

PROPOSED AMENDMENT TO SECTION 164, JUDICIAL
CODE.

LETTER

FROM

THE ACTING SECRETARY OF WAR,

TRANSMITTING

PROPOSED AMENDMENT TO SECTION 164 OF THE JUDICIAL CODE.

MARCH 13, 1918.—Referred to the Committee on the Judiciary and ordered to be printed.

WAR DEPARTMENT,
Washington, March 11, 1918.

HON. CHAMP CLARK,
Speaker of the House of Representatives.

MY DEAR SIR: On March 2, 1918, there was introduced in the House of Representatives a bill (H. R. 10398, Sixty-fifth Congress, second session) to amend and reenact * * * section one hundred and sixty-four * * * of the Judicial Code.—The bill was referred to the Committee on the Judiciary, and ordered to be printed.

The proposed amendment of section 164 reads as follows:

SEC. 164. The said court shall have power to call upon any of the departments for any information or papers it may deem necessary or material as evidence in a cause pending in the court of which, or of the subject matter of which, the court has jurisdiction.

The existing section 164 of the Judicial Code (identical in language with section 1070, Revised Statutes) reads as follows:

SEC. 164. The said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and shall have the use of all recorded and printed reports made by the committees of each House of Congress, when deemed necessary in the prosecution of its business. But the head of any department may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest. (36 Stat. L., 1140.)

Under the existing practice this department furnishes to the Court of Claims, upon its call therefor, when this can be done without injury to the public interest, any information or copies of papers that may be deemed necessary by the court in the prosecution of its business. When, for various reasons, it is impracticable to furnish copies, the

original papers are produced in court by a representative of the department. Furthermore, recognizing the just rights of claimants in the premises, when ever it is desired by the Department of Justice that claimants, or their attorneys, shall have permission to examine papers pertaining to cases pending in the Court of Claims, such permission is given on condition that the examination shall be made in the War Department and in the presence of an officer of the Department of Justice.

No intimation has ever reached this department that this practice is otherwise than satisfactory to all parties interested.

It will be observed that the effect of the proposed amendment in omitting the last clause of the existing section 164 of the Judicial Code would be to deprive the Secretary of War of the exercise of his discretion in determining what information or papers in his custody can or can not be safely given out with regard to the public interest, and to compel him, in fact, to furnish information or papers even though the furnishing of such information or papers would be manifestly injurious to the public interest.

It is not believed that any such policy is really contemplated in any quarter. Congress itself does not expect the head of a department to comply with its calls for information or papers when the furnishing of such information or papers, in his opinion, would be injurious to the public interest, as is shown by the fact that all calls by Congress for information or papers are always qualified by some such phrase as "if not incompatible with the public interest."

As regards the furnishing of information or papers to other courts of justice, Federal or State, there is no provision of law covering the subject, but there is all the more reason for the exercise of judgment as to what information or papers may be furnished to these courts in view of the fact that such information and papers are spread on their records, and thus become accessible to the general public. In such cases, therefore, where the War Department has been called upon to furnish information or papers to a court, the department has declined to comply with the call when the furnishing of such information or papers would be injurious to the public interest. The soundness of this policy has been upheld by many courts, and I inclose herewith a copy of the opinion of one such court (Circuit Court, District of Columbia), in which the refusal of the then head of the department, the able Secretary Edwin M. Stanton, to produce a certain paper on the ground that its production would be a serious public injury was fully sustained by the court. I also inclose a copy of an opinion of the Attorney General, relating to the subject of the extent of the judicial power in such cases.

The soundness of the principle that the general public interest must be deemed paramount to the interests of private suitors, and the obviousness, therefore, of some such provision as that contained in the clause under consideration for safeguarding that interest, are matters too self-evident to require further elucidation. And if this precaution is necessary in ordinary times, how much more is it necessary in an emergency such as is now existing, when the country is at war, to guard against the giving out of information contained in the archives of the Government—information which, were it to become known to some alien enemy or disloyal citizen, might be used to the most serious detriment of the entire Nation.

In view of the foregoing considerations, and of the fact that the Court of Claims exclusively adjudicates cases that involve no higher than mere monetary interests, I am unable to conceive of any sound reason for abrogating the clause in question in favor of that court, and I therefore recommend that the accompanying bill be amended by adding after the word "jurisdiction," on line 16, page 2, the following provision of the existing law:

But the head of any department may refuse and omit to comply with any call for information or papers when in his opinion, such compliance would be injurious to the public interest.

