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Article 9

Constitutional Law: Access to Legislative Department Records by the Press

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RECENT DECISIONS

Constitutional Law—Access to Legislative Department Records by the Press—The plaintiff, a newspaper reporter, requested the Secretary of the Senate to allow him to inspect and copy certain payroll records[1] containing the names and salaries of people employed by Senators. Upon being refused, he brought an action for a mandatory injunction requiring the Secretary of the Senate to permit him to inspect and copy these records. The court dismissed the action on the ground that: 1) no statutory right to inspect and copy the records had been granted to the plaintiff, or any other member of the public, 2) freedom of the press does not encompass a right to inspect documents not open to members of the public generally, 3) there was no unlawful interference with the plaintiff's constitutional right to pursue his vocation. *Trimble v. Johnston,* 173 F. Supp. 651 (D.D.C. 1959).

The court dismissed the plaintiff's first contention by pointing out that under 2 U.S.C. §103[2] the only documents to be submitted to Congress are the *results* of the returns made by the disbursing officers and the "sums total." Congress had neither expressly or impliedly decreed that all of the financial statements were to be regarded as public records. Therefore the plaintiff could claim no statutory right.

The second contention of the plaintiff was that freedom of the press encompasses a right to inspect the records in question. This was an attempt to obtain judicial recognition of "freedom of information" as a constitutional right. "Freedom of information" is the alleged constitutional right of the people to know what the government is doing, residing by implication in the First Amendment guarantee of freedom of press and speech and in the Ninth Amendment which protects rights retained by the people.[3] The court refused to accept this theory.

It would seem that even if there is a right to information protected by the Constitution, it would not extend to information which in the interest of the public should not be disclosed. A determination as to which records fall within this class must be made. By recognizing "freedom of information" as a Constitutional right to be enforced by

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[1] The statutory provisions relating to these records are found in 2 U.S.C. §103, 5 Stat. 527. Section 103 reads: "The Secretary of the Senate and the Clerk of the House of Representatives shall each require of the disbursing officers acting under their direction and authority, the return of precise and analytical statements and receipts for all the moneys which may have been from time to time, during the next preceding year, expended by them; and the results of such returns and the sums total shall be communicated annually to Congress, by the Secretary and Clerk, respectively."

[2] *Supra* note 1.

[3] Senator Thomas C. Hennings, Jr., *Constitutional Law: The People's Right To Know,* 45 A.B.A.J. 667, 670 (1959).

writs of mandamus or mandatory injunctions directed to the custodian of the records, the court would by necessity assume the task of deciding which records should be withheld in the public interest.[4] Hence, the basic problem involved in recognizing "freedom of information" as a Constitutional right is *not* the speculative problem as to the existence or non-existence of a general right of citizens in a democracy to know what the government is doing, but the practical problem of *who* is to exercise the ultimate discretion as to the release of government records. The *Trimble* case by rejecting "freedom of information" makes clear that this discretion does not lie in the courts. A statement by the court, however, indicates that the release of government records is to be determined by Congress.

In deciding that the reporter possessed no statutory right to inspect the records the court said, "Whether *any* Government records are open for inspection by the public is, in the first instance, to be determined by the Congress."[5] (emphasis added). Certainly, as in the *Trimble* case, Congress has the power to control its own records.

Although the sweep of the language in the *Trimble* case might be interpreted to pertain to all government records, it is doubtful if Congress can exercise any control over executive records. Such control is incompatible with the existence of the "executive privilege" asserted by the attorney generals to exist in the President. Since the time of President Washington, the "executive privilege" has been used repeatedly to withhold information from Congress when the President believed it to be in the public interest.[6] The "executive privilege" can be defined as the power of the President or the head of an executive department to withhold, in the interest of the public, information and records of the Executive Branch.[7] The exercise of this discretion by the President or department head is deemed *conclusive.*[8]

The "executive privilege" is based upon the separation of powers doctrine which provides that each of the three branches of government is supreme in its own area, and no branch can encroach upon the power of another unless it is exercising one of the explicit "checks" built into our Constitutional structure.[9] The purpose of this doctrine

[4] U.S. v. Reynolds, 345 U.S. 1 (1953) held that in passing upon a claim of the government that records sought by the plaintiff under the Federal Rules of Civil Procedure were privileged, the court should use a test similar to that used in passing upon a claim of privilege against self-incrimination; namely, to decide the issue from the surrounding circumstances, and the nature of the records sought. Perhaps this same test could be used if the court assumed the general discretion as to the release of records where the plaintiff seeks to be informed.

