North Dakota Law Review

Volume 28 | Number 1 Article 10

1952

Subpoena Duces Tecum - Liability for Failure to Produce Papers in Obedience to Subpoena - Production of Documents by Witness

Herman J. Elsen

takeoffs and landings.[19] It is the low flying after takeoffs and before landings that give rise to suits by adjacent landowners.[20] Illustrative is *Causby v. United States*,[21] in which both direct and consequential damages were allowed for a "taking" and for loss of chickens killed and the forcing of the plaintiff out of the poultry business. In the *Causby* case plaintiff lived directly in line with a runway and his air space was invaded, causing repeated disturbances among his poultry when planes passed over at low altitudes. The instant case is easily distinguished, since there was no showing in it that there was a direct invasion of airspace, nor was the point in issue.

In Maryland, when property is not physically taken or the owner not divested of title, compensation for consequential damages is not allowed [22] unless there is a serious interference with use such as a flooding.[23] The rule is different in states which require compensation for "taking or damaging." [24] Since the airplane has become such a vital force to the comfort, convenience and national safety of the people, it is submitted that the actual interference view, effecting a compromise between the nuisance theory, the zone theory, and the Restatement position, is the most practical and beneficial to all parties. Universal adoption of such a view would allow aircraft freedom of operating activity without subjecting the operator to technical suits, but at the same time would allow the landowner a more suitable method of recovery than the nuisance theory.

FRANK J. KOSANDA

SUBPOENA *Duces Tecum* — LIABILITY FOR FAILURE TO PRODUCE PAPERS IN OBEDIENCE TO SUBPOENA — PRODUCTION OF DOCUMENTS BY WITNESS. In a recent case the Supreme Court of the United States decided that the Department of Justice is privileged to keep its records private in the face of a subpoena *duces tecum* issued by a federal district court. Attempting to get his release from a state prison, the plaintiff brought habeas corpus proceedings against the warden. In the course of the trial, he had the court issue a subpoena *duces tecum* and it was served on the F.B.I. agent in charge of the Chicago office of the Department of Justice.[1] The agent answered the subpoena, but refused to produce the records demanded by the court. He was accordingly adjudged in contempt. On certiorari, the Supreme Court *held* that department regulations forbade disclosure and that the agent rightfully withheld the records from the court. *United States* ex rel *Touhy v. Regan*, 71 S.Ct. 416 (U.S. 1951).

There is a federal statute [2] that allows the Attorney General to make lawful

19. *Ibid.*
20. See Causby v. United States, 60 F.Supp. 751 (1945); Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385 (1930).
21. 60 F.Supp. 751 (1945), *rev'd.*, 328 U.S. 256 (1946) (remanded to determine value of easement); 75 F.Supp. 262 (1948).
22. Baltimore v. Himmelfarb, 172 Md. 628, 192 Atl. 595 (1937).
23. Northern Cent. Ry. Co. v. Oldenburg & Kelley, 122 Md. 326, 89 Atl. 601 (1914).
24. *E.g.*, Cal. Const. Art. I, §14; Ill. Const. Art II, §13.

1. The subpoena was also addressed to the Attorney General, but he apparently was not personally served and did not appear.
2. 5 U.S.C. §22 (1946) "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, . . . and the custody, use and preservation of the records, papers, and property appertaining to it."

regulations for the purpose of safeguarding departmental records and as a result of this statute, the Attorney General issued the regulation now followed by the agent.[3] However, the issue in the case is not so simple. In effect, the court was called upon to decide the question whether the Attorney General could legally withhold records from the court and this question was evaded by the court when it held that the legality of the non-disclosure was a question for the Attorney General's decision. It seems difficult to justify such a result because it is giving the executive branch of the government a privilege apparently not contemplated by the statute.[4]

The court relied on several cases to justify its holding; the foremost one being *Boske v. Comingore*.[5] In that case a subpoena *duces tecum* was directed at an official of the Bureau of Internal Revenue requesting disclosure of certain reports in his custody. He, too, refused to disclose and was promptly jailed for contempt. On appeal, however, the order was reversed for the reason that the reports were privileged. The basis for the privilege was this same federal statute and a similar regulation. The court said in that case that the regulation was authorized under the statute [6] and as the statute has been held constitutional,[7] the agent could properly refuse to disclose.

