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nition of the *Dillon* court that Congress could properly enact the proposals that became the present Criminal Justice Act — including the fee schedules[30] — indicates the court's own insecurity about the applicability of the fifth amendment to attorney's services.

Aside from the constitutional infirmities of the *Dillon* decision, the Criminal Justice Act appears to be the better solution for the admitted problem on practical grounds. The bar does not view the statutory rates as unreasonable[31] and since the rates are lower than the market rate,[32] less strain would be imposed on the treasury. Furthermore, the fixed statutory rates make the Criminal Justice Act much easier to administer than the eminent domain approach, which requires an ad hoc determination of the value of each attorney's services.

Administrative Law—Contempt: Federal Agent Convicted of Contempt for Following Agency Head's Instructions Not To Testify

Plaintiff brought an action in a federal district court to enjoin the agent in charge of the Chicago office of the Federal Bureau of Investigation[1] from keeping the plaintiff under a harassing surveillance. During a hearing on plaintiff's motion for a preliminary injunction, the plaintiff's attorney called the agent as an adverse

30. *Ibid.* In criticizing the pending bill the court noted only that it did not appear to cover post-conviction and collateral proceedings such as in *Dillon.* The act could be so construed if the representation from time of initial appearance through appeal provided by the act is viewed as a time span applying only to the trial proper. In view of the act's purpose to provide paid counsel whenever needed, it would seem more appropriate to read it as applying to representation through appeal in the case of any proceeding. See Letter from Attorney General Robert F. Kennedy to The President, March 6, 1963, in 13 U.S. CODE CONG. & AD. NEWS 3048, 3049 (1964) emphasizing that counsel is guaranteed "at every stage of the proceedings, commencing with the initial appearance . . . ." However, the Judicial Conference takes the position that the act does not cover habeas corpus or § 2255 proceedings. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON THE CRIMINAL JUSTICE ACT 11 (1965), in 85 Sup. Ct. No. 10.

31. See AMERICAN BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS AND THE NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR ADEQUATE DEFENSE SYSTEMS 11 (1964) (model legislation).

32. Dillon's counsel was awarded $35 per hour. 230 F. Supp. at 494.

1. J. Edgar Hoover, Director, Federal Bureau of Investigation, was also named in the complaint as a defendant, Appendix for Appellant, p. 1, Giancana v. Johnson, 335 F.2d 372 (7th Cir. 1964), but the complaint against him was dismissed for lack of personal jurisdiction. *Id.* p. 284.

witness. The agent asserted that a Justice Department regulation, which forbade production or disclosure of documents or information in the Department's files without the permission of the Attorney General, barred him from answering certain questions. The court ordered him to answer the questions and upon his refusal fined him 500 dollars for criminal contempt. On appeal, the Seventh Circuit affirmed the contempt order in a two-to-one decision, *holding* that the regulation did not apply to the questions asked of the agent about exhibits which were never in the files of the Justice Department and about his own activities.[2] *Giancana v. Johnson*, 335 F.2d 372 (7th Cir. 1964).[3]

The Justice Department regulation[4] centralizes in the Attorney General the determination of whether "material or information

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2. The questions pertained to the following: (1) whether he had received a telegram, a copy of which plaintiff's attorney displayed as he asked the question; (2) whether he had placed a telephone call to plaintiff's attorney on a certain date; (3) whether he had said during the telephone conversation that the surveillance was not going to be removed; (4) whether he was in the courtroom when certain films were shown; and (5) whether he had recognized any FBI agents under his supervision in films plaintiff had exhibited in court. He was allowed to change his answer to (4) above to an affirmative response before sentencing.

The two judge majority differed on whether to affirm the lower court's ruling in all respects. The principal opinion held the defendant properly refused to answer whether he had received a telegram from the plaintiff's attorney as an affirmative answer would have established that it was in the files of the department. 335 F.2d at 375. The concurring opinion held he was not barred from answering that question since an answer did not require production of documents or information from the files and concerned a matter of which he had personal knowledge. *Id.* at 376.