[5] Trimble v. Johnston, 173 F. Supp. 651, 654 (D.D.C. 1959).

[6] Cross, Harold L., THE PEOPLE'S RIGHT TO KNOW; LEGAL ACCESS TO PUBLIC RECORDS AND PROCEDURES, (1953) at 205 and authorities cited.

[7] *Id.* at 203-213.

[8] 40 Ops. Att'y. Gen. 45 (1941).

[9] Kilbourn v. Thompson, 103 U.S. 168, 191 (1880) where the court states: "It

is to prevent the concentration of power and tyranny. The "executive privilege" is nothing more than a name given to the executive department's right to control its own records as a necessary adjunct to the exercise of its constitutional powers.[10] Since the executive department has *exclusive* control over its own sphere of activity, and it is reasonable to hold that its records fall within this scope of activity, it would seem that Congress cannot force the release of executive department records without violating the separation of powers doctrine.

In the *Trimble* decision the Court recognized that the separation of powers doctrine was a factor to be considered in deciding the case. One of the underlying reasons for rejecting the "freedom of information" theory was the belief that the separation of powers doctrine precluded the judiciary from interfering with the records of the legislative branch. It apparently overlooked the fact that this same rationale applied to the relation between Congress and the executive department, insofar as it held that the release of *any* government records was to be determined by Congress.[11]

Senator Hennings of Missouri in an article on "freedom of information" argued that the separation of powers doctrine could not be used as a basis for the "executive privilege" where the "executive privilege" was used to withhold information from the public. He urged that since the separation of powers doctrine referred only to the relationship between the three branches of the government, it could not affect the relation between the people and the Executive Branch. This argument fails to recognize that any right to information which the people possess can only be enforced through the judiciary which is itself subject to the doctrine of separation of powers.

The dispute between the Executive Branch and the Legislative Branch in regard to the control of the executive department records

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is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

[10] Appeal of Hartranft, 85 Penn. State Rep. 433, 445, 447 (1877) where the court states: "We had better at the outstart recognize the fact, that the executive department is a co-ordinate branch of the Government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere than has the executive, under like conditions, to interfere with the courts.... We are inclined to think the conclusion thus reached is wise and discreet; and is supported by the best text writers of our time. These state the law to be, that the President of the United States, the governors of the several states and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, in their own judgment, the disclosure would, on public gground, be inexpedient (1 Greenf. on Ev., §251; 1 Whart. Law of Ev., §604)."

[11] *Supra* note 3.

was brought into sharp focus when Congress amended 5 U.S.C. §22.[12] This statute had been cited by executive departments and even some federal agencies as authority for withholding information from the public and Congress.[13] In order to halt this practice, Congress passed the Hennings-Moss Act in 1958 which added the following sentence to 5 U.S.C. 22: "This section does not authorize withholding information from the public or limiting the availability of records to the public."[14] However, upon signing the bill, the President made it clear that from the legislative history of the act it was not intended to and in fact could not alter the existing power of an executive department head to withhold information in the interest of the public.[15]

The leading case on 5 U.S.C. §22 is *Boske v. Comingore*[16] which was a habeas corpus proceeding brought by a United States revenue collector who was adjudged by a Kentucky court to be in contempt because he refused, while giving his deposition in a state court, to file copies of certain reports made by distillers, which reports were in his possession as a subordinate officer of the Treasury Department. He based his refusal on a department regulation issued by the Secretary of the Treasury under 5 U.S.C. §22, which withdrew from subordinate officers all discretion as to the release of records in their control. The U.S. Supreme Court held that 5 U.S.C. §22 was constitutional, and the regulation adopted by the Secretary was valid. The case of *Touhy v. Ragen*[17] raised the question, but did not decide, whether 5 U.S.C. § 22 gave to the executive department *head* power to withhold records. The language of the Hennings-Moss Act now precludes this construction.[18] A departmental order withdrawing the discretion as to the

[12] Act of August 12, 1958, 72 Stat. 547, known generally as the "Hennings-Moss Act." 5 U.S.C. §22 of the United States Code reads: "The head of each department is authorized to prescribe regulations, not inconsistent with the law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." The Hennings-Moss Act added to Section 22 the sentence: "This section does not authorize withholding information from the public or limiting the availability of records to the public."

