminal conviction, wants the threat of a substantial sentence of imprisonment, wants the threat of a felony record on a second conviction; the government should be required to adhere to the same criminal standards which govern every other prosecution.

Nor is there any logical reason why a special rule should be elaborated merely for Food and Drug Act cases. Certainly the government, when other statutes are at issue, does not take the position that Dotterweich applies only to Food and Drug Act cases.

It's been applied in Freed, the firearms registration; the O'Keefe article, which both sides have cited, includes an appendix listing dozens of other statutes which might receive a similar interpretation. It's not properly a special problem for Food and Drug Act cases.

If respondent is correct that it is a criminal case,

then, under Winship, the accused is protected against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

And it appears to respondent that the concept which the government advanced at trial, advanced in the Fourth Circuit, and advanced here, that somehow there is a standard of proof which gets to the jury, and there is a different standard of proof which might be the standard for conviction, which I think is the substance of their argument, is not one which is justifiable in a criminal case.

Nor can the sentence in Wisenfeld be relied upon to create a doctrine of affirmative defenses applicable to individuals. Most especially because the Wisenfeld case involved only a corporation, as my brother forgot in his prior argument, although the case speaks of a public warehouseman, it is a corporation which is involved.

And furthermore, the powerlessness issue which was discussed there had no application to individuals charged with offenses, it went merely to defenses which might be available to a corporation.

We would say lastly that going back to Scales and other cases, this Court has never favored, and has gone to some lengths to disfavor, punishment imposed merely upon a status.

In this case, the government sought to do that.

The Courth Circuit has laid down a rule which requires instead, and,in our view, consistently with Dotterweich, that the acts of the individual, either by omission or commission, which directly or constructively cause the offense, be the evidence necessary to convict.

QUESTION: Well, under that theory, only the rats would be liable?

[Laughter.]

MR. HARVEY: No, I think under that theory many chief executive officers in this situation, and perhaps respondent John Park might be found guilty, I think that is a standard which gives the government very ample room to convict when there has in fact been a violation of the Act.

And the government's own standards, as have been pointed out in the briefs, show that the government has rarely if ever, until this case, commenced a prosecution in which they did not attempt to present exactly that evidence, tying the individual directly to the violations.

QUESTION: But how could they do that unless they put 24-hour surveillance on him from the time he first got notice of the event and up to the time that they charged him? You don't expect that the government can know what he is doing, except as he writes memos and gives orders, which are documented by tangible evidence.

MR. HARVEY: Well, his omissions to act, under the

Fourth Circuit decision, are equally proof of his personal liability for what has occurred within his corporation. I think that's a key part of the decision which has been overlooked in the government's brief.

And I think --

QUESTION: You would say that if it were proved he knew of it, and had an opportunity to cure the defect and didn't, that that's a far different situation than this instruction would permit?

MR. HARVEY: Absolutely. And I'm saying -- and I do not mean by responding that way to your question to imply that your question limits the other evidence which the government might show, because notice or knowledge is not a necessary part of the government's case, either.

I think the government has misunderstood the opinion on that point. And, as we pointed out, it also appears to have misunderstood the Abbott opinion, which is referred to in both briefs.

QUESTION: Well, are you making any kind of a constitutional argument here? Let's assume the statute said in plain language, "any chief executive officer, if, under the bylaws, he has general responsibility for the situation that is then found to be defective or vulnerable under the statute" that --

MR. HARVEY: Yes, I am making a due process argu-

ment there. I think that as to an individual, that a statute which wrote into the text of the statute what the government attempted to do here in this trial, that is prove merely the by-law and prove that he was president, that that statute would not be constitutional. I don't think Dotterweich did that, and we have urged the reasons why not; and therefore we support the fourth Circuit's reversal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Harvey.

QUESTION: Mr. Tuttle, before you commence, what effect, if any, do you give in your analysis of this problem, this statute and how it should be applied, to the size and complexity of the corporation? This corporation involved 35,000 employees, and 900 stores, scattered all over the United States.

It seems to me to be one thing to hold a corporate executive responsible if he has a very small organization and sits right on top of it, and either knows or ought to know what goes on from day to day; but if you have a corporation of this size, and the other is much larger, could this statute apply?

REBUTTAL ARGUMENT OF ALLAN ABBOT TUTTLE, ESQ.,
ON BEHALF OF THE PETITIONER

MR. TUTTLE: In my view, the size and increasing complexity of the business of handling these kinds of sensitive

commodities is an argument for applying the statute in the strictest sense to the highest corporate official who has responsibility.

It's the only way that we are going to have a total commitment by the corporation to compliance with the Act. If we can use size as a shield, from responsibility, then the FDA will simply not be able to induce companies to comply with the Act.

By holding highest corporate officials responsible, we do create a strong incentive in that end. Excuse me, Mr. Chief Justice.

QUESTION: Does this record show many warehouses they have?

MR. TUTTLE: Yes. They had 12 warehouses, and four special warehouses, according to the record, and some 800 stores.

QUESTION: And these offenses were all relating to warehouses, were they?

MR. TUTTLE: These violations?

QUESTION: These violations, yes.

MR. TUTTLE: Yes, they were relating to inspections of warehouses.

If I may, with only the few minutes I have, I would like to address myself initially to the question of the Park case itself.

It seems to us that if respondent Park is not guilty under this statute, no one is.

I think we have failed to pay adequate attention to the evidence in this case.

Park received notice in 1970, fully a year, more than a year before the violation in Baltimore, of the fact that his system for handling sanitation matters had abysmally failed in Philadelphia, and he nonetheless relied upon the same subordinates in the same system and allowed the same situation to occur in Baltimore.

With respect to the Baltimore violations themselves, he received notice of those violations after the initial inspection, and he failed to take action to correct those violations.

QUESTION: Well, is --

MR. TUTTLE: He was on notice of the problem.

QUESTION: -- is the point of what you're telling us now that even if the instructions were erroneous, they were harmless?

MR. TUTTLE: Well, I don't concede for a moment that the instructions are erroneous.

QUESTION: Well, even assuming arguendo that the instructions were erroneous --

MR. TUTTLE: Well, if the Court --

QUESTION: -- erroneous, they were harmless.

Otherwise, what's the point of what you're telling us?

MR. TUTTLE: Well, the point is that -- I believe the instructions are proper and the evidence supports the conviction, and that of course is a burden I have to carry. I would argue that if the -- to the extent that the Court might wish to articulate more fully the nature of those things which might constitute a responsible relationship, that there was no harm as to Park, where the evidence showed his involvement in the event.

I think it's important to distinguish the Dotterweich case, to realize that in Dotterweich the corporation -- neither the corporation nor Dotterweich had anything to do with the conditions that caused the violation of the Act.

Here it's Acme that did it, it's Acme that let these filthy conditions obtain in their Baltimore and Philadelphia warehouses. And it's Park that knew about this, and it's Park that failed to take action to correct it.

Dotterweich had set up a system whereby others were handling the matter, and he had absolutely no knowledge of anything, and yet he was held responsible.

There are -- well, my time has expired. I would only urge the Court to compare, if you will, the evidence and the instructions in Dotterweich with the evidence and the instructions here.

I don't think any serious constitutional challenge

is presented, and I think the cases are on all fours.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Tuttle.

Thank you, Mr. Harvey.

The case is submitted.

[Whereupon, at 10:57 o'clock, a.m., the case in the above-entitled matter was submitted.]

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