3. In the civil suit in which the contempt issue arose, the plaintiff sought an injunction to restrain the agent and other agents under his supervision from keeping plaintiff under a harassing surveillance. The plaintiff claimed his rights under the fourth and fifth amendments were being violated. The district court granted a preliminary injunction. This judgment was vacated and the case remanded to the district court in Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964), on the grounds that the claim of "federal question" jurisdiction was not supported by an allegation of an amount in controversy exceeding $10,000. See 28 U.S.C. § 1331 (1958), McNutt v. General Motors Corp., 298 U.S. 178 (1936).

4. PART 16 [ORDER 260-62]—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION, 28 C.F.R. §§ 16.1, .2 (1964) (Judicial Administration—Department of Justice), provides:

§ 16.1 Response to Subpoena or Order for Production or Disclosure.

> Whenever a United States Attorney or any other officer or employee of the Department of Justice is served with a subpoena or order for the production or disclosure of material or information contained in the files of the Department of Justice, the United States Attorney, or such other attorney as may be designated, shall appear with the person

contained in the files of the Department of Justice . . ." will be furnished in response to a court order for the production thereof.[5] If the Attorney General decides that nondisclosure is in the public interest, he may assert that the information is privileged.[6] In

upon whom the demand is made and inform the court or other issuing authority that such person is not authorized to produce or disclose the material or information sought. Time shall be requested within which to refer the subpoena or order to the Attorney General, and the United States Attorney, or other attorney, designated, shall refer the court to the regulations in this part. Advice as to such subpoena or order shall be given immediately to the Attorney General without awaiting court appearance.

§ 16.2 **Action to be Taken on Adverse Ruling by the Court.**

In the event the court declines to defer a ruling until instructions from the Attorney General have been received or in the event the court rules adversely on a claim of privilege asserted under instructions of the Attorney General, the person upon whom such demand is made shall, pursuant to the regulations in this part, respectfully decline to produce the material or information sought (United States ex rel. Touhy v. Ragen, 340 U.S. 462).

5. The main justification for such regulations is that they protect the public interest in effective law enforcement by restricting access to information in the possession of the Government which, if disclosed, could hinder the work of the Government's law enforcement agencies. See United States *ex rel.* Touhy v. Ragen, 340 U.S. 462, 468 (1951); Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166, 168 (1958); Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73, 80 (1949); Timbers & Cohen, *Demands of Litigants for Government Information*, 18 U. PITT. L. REV. 687 (1957). Such regulations may also make available information which, if the decision whether to disclose or not were left to a subordinate, would not be disclosed.

The Supreme Court has recognized the validity of regulations similar to the one construed in *Giancana*. See United States *ex rel.* Touhy v. Ragen, *supra*; Boske v. Comingore, 177 U.S. 459 (1900). In those two cases subordinates of the Justice Department and the Treasury Department, respectively, were released from commitments by lower courts for contempt.

6. Courts recognize a privilege for some information in the possession of the Government. See, *e.g.*, United States v. Reynolds, 345 U.S. 1 (1953); Campbell v. Eastland, 307 F.2d 478, 486 (5th Cir. 1962); Appeal of the SEC, 226 F.2d 501, 520 (6th Cir. 1958). See generally 8 WIGMORE, EVIDENCE § 2378 (McNaughton rev. 1961); Ashbill & Snell, *Scope of Discovery Against the United States*, 7 VAND. L. REV. 582 (1954); Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166 (1958); Hardin, *Executive Privilege in the Federal Courts*, 71 YALE L.J. 879 (1962); Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73 (1949).