[13] S. Rep. No. 1621, 85th Cong., 2nd Sess. 3 (1958).

[14] *Supra* note 12.

[15] 45 A.B.A.J. 667 (1959).

[16] Boske v. Comingore, 177 U.S. 459 (1899).

[17] U.S. *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951). The United States on the relation of Roger Touhy brought a habeas corpus proceeding against Joseph E. Ragen, warden, Illinois State Penetentiary, to secure the release of the relator. The District Court for the Northern District of Illinois, Eastern Division, rendered an order holding George R. McSwain, a special agent of the FBI, in contempt of court for refusing to produce records called for in a subpoena duces tecum, and McSwain appealed. The U.S. Court of Appeals reversed and remanded the case. Relator brought certiorari. The Supreme Court held that an order promulgated by the Attorney General under 5 U.S.C. §22 restricting disclosure as to all official documents, records, files, and information in the offices of the department was valid, and that under the circumstances, McSwain had properly refused to produce the documents.

[18] *Supra* note 13, at 9.

release of records from subordinates such as the one in the *Boske* case is still valid in spite of the Hennings-Moss Act,[19] because a subordinate relies on the departmental order, not 5 U.S.C. §22, as authority for withholding information. Testifying before the Subcommittee on Constitutional Rights, the Attorney General said that the amendment "wouldn't amount to much" because it would merely prevent people from incorrectly citing 5 U.S.C. §22 as authority for withholding information, the true authority being the "executive privilege."[20]

The *Trimble* case, in conjunction with the "executive privilege," leads to the conclusion that the release of government records must be determined by the branch of government which controls them. This conclusion will sound harsh to those who advocate less secrecy in government. However, any attempt to decrease secrecy in government must proceed with a realization that the separation of powers doctrine leaves no alternative. The judicial branch of the government in the *Trimble* case recognized this fact and followed the wise course of non-interference.[21]

FRANCIS SKIBA

Equitable Servitudes: Chattels—Plaintiff purchased from a railroad company a quantity of Kraft-brand fruit salad that had become frozen in transit. Plaintiff agreed he would allow the goods to enter retail outlets under the Kraft label. Plaintiff then sold the merchandise to a wholesaler with the restriction that the goods were to be removed from the jars and the jars with caps and cases were to be returned to plaintiff. Subsequently, a wholesaler sold a portion of the goods to the defendant. Although defendant had knowledge of the restriction at the time of sale, he refused to comply with it and sold some of the goods in the Kraft-jars to retailers. The trial court granted plaintiff injunctive relief against the defendant upon the basis of broad equitable

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[19] 104 Cong. Rec. 15695 (daily ed. July 31, 1958).

[20] *Supra* note 13 at 5.

[21] Occasionally, recognition of the importance of the separation of powers doctrine in the area of federal records proceeds from Congress. In May of 1948, a resolution came up in the House of Representatives which would have required the executive department and agencies of the Federal Government, which had been created by Congress, and those serving in them, to make available to Congress information which would enable it to legislate, provided that the request was made by a majority vote of the committee seeking the information and had been approved by either the Speaker or the president pro tempore of the Senate. During the debate on the resolution, Representative Rayburn admonished the House: "Pass this resolution. The President says to his cabinet officer, 'No, you are my agent, you are my alter ego; do not give that information to Congress.' What are you going to do about it? You might have an unseemly row upon the floor of the House of Representatives. What are you going to do about it? Are you going to impeach the President of the United States because he says that the giving up of certain information is not in the public interest?" This reply can be found in H. Rep. No. 1461, 85th Cong., 2nd Sess. 19, 20 (1958).