By implication, the court is apparently accepting the Attorney General's determination that non-disclosure of the records is legally correct. Results of this type have caused considerable comment among legal writers and analysts.[8] It has been suggested that litigants in the plaintiff's position may try to reach the Attorney General by process. However, this seems difficult in the light of the Federal Rules of Civil Procedure.[9] In a concurring opinion, Justice Frankfurter stated that the Attorney General could be reached by process,[10] and if such a proceeding would be initiated, the court would have to decide whether the executive branch of the government has a new statutory immunity from disclosure or whether the records should be submitted for judicial determination of disclosure.

---

3. 28 Code Fed. Regs. §51.71 (1946) "All official files, documents, records, and information in the offices of the Department of Justice . . . are to be regarded as confidential . . . No officer or employee may permit the disclosure . . . except in the discretion of the Attorney General. . . . Whenever a subjoena *duces tecum* is served to produce . . . files, documents, records or information, the . . . employee on whom such subpoena is served unless otherwise expressly directed by the Attorney General, will appear in court . . . and respectfully decline to produce . . . on the grounds that the disclosure . . . is prohibited by this regulation."

4. Butler v. White, 83 Fed. 578, 581 (C.C.D. W.Va. 1897).

5. 177 U.S. 459 (1900).

6. *Ex parte* Sackett, 74 F.2d 922 (9th Cir. 1935) (this regulation has the force of law, and the court has no jurisdiction or power to punish an officer for conforming to that law); Harwood v. McMurtry, 22 F. Supp. 572 (W.D. Ky. 1938) (involving a communication from a subordinate officer to his superior); For an illustration of a valid state statute similar to the Federal Regulation where the Secretary of the Wisconsin Tax Commission, relying on the state statute, refused to produce Income Tax returns in response to a subpoena *duces tecum*. See *In re* Valencia Condensed Milk Co., 240 Fed. 310 (7th Cir. 1917).

7. Boske v. Comingore, 177 U.S. 459 (1900); *In re* Weeks, 82 Fed. 729 (D. Vt. 1897); United States v. Brooks, 51 F. Supp. 974 (D.N.J. 1943).

8. Berger and Krash, *Government Immunity from Discovery*, 59 Yale L.J. 1451 (1950); Pike and Fischer, *Discovery Against Federal Administrative Agencies*, 56 Harv. L. Rev. 1125, 1130 (1943).

9. Fed. R. Civ. P. 45 (e)(1). "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within *one hundred miles* of the place of the hearing or trial specified in the subpoena." (Italics supplied).

10. See Marbury v. Madison, 1 Cranch. 137 (U.S. 1803) (where the Attorney General answered a subpoena to be a witness).

This privilege from disclosure can apparently be exercised by the government in all civil and criminal cases between private litigants [11] and also in civil actions where the government is a party to the suit.[12] In many cases, such a privilege has been used for the benefit of the people [13] but it also has been abused.[14] However, where the government brings the criminal action, it waives its privilege and is forced to disclose.[15] This same rule has been applied to government agency records.[16] Similarly, many states have construed their statutes to reach the same effect, such as those regarding public welfare,[17] tax records,[18] accident reports,[19] and public service commission reports.[20]

There is authority in the common law for the decision in the instant case.[21] Privilege from disclosure has been granted to governments to insure effective law enforcement,[22] Privilege from disclosure has been granted to governments to insure effective law enforcement,[23] and to protect national security.[24] There is also authority for the proposition that the reports or records should be submitted to the court which should then make the determination for disclosure.[25] However, the majority of cases allow the administrative head final determination as to disclosure for the stated reason that he is in the most advantageous position to know whether or not the disclosure would adversely affect the public interest.[26]

The court in the instant case left unanswered the question of whether a subordinate could refuse to answer the subpoena *duces tecum* without the express authorization of the Attorney General or whether the Attorney General can delegate his determination to his subordinates.[27] If it is held that he can, then such a delegation may create a greater governmental immunity because employees will generally be more reluctant to disclose public documents.