Wigmore states that the limits of this privilege are unknown but that the courts generally use as a guideline, UNIFORM RULE OF EVIDENCE 34, which states:

Giancana the question arose as to whether certain information gained by a subordinate while acting in an official capacity fell within the province of the regulation. Evidently the Attorney General had interpreted the regulation as applying to such information, as well as to documentary information actually within the Department's files, and instructed agent Johnson not to produce any of the requested documents or give any of the required testimony.[7] Johnson contended that under the regulation only the Attorney General could decide whether to disclose the information necessary to answer the questions, and that unless he had decided to do so, the agent, even when faced with a court order, could not answer.[8] The *Giancana* court disagreed with this interpretation.

When an administrative regulation is before a court, the rules

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> Official Information
> (1) As used in this rule, "official information" means information not open or heretofore officially disclosed to the public relating to internal affairs of this State or of the United States acquired by a public official of this State or of the United States in the course of his duty, or transmitted from one such official to another in the course of his duty.
> (2) A witness has a privilege to refuse to disclose a matter on the ground that it is official information, and evidence of the matter is inadmissible if the judge finds that the matter is official information, and (a) disclosure is forbidden by an act of the Congress of the United States or a statute of this State, or (b) disclosure of the information in the action will be harmful to the interests of the government of which the witness is an officer in a governmental capacity.

The Supreme Court has agreed with this rule that it is for the court rather than the person or agency concerned to decide whether the information is actually to be protected by a privilege. See United States v. Reynolds, *supra* at 9–10: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."

In *Giancana* the Attorney General did not specifically assert the privilege, see note 7 *infra*, but simply instructed Johnson not to comply with the court order pursuant to the regulation. In any event, the court never reached the question of whether the information requested in *Giancana* would have been privileged had it fallen within the coverage of the regulation, since the regulation was found inapplicable.

7. The defendant was ordered not to answer the questions by the Attorney General in a telegram addressed to the United States Attorney, Chicago, which stated:

> Your attention is directed to Department Order No. 260–62. In connection with the matter under which Special Agent Marlin Johnson is now under subpoena, he is instructed to abide by Order No. 260–62. Johnson is instructed not to produce any of the documents called for nor to give any testimony in this matter.

Appendix for Appellant, p. 222.

8. Brief & Supplemental Appendix for Appellant, pp. 28–29, Giancana v. Johnson, 335 F.2d 372 (7th Cir. 1964).

of construction are the same as for a statute administered by an agency.[9] It is the court rather than the agency which must determine its true construction or interpretation.[10] However, the court will give great weight to the interpretation by the agency which promulgated it[11] unless such interpretation allows the agency to exceed the authority granted by Congress,[12] and when that interpretation is not clearly erroneous or contrary to the plain meaning of the regulation, it is binding on the court.[13] The difficulty with this rule of construction is that there are differences of opinion over what is the plain meaning of words.[14]

The issue before the court in *Giancana* was whether the questions asked of the defendant would require disclosure of "material or information contained in the files of the Department of Justice."[15] The majority evidently felt that this phrase excluded the Attorney General's interpretation,[16] but disagreed on how to interpret it themselves. One judge thought it justified the agent's refusal to answer the question whether he had received a certain telegram from the plaintiff's attorney, because an affirmative answer would have "established thereby that [the telegram] . . . was in the files of the Department of Justice."[17] The other disagreed

9. See Newman, *How Courts Interpret Regulations*, 35 CALIF. L. REV. 509 (1947).

10. See Bartels v. Birmingham, 332 U.S. 126, 132 (1947); M. Kraus & Bros. v. United States, 327 U.S. 614, 621–25 (1946).

11. Fort Worth & D.C. Ry. v. Childress Cotton Oil Co., 48 F. Supp. 937, 940 (N.D. Tex. 1942); Froeber-Norfleet v. Southern Ry., 9 F. Supp. 409, 411 (N.D. Ga. 1934); *cf.* Southern Goods Corp. v. Bowles, 158 F.2d 587, 590 (4th Cir. 1946) (respectful consideration).

