Journal of Criminal Law and Criminology

Volume 41 | Issue 3 Article 9

1950

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Recommended Citation

Dale McAllister, Executive or Judicial Determination of Privilege of Government Documents, 41 J. Crim. L. & Criminology 330 (1950-1951)

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possible abuses by federal officers and the practical difficulties encountered under a case by case approach it favors a return to this doctrine.

By recognizing the right to search incident to an arrest and yet limiting that right, the *Rabinowitz* case might be considered as a middle position between the extremes represented by the *Harris* and *Trupiano* cases. However, by taking the same approach as the *Harris* case and other cases prior to *Trupiano*,[31] it is altogether possible that in effect the decision in the *Rabinowitz* case, rather than being a middle ground, is a return to the *Harris* case. To what extent the *Harris* case has been revitalized can only be determined by subsequent decisions under the Supreme Court's new case by case method.[32]

A recent case[33] would seem to indicate a reluctance on the part of lower courts to dispense with the necessity of obtaining a search warrant. This decision also points up the difficulty with the case by case approach. It may well be that in attempting to aid federal law enforcers the Court has in effect created a doctrine whereby officers are lulled into thinking a warrant is not necessary only to have a warrant declared mandatory by a court basing its decision on judicial niceties. Federal officers will be faced with the practical problem of whether or not under all the circumstances it is reasonably practicable to obtain a warrant. By and large police officers are not in a position to make this determination objectively.

EXECUTIVE OR JUDICIAL DETERMINATION OF PRIVILEGE OF GOVERNMENT DOCUMENTS?

Dale McAllister

Considerable controversy has arisen in recent months over the refusal of government agencies to make available their files although directed by court order to produce them. This impasse between executive and judiciary owes its existence to a seemingly harmless statute giving department heads power to make regulations, not inconsistent with law, in regard to the government of their departments, conduct of personnel, and use and preservation of documents.[1]

31. Weeks v. United States, 232 U.S. 383 (1914) (search of home when man was arrested several blocks away); Marron v. United States, 275 U.S. 192 (1927) (agents seize ledger in plain sight during search of a saloon); Agnello v. United States, 269 U.S. 20 (1925) (right to search premises but not house three blocks away).

32. The change may not be restricted solely to cases dealing with searches incident to an arrest, but may well be felt in other phases of the search and seizure field. If, for example, a more lenient view respecting the requirements necessary to constitute probable cause for arrest is taken, this will expand the instances when searches without a warrant can be conducted inasmuch as the search must be incident to a valid arrest.

33. McKnight v. United States, ___ F. 2d ___ (C.A. D.C. 1950). Instead of arresting defendant, who was suspected of running a numbers game on the street, police allowed him to enter a private dwelling. Without a warrant, the officers broke down the door and arrested defendant and incidentally seized equipment in the room. By rejecting a convenient opportunity to arrest defendant, and by breaking down the door to a private home, the court declared that the officers acted unreasonably. The case illustrates the possible beginning of a long line of judicial rationalizations whereby a court decides if a given search and seizure is reasonable. The decision by the lower court is surprising in the light of the *Rabinowitz* case. Although clearly distinguishable, the case does not appear to reflect the liberality of the present Supreme Court with respect to a search and seizure incident to an arrest.

1. 17 STAT. 283 (1872), 5 U.S.C.A. §22 (1927). "The head of each department is authorized to prescribe regulations not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of

The most recent circuit court decision involving the question of the availability of subpoenaed agency documents does little to set the conflict at rest.[2] In this case the celebrated Roger Touhy initiated a habeas corpus proceeding in an attempt to secure his release from prison after conviction for the alleged kidnapping of John "Jake the Barber" Factor. Touhy claimed that the conviction was a "frameup" and contended that information essential to proof of his case was contained in the Chicago files of the FBI. George McSwain, Special Agent in charge of the FBI office in Chicago, refused to produce the requested documents in response to a court order and was cited for contempt. In refusing, McSwain asserted that the files demanded contained names of informers whose lives would be in jeopardy if the documents were revealed. He based his action on a Department of Justice regulation directing officials of that department to refuse to produce such files in any situation where the Attorney General felt it to be contrary to public policy to disclose the information desired.[3]