This decision may and can have far-reaching complications. The courts

---

11. Krumin v. Bruknes, 255 Ill. App. 503 (1930) (libel); Meyer v. Home Ins. Co., 127 Wis. 293, 106 N.W. 1087 (1906) (action on Insurance policies).
12. United States v. Kohler Co., 9 F.R.D. 289 (E.D. Pa. 1949).
13. *E.g.*, United States v. Nichols, 78 F. Supp. 483 (W.D. Ark. 1948); McGlothan v. Pennsylvania R. Co., 170 F.2d 121 (3d Cir. 1948) (Involving records in Veterans Administration wherein the court stated that the assertion of the privilege must be timely to be effective); Zimmerman v. Poindexter, 74 F. Supp. 933 (Hawaii 1947).
14. United States v. General Motors Corp., 2 F.R.D. 528 (N.D. Ill. 1942); O'Reilly, Jr., *Discovery Against the United States: A New Aspect of Sovereign Immunity*, 21 N.C.L. Rev. 1 (1942) (wherein the author considers the existing law resulting from the *General Motors* case undesirable). *Cf.* Bowles v. Ackerman, 4 F.R.D. 260 (S.D.N.Y. 1945).
15. United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Watkins, 67 F. Supp. 556 (S.D.N.Y. 1946).
16. Harris v. Walsh, 277 Fed. 569 (D.C.Cir. 1922) (Selective Service Records); Louisville & N. R. Co. v. Stephens, 298 Ky. 328, 182 S.W.2d 447 (1944) (Interstate Commerce Commission Records).
17. Coopersburg v. Taylor, 148 Misc. 824, 266 N.Y.S. 359 (1933).
18. Brackett v. Commonwealth, 223 Mass. 119, 111 N.E. 1036 (1916).
19. Lowen v. Pates, 219 Minn. 566, 18 N.W.2d 455 (1945).
20. Friedman v. Burritt, 195 Misc. 376, 90 N.Y.S.2d 755 (1949).
21. 8 Wigmore, Evidence §2374, 2377 (3d ed. 1940); Home v. Bentinck, 2 B. & B. 130, 129 Eng. Rep. 907 (Ex. 1820) (Informers report held privileged).
22. See The Trial of the Earl of Strafford, 3 How. St. Tr. 1382, 1442 (1640). *But cf.* Gugy v. Maguire, 13 Low. Can. 33, 38 (1863) where Judge Mondelet denounced this practice of refusing to produce a police report in the interests of the public in answer to a subpoena *duces tecum* as tyrannical and monstrous.
23. Beatson v. Skene, 5 H. &. N. 837, 157 Eng. Rep. 1415 (1860).
24. Hennessey v. Wright, 21 Q.B.D. 509 (1888).
25. Robinson v. State of South Australia, A.C. 704, L.R. 100 P.C. 183 (1931); See note 56 Harv. L. Rev. 806, 811 (1943).
26. 56 Harv. L. Rev. 806 (1943).
27. This same point is also discussed in 35 Minn. L. Rev. 586 (1951).

have always assured everyone of due process of law; yet, here is an individual imprisoned with his most effective means of obtaining his release denied. It is however doubtful whether the privilege could still be exercised by the government where the extreme penal sanction has been imposed.[28]

The best solution to the problem would seem to be to leave the determination of disclosure up to the trial judge,[29] thus allowing disclosure to the court without publicly disclosing confidential records.

HERMAN J. ELSEN

28. State v. Cooper, 2 N.J. 540, 67 A.2d 298 (1949) (held that State Police Bureau could not validly claim as privileged the identification of a bottle for fingerprints allegedly used in a murder).

29. See Model Code of Evidence, Rule 228 (1942); McAllister, *Executive or Judicial Determination of Privilege of Government Documents?*, 41 J. Crim. L. & Criminology 330 (1950); 35 Minn. L. Rev. 586 (1951).