12. There is no doubt that the Attorney General could have promulgated a regulation which specifically prohibited disclosure of the information requested from the agent in *Giancana*. The statutory authority for these regulations is very broad. See REV. STAT. § 161 (1875), as amended, 5 U.S.C. § 22 (1958). Since the Attorney General obviously intended to prevent Johnson from testifying, his decision not to broaden the scope of the regulation by amendment supports the conclusion that the regulation as written would reasonably bear the interpretation he gave it.

13. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 n.6 (1940); Glen Alden Coal Co. v. NLRB, 141 F.2d 47, 52 (3d Cir. 1944).

14. Newman, *supra* note 9, at 525.

15. See the full text of the regulation, *supra* note 4.

16. "[A]s to [questions 2, 3 & 5, *supra* note 2], . . . no application of Order 260–62 was involved." 335 F.2d at 375.

17. *Ibid.* The decision that the regulation precluded the agent from testifying as to what was contained in the files, prevented him from proving that the answer to any given question asked him was in the files. Perhaps this should have obligated the court to accept the agent's claim that the other information was in the files.

because "the question concerned a matter of which he had personal knowledge."[18] Such disagreement indicates that the regulation was not unambiguous, and in this situation "the ultimate criterion is the administrative interpretation . . . ."[19]

The Supreme Court has said that "the purpose in view is for consideration when the true meaning of a statute or rule is sought."[20] If the administrative interpretation is inconsistent with that purpose, then, of course, it is not binding on the court.[21] The purpose of the regulation in question was to centralize control over information in the possession of the department. The Attorney General's order not to testify was not inconsistent with that purpose.[22]

Even if the court was justified in substituting its interpretation of the regulation for that of the Attorney General, there was no justification for allowing the contempt order to stand. The plaintiff did not need the defendant's testimony in order to prove his case for a preliminary injunction.[23] In fact, his failure to testify and to deny the facts alleged by the plaintiff probably helped the plaintiff's case more than his answers to the questions would have helped it.[24] In addition, the Supreme Court has decided in *United States ex rel. Touhy v. Ragen*[25] that subordinates who are acting in conformance with lawful regulations in refusing to obey a court order for the production of information in the pos-

18. *Id.* at 376. He evidently gave no weight to the phrase: "disclosure of . . . information contained in the files . . . ."

19. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

20. Hines v. Stein, 298 U.S. 94, 98 (1936).

21. *Cf.* Walling v. Brooklyn Braid Co., 152 F.2d 938, 940 (2d Cir. 1945), where the court said that the respect to be accorded an agency interpretation depended on "the thoroughness evident in its consideration, [and] the validity of its reasoning . . . ."

22. In *Ex parte* Sackett, 74 F.2d 922, 924 (9th Cir. 1935), the court found that documents physically in the possession of an FBI agent were, in the eyes of the law, in the possession of the Attorney General.

In *In re* Lamberton, 124 Fed. 446 (D. Ark. 1903), the court looked at the reason behind a Treasury Department regulation forbidding only the production of documents and construed it to preclude disclosure of information received by an officer in his official capacity also.

23. See the findings of fact enumerated by the dissenting judge in the companion case, Giancana v. Johnson, 335 F.2d 366, 370 n.1 (7th Cir. 1964).

24. The trial judge stated in his findings of fact "that the [agent] . . . has not shown to the court any reason or justification for the surveillance and observation of the plaintiff as shown by the evidence." Appendix for Appellant, p. 67.