Supplement No. 2 to the Justice Department Regulation unaccountably provides that the subordinate should appear and, if questioned, should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether, in the best public interest, the information should be disclosed. The supplement further provides that under no circumstances should the name of any confidential informant be disclosed.[4]

The circuit court decided that the documents concerned were privileged by virtue of the Justice Department Regulation, but that the provisions of the Supplement to that regulation operated to waive the privilege. However, despite the waiver, the circuit court held that the district court had failed to make a proper formal request for the documents when Mr. McSwain appeared before it, and consequently the contempt citation was overruled.[5]

The *McSwain* case, in common with other cases upholding the proposition that such government files are privileged, relied for authority solely on the United States Supreme Court case of *Boske v. Comingore*.[6] In that case, a

its business, and the custody, use and preservation of the records, papers, and property appertaining to it."

2. United States ex rel. Touhy v. Ragan, 180 F. 2d 321 (7th Cir. 1950).

3. Department of Justice Order No. 3229, May 2, 1939 pursuant to 5 U.S.C.A. §22: "All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than the performance of his official duties, except in the discretion of The Attorney General, The Assistant to The Attorney General, or an Assistant Attorney General acting for him.

"Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by The Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation."

4. Supplement No. 2 to Order No. 3229, June 6, 1947 provides in part that: "If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. * * * Under no circumstances should the name of any confidential informant be disclosed."

5. It is difficult to see what further questioning was required. United States *ex rel.* Touhy v. Ragan, 180 F. 2d 321, 328 (7th Cir. 1950).

6. 177 U.S. 459 (1900); *accord, Ex parte* Sackett, 74 F. 2d 922 (9th Cir. 1935); U. S. *ex rel.* Bayarsky v. Brooks, *et al.*, 51 F. Supp. 974 (D.C. N.J. 1943).

state court had issued a contempt citation against a local agent of the District Internal Revenue Collector for his refusal to supply the court with Revenue records indicating the amount of liquor on hand in the defendant's warehouses, which liquor had not been listed for state taxation. Present in the case was a Department of Internal Revenue Regulation comparable to the Justice Department Regulation in the *McSwain* case. The Court found the regulation not inconsistent with law, indicated that the documents were privileged, and dismissed the contempt citation. From the *Boske* case springs a general rule that, where a departmental head establishes a regulation which denies records to a court of law, those records become privileged.

Courts have, to a degree, recognized the unreasonable breadth of a rule granting an unqualified privilege to government documents. In situations where the government brings the action the privilege is deemed to have been waived.[7] The government is not allowed to shield itself with the privilege when it is responsible for the prosecution, and must either reveal material documents desired by the defendant or dismiss the suit. Yet this qualification is not enough to cover all situations where the privilege would work hardship. The qualification may, in itself, produce inequities.[8] Consequently, the general proposition of the *Boske* case should be re-examined.

Boske v. Comingore is vulnerable on several points. The act of Congress giving department heads the power to make regulations regarding the use and preservation of documents refers to regulations "not inconsistent with law." The court in the *Boske* case emphasizes the general rule that a regulation must be plainly and palpably inconsistent with law to be held invalid. Yet another important rule would suggest a less demanding criterion of invalidity. It is an inherent power of the court to require production of evidence and testimony for the proper administration of justice. The general rule of the common law requires production while privilege is the exception.[9] Since the effect of the statute and regulation here is to reduce the evidence available to the courts it would seem reasonable that a less strenuous proof of inconsistency with law would be required to make the regulation invalid. Moreover, it has always been a basic part of judicial procedure that the judge decide which documents coming under his authority are to be privileged and which are not. A regulation withdrawing this determination from the trial judge and lodging it in the hands of a department head could, therefore, be considered "inconsistent with law."[10]

The *Boske* opinion might be rationalized, however, to meet this argument. In application to the case's particular fact situation the regulation may not have been inconsistent with law for the reason that the trial judge could have

7. U. S. v. Grayson, 166 F. 2d 863 (2d Cir. 1948); U. S. v. Andolschek, 142 F. 2d 503 (2d Cir. 1944); Bowles v. Ackerman, 4 F.R.D. 260 (D.C. S.D. N.Y. 1945); Kentucky-Tennessee Light and Power Company v. Nashville Coal Company, 55 F. Supp. 65 (D.C. W.D. Ky. 1944).