Very respectfully,

B. CROWELL,
Acting Secretary of War.

[Memorandum. Circuit Court, District of Columbia (Judge Olin).]

WAR DEPARTMENT,
THE ADJUTANT GENERAL'S OFFICE,
Washington, June 20, 1866.

Francis McGahn against Lewis Clephane. This is a suit for libel, McGahn fixing his damages at \$10,000, and was taken up in this court on Friday last. Mr. Clephane is charged with sending a letter to the Secretary of War, representing the plaintiff as using money made on Government contracts in endeavoring to break up the administration.

Hon. Edwin M. Stanton, Secretary of War, having been subpoenaed by the court to produce the letter in question before the court, appeared before that tribunal yesterday morning.

The honorable Secretary, on the case being resumed, was called to the witness stand, when he put in the following written affidavit:

Edwin M. Stanton, being sworn, deposes and saith that yesterday afternoon, the 16th instant, he received the subpoena hereto attached. He was informed at the same time that court had adjourned, and his attendance would not be required until this morning, and he is now here in court in obedience to said process.

Witness never has had the paper in his personal possession, nor has he any personal knowledge of the paper called for in said subpoena, and if it is in his legal possession, or within his power and control, it is so in his official capacity as Secretary of War, charged by law with the care and custody of the archives, records, and papers pertaining to the administration of that department of the Government, and he submits to the court whether he is bound to produce the same:

First. That he is advised and believes that the head of a department is not required by law to produce or cause to be produced, as evidence in private controversies, any of the archives, records, papers, or correspondence in his official possession, and that for the ends of justice the law has made duly authenticated copies thereof evidence to the same purpose and effect as the originals; but to require the production of originals in court would subject them to accident and loss, and might be productive of much public mischief.

And even if such papers could be produced in this court without much inconvenience, the right to compel production equally belongs to Federal courts in every State, and may be enforced by different tribunals at the same time. Moreover, the most important and confidential transactions and affairs of the Government would be subject to public disclosure to the enemies of the Government if official files, letters, and correspondence can be forced into court under subpoena in a real or sham suit between private parties.

Second. That the paper described in said subpoena, if it be in the possession, power, or control of the affiant, was addressed to C. A. Dana, the Assistant Secretary of War, on a matter relating to the public welfare and the administration of the War Department, intrusted to his charge and jurisdiction, and that no other person than the said Assistant Secretary and the officer having immediate charge of the subject matter could have obtained possession of a copy thereof or knowledge of its contents, unless, as he believes, surreptitiously, or by a breach of the standing rules and regulations of the War Department.

That such communications have always been regarded as confidential and in the nature of privileged communications, which are essential to enable the officers of the department to faithfully perform their duty and protect the public interest. If information of disloyalty is communicated at the peril of a libel suit, the means of knowledge are cut off, and the act of Congress becomes a dead letter or a snare to public officers.

Affiant is advised and believes that such communications addressed to the head of a department or his assistant are privileged, and that their production in evidence against the party making them is not required by law. With profound respect to the authority and jurisdiction of this tribunal, affiant therefore submits for its determination whether he should be required to produce the said paper or give evidence concerning it.

If, in the opinion of the court, the production of said paper is not a legal obligation, but rests in his official discretion, then affiant declines to produce or testify concerning it, not from any favor or prejudice toward either party, for he barely knows one of them by sight, and has no acquaintance with the other, but because he believes the production of such papers from department files would be a serious public injury, would promote strife and litigation, create animosities, incite revenge, and disturb the public peace and tranquility. Upon the foregoing grounds he respectfully submits his objections to the production of the paper in question, asks to be discharged from further attendance.

EDWIN M. STANTON.

The affidavit bore the following indorsements: Respectfully referred to the Attorney General for his opinion. First Whether the head of a department is bound in law to produce in court in evidence in private controversies, the archives, records, or papers on file in such department and relating to its administration. Second. Whether the paper referred to, it being a letter addressed to the Assistant Secretary of War on a matter relating to the administration of said department and to the public interest, and not published by the writer to any other person, is or is not in the nature of a privileged communication, which the head of the department is or is not bound to produce under process.

SIR Letters on file with the heads of departments are privileged communications. Unless their publication have been authorized, no copies should be taken at private request, and the production of the originals can not be compelled in a suit betwixt individuals. It has been ruled that such communications can not be made the foundation of an action for libel. Then I think the head of a department is bound not to produce a paper on file in his office. Such a letter as you describe is a privileged communication.