25. 340 U.S. 462 (1951).

session of the Government cannot be convicted of contempt. In *Giancana*, the agent was acting in conformance with his superior's interpretation of a lawful regulation. Thus the imposition of contempt sanctions would seem to be contrary to the policy of *Touhy* to immunize subordinates from judicial punishment for relying on a seemingly legitimate interpretation of a departmental regulation.[26]

It is evident that the court was convinced that the regulation had been invoked to avoid disclosure of FBI misconduct violating the plaintiff's legal rights.[27] This did not justify punishment of the subordinate who may have had nothing to do with the decision to invoke it, however. He was faced with a choice between obeying his superior and obeying the court.[28] In such circumstances it is hard to understand how a court can find the requisites of willfulness[29] or misbehavior[30] necessary for a finding of criminal contempt.[31]

A better solution would have been for the court to declare that since plaintiff secured the relief he sought, there was no public interest[32] to be served by the imposition of contempt sanc-

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26. See also Appeal of SEC, 226 F.2d 501 (6th Cir. 1958), where the court reprimanded the district court judge for immediately commiting for contempt an SEC employee who relied on SEC regulations and orders from his superiors in refusing to obey the judge's orders to produce documents.

27. "Although order No. 260-62 is a legal exercise of executive authority to protect the files of the department, it should not be used, as attempted here, to escape responsibility for conduct that is allegedly violative of legal rights." 335 F.2d at 376 (concurring opinion).

28. If he had obeyed the court he could have been charged with insubordination. Petition for Rehearing on Behalf of Appellant p. 5, Giancana v. Johnson, 335 F.2d 372 (7th Cir. 1964).

29. See Wilson v. North Carolina, 169 U.S. 586, 598-600 (1898); United States v. Kroger Grocery & Baking Co., 163 F.2d 168, 172-78 (7th Cir. 1947).

30. See Offutt v. United States, 232 F.2d 69, 72 (D.C. Cir. 1956).

31.

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
> (2) Misbehavior of any of its officers in their official transactions;
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401 (1958).

32. The public interest which conflicts with the policy behind restricting access to information in possession of the Government is the public interest in making all relevant evidence available in order to properly decide a case before a court. Carrow, *supra* note 6; Sanford, *supra* note 6.

tions; plaintiff could secure the information he sought, prior to a final hearing on making the injunction permanent, through discovery proceedings. Then, if the agent failed to permit discovery, appropriate sanctions, other than contempt,[33] could be imposed on him. One of these sanctions — a default judgment — would place the consequences of failure to disclose on the real party at fault, the Government, not a mere subordinate.

Criminal Law—Constitutional Law: *Gouled* Rule and Authorization by Spouse of Search and Seizure in Absence of Defendant or Suspect

Defendant appealed from a second degree murder conviction contending that a bullet admitted into evidence at his trial was obtained in violation of the fourth amendment.[1] Defendant's wife allowed the police to recover the bullet from a ceiling into which defendant had discharged his gun one year before the crime in question was committed. The murder weapon, which was never found, was linked to the defendant by proving that the bullets recovered from the ceiling and the victim were fired from the same gun. Had defendant's wife not permitted the officers to retrieve the bullet, it probably could not have been obtained by a search warrant.[2] The Eighth Circuit affirmed defendant's conviction and *held* that the wife, being in possession and control of the premises, could authorize a reasonable search for, and recovery of, the bullet, since it was not defendant's personal effect, and in any case he had abandoned it. *Roberts v. United States*, 332 F.2d 892 (8th Cir. 1964).[3]

33. See FED. R. CIV. P. 37. These sanctions include, besides contempt, orders to: (1) take any fact as established for the purposes of the action; (2) refuse to allow the disobedient party to support or oppose designated claims or defenses; (3) strike out pleadings, dismiss the action, or render a judgment by default against the disobedient party.

1. U.S. CONST. amend. IV provides, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

2. FED. R. CRIM. P. 41(b) only allows a search for stolen or embezzled property, instruments of a crime, and property used to aid a foreign government.

3. *Cf.* Abel v. United States, 362 U.S. 217, 240 (1960); United States v. Minker, 312 F.2d 632 (3d Cir. 1962), *cert. denied*, 372 U.S. 953 (1963). The *Roberts* court did not discuss the question of how one may abandon property in his own home. In Rios v. United States, 364 U.S. 253 (1960), the Court