8. In situations where the documents sought are material but not important, the public interest might best be served by granting a privilege to the documents and still continuing the prosecution. This idea is implicit in U. S. v. Beekman, 155 F. 2d 580 (2d Cir. 1946). ("If documents are importantly relevant the government abandons the privilege.") It must be realized that, in deciding whether the documents are "importantly relevant," the court is making the determination of privilege.

9. *In re* Herrnstein, 6 Ohio Supp. 260 (1941).

10. 8 WIGMORE, EVIDENCE §2378a (3d Ed. 1940); Zimmerman v. Poindexter, 74 F. Supp. 933 (D.C. Hawaii 1947); Walling v. Richmond Screw Anchor Company, 4 F.R.D. 265 (D.C. E.D. N.Y. 1943); Carson Investment Company v. Anaconda Copper Mining Company, 14 F. 2d 559 (D.C. Mon. 1926); Edison Electric Light Company v. United States Electric Lighting Company, 44 F. 294 (C.C. S.D. N.Y. 1890).

justifiably held the records in question privileged for reasons of public policy. Therefore, the department head merely anticipated a ruling by the judge placing these documents beyond the subpoena power of the court.

The argument that the court could have ruled the records privileged without reference to any statutory privilege is supported by a series of factors peculiar to the *Boske* case. These are: (a) One sovereign will not aid another in enforcing its revenue laws; (b) only property rights were under consideration, and modern courts consistently show a greater concern for personal rights than for property rights; and (c) in the *Boske* case the tax information had been given to the Department of Revenue under compulsion of law. Later revelation of the confidential information in court would tend to induce persons to violate the law. None of these considerations were present in the *McSwain* case.

In the light of the questionable soundness of the *Boske* opinion, and the unique nature of its fact situation, that case is inadequate to sustain the proposition that documents in the *McSwain* situation are privileged. To say this, however, does not preclude the contention that, after the judge had examined the documents, he could have held them to be privileged for reasons of public policy. This result could be achieved even though the reasons of public policy were entirely different from those present in the *Boske* case.

Wigmore has set out four requirements which, if met, warrant a judicial determination of immunity in situations such as the *McSwain* case.[11] A consideration of the informer privilege aptly illustrates the efficacy of Wigmore's analysis, and provides the tools for a more satisfactory treatment of the problem.

For reasons of public policy courts grant an informer immunity from exposure as a means of fostering the presentation of information about criminal activities to government investigating and policing authorities.[12] For example, prosecuting attorneys are obliged to conceal the names of persons who give them confidential information in the course of an investigation.[13] The cases indicate that both the subject matter disclosed and the name of the informer fall within the privilege.[14]

Because it has as its basis promotion of the public interest the privilege is not extended under all circumstances. The cases bear out the view that a

11. A privilege must fulfill these requirements: (1) the communication must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties; (3) the relation must be one which in the opinion of the community must be sedulously fostered; and (4) the injury to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation. 8 WIGMORE, EVIDENCE §2285 (3d Ed. 1940).

12. Vogel v. Gruaz, 110 U.S. 311 (1884); American Surety v. Pryor, 217 Ala. 244, 115 So. 176 (1927).

13. Mitrovich v. U. S., 15 F. 2d 163 (9th Cir. 1926); Wells v. Toogood, 165 Mich. 677, 131 N.W. 124 (1911); Michael v. Matson, 81 Kan. 360, 105 P. 537 (1909); Worthington v. Scribner, 109 Mass. 487 (1872). Such a privilege lessens the fear of informers that civil suits or physical violence will be directed at them, thereby encouraging them to follow their presumed natural inclination to aid justice.