J. SPEED, *Attorney General.*

Counsel said that the letter was referred to the Quartermaster General, and by him referred to Gen. Rucker for immediate investigation, and he called the attention of the Secretary to the indorsement on a certified copy of the letter, which states that it was made by order of Gen. Rucker, and upon the certificate the suit had been brought, and the very thing which it seems the Government wished to guard against has been done.

The Secretary replied that the letter was furnished by one of the subordinates to Mr. McGahn, so that he might answer the charge. He asked if he was bound to furnish a letter to be used as evidence.

The judge stated first that he was impressed with the great importance of the motion for the issuing of a subpoena duces tecum, to compel the production of the paper in question- to compel the Secretary of War to produce a paper written to the department, charging an employee with disloyalty, on which the action for libel is based. The question whether the court shall compel a communication made to the department to be produced is an important one. This question was incidentally argued in the case of the United States against Burr. Chief Justice Marshall held that a subpoena duces tecum might issue against the President of the United States, but that case is unlike this.

The question in the Burr case was whether the writ of subpoena might properly issue, and in this case it is whether the writ having been issued and the party declining to obey, for the reasons stated in the return, whether the court will indorse a compliance with the mandate of the writ. Chief Justice Marshall in that case decided that the papers asked for were not necessary, and held also that there may be papers the production of which would be incompatible to the Government interests, and he (Judge Olin) inclined to this opinion. (Coomb's Trial of Burr, p. 51.) There were some papers which no person could force the Government to disclose. But the ques-

tion is, who shall be the judge, and he thought the department should be the judge. If Congress calls for information, the usual form is for them to ask it "if not incompatible with the public interest." In this case he very much doubted whether or not the writ should not have been addressed to the President, for his Cabinet are simply his clerks, ministers, and advisers, and they are presumed to act as he directs them. He would not, however, put the decision of the question on that ground.

The only case in point, similar to the present one, he had found in *Sergeant and Rawle's Reports*. A party having been removed from office because of an affidavit made and transmitted to the governor, an action for libel was commenced, and on the trial a subpoena duces tecum was issued to the governor, which he refused to answer. A commission was issued, and the governor refused to appear before them. The question was argued before the Supreme Court whether the affidavit in question should be produced, and the court (Breckinridge, Tighlman, and Yates), although differing on some minor points, were unanimous that the paper could not be produced.

The theory of our Government is that there are three departments—the legislative, executive, and judiciary—each independent of the other. It can not be possible that the executive should be called before a court and be compelled to disclose what has been done, is being done, and is to be done.

Judge Olin held that the court could not compel the production of the paper.

DEPARTMENT OF JUSTICE.

March 31, 1893.

SIR: I have your communication of the 22d instant, made at the instance and for the use of the Civil Service Commission, requesting an opinion upon this question.

"Can a court require, or subpoena, the production of any application or examination papers or other records of the boards of civil-service examiners?"

I assume that what is desired is a statement of rules to be acted upon in the practical conduct of affairs rather than a discussion of the principles and precedents upon which such rules are founded, and, in that view, have the honor to submit the following conclusions:

1. The general power of appointment to office being in the President, qualified only by the right of Congress to vest the appointment of inferior officers in him in the courts of law, or in the heads of departments, the Civil Service Commission is to be regarded as an advisory board subordinate to the President, reporting to him, and clothed with the function of aiding the President or any head of department in the exercise of the appointing power.

2. The boards of civil-service examiners are selected by the Civil Service Commission, and though subordinate to the commission, may properly be regarded as officials of the respective departments in connection with which they act.

3. The application and examination papers or other records of the civil-service examiners are therefore the official records or papers of the President or of the head of a department.

4. Being records and papers of the character described, their production can not be compelled by the courts whenever the general public interest must be deemed paramount to the interests of private suitors.

5. Whether such general public interest forbids the production of an official record or paper in the courts and for the purposes of the administration of justice, is a question not for the judge presiding at the trial in aid of which the record or paper is sought, but for the President or head of department having the legal custody of such record or paper.

And such question may be determined either as and when arising in each particular case and upon its own peculiar facts and merits, or in advance, by general rules applicable to all records and papers, or by special rules applicable to special classes of records of papers.

Very respectfully,

RICHARD OLNEY.

THE PRESIDENT.