14. Wells v. Toogood, 165 Mich. 677, 131 N.W. 124 (1911); Michael v. Matson, 81 Kan. 360, 105 P. 537 (1909); Marks v. Beyfus, L.R. 25 Q.B.D. 494 (1890). But *see*, 8 WIGMORE, EVIDENCE §2374 (3d Ed. 1940) ("The privilege applies only to the identity of the informant, not to the contents of his statement as such for, by hypothesis, the contents of the communication are to be used and published in the course of the prosecution." Is the quoted hypothesis valid? Often revealing the statement would reveal the informer. The informer interested in preserving the secrecy of his identity offers such information only as an aid to the state in finding information on which to base its case. Of course, if the name of the informer is known, the reason for the privilege vanishes.

balancing of interests of the party seeking disclosure with the informer's interests determines the existence or non-existence of the privilege. In civil cases the general principle emerges that protection of the informer is paramount and the privilege is usually extended even though the information excluded is of primary importance to the proof of the plaintiff's case.[15] On the other hand, in criminal proceedings, if disclosure is crucial to the guilt or innocence of the accused the privilege fails.[16] The question of when information is crucial invariably must be determined on the facts of the particular case and, if a question can be satisfactorily resolved in another manner or through different means, the information may not be crucial. Yet if it is important to a substantial issue in the case, the interests of the informer must be subjugated to those of the accused. It is the function of the judge to weigh the interests involved and make the determination of whether the privilege is to be invoked.

The considerations involved in a disposition of the problem when an informer interest is present are equally appropriate where federal agencies are interested in preserving the secrecy of their files. The judge should weigh the importance to parties of having evidence put before the court against the value of fostering the goals of the administrative agency by withholding that evidence. His ruling would then determine which interest would prevail without reference to the presence or absence of a departmental regulation.

Apart from the legal aspects of the problem, on the basis of fairness and justice, the court should make the final decision as to whether documents will be made available.[17] Undoubtedly the judge should receive the opinion of the executive head in each case as to the advisability of disclosure. Because of the importance of the elements of comity and official courtesy this opinion will be confirmed in most instances. Each branch of the government owes the duty of assistance to each of the others and great weight should be given by the judiciary to the opinions of the executive branch. Yet the department head would not, in most cases, have the time to decide the value of secreting specific information and would be obliged to adopt some blanket policy that could not meet each situation justly. He would in many cases be too far removed from the controversy to appreciate all of the values involved. The judge on the other hand, can hear arguments on both sides of the question, and then reach an unbiased decision.

In contrast to a judicial determination of privilege, the *McSwain* case found these documents privileged solely by virtue of the Department of Justice Regulation. Curiously, it found that the privilege had been waived by the supplement to the regulation. Yet because the judge had not properly

15. Michael v. Matson, 81 Kan. 360, 105 P. 537 (1909) (In a malicious prosecution suit the prosecuting attorney could not divulge the name of the informant who implicated the plaintiff in an alleged embezzlement); *semble*, Wells v. Toogood, 165 Mich. 677, 131 N.W. 124 (1911) (Trial court objection of the defendant, a confidential informer, to the testimony of a deputy sheriff that he had advised the sheriff that he suspected plaintiff of stealing should have been sustained.)

16. Mitrovich v. U. S., 15 F. 2d 163 (9th Cir. 1926) (Impeachment of witness against an accused cannot be accomplished by seeking the name of an incidental informer); Segurola v. U. S., 16 F. 2d 563 (1st Cir. 1926) (Defendant, charged with illegally transporting liquor, could have forced disclosure of the name of an informer excepting for the fact that his own actions in fleeing gave probable cause for search and seizure without warrant); *compare*, Mapp v. State, 148 Miss. 739, 114 So. 825 (1927) (Name of informant must be disclosed to prove his character and reliability in order to give officers probable cause to seize an illegal still without a warrant.)

17. 8 WIGMORE, EVIDENCE §2379 (3rd Ed. 1940).