

Witnesses, Government Special Agent As. Government Special Agents, as Witnesses. Testimony, of Government Employee.

An officer of the federal government may be subpoenaed as a witness and may be compelled to testify as to facts within his personal knowledge as an individual, but cannot be compelled to testify concerning information obtained by him in his official capacity, nor as to communications and official documents passing between him and his superior officer or heads of department.

January 27th, 1911.

Hon. Fred Whiteside, Chairman,
Carey Land Investigation Committee,
Twelfth Legislative Assembly,
Helena, Montana,

Dear Sir:

I acknowledge receipt of your verbal request for an opinion from this department as to the power of your committee to compel a special agent in the field service of the general land office of the United States to appear and testify before your committee.

In your request you did not state the nature of the testimony that

your committee sought to obtain from this witness, but from the nature of the matter under investigation and the nature of the official position and employment of the witness, it is apparent that the testimony sought is within some one or more of the three classes enumerated as follows:

First: Either as to the facts within the personal knowledge of the witness in his individual capacity;

Second: Information obtained by such witness in his official capacity as such special agent of the field service of the general land office of the United States;

Third: Communications and official documents passing between such witness in his official capacity and his superior officer or heads of department.

I have gone into this matter very carefully and examined, I think, all of the authorities upon the subject. The decisions of the courts on matters of this character are exceedingly few, but I believe that the proper rule of law and the most elaborate discussion of the matter is to be found in the opinion of Judge Evans in the case of, "In re Comingore," reported in 96 Fed. Rep. 552. This was a case in which Comingore was a collector of interior revenue in the state of Kentucky, and he had been subpoenaed by a court in the state of Kentucky to appear as a witness and give certain testimony and to produce and make copies of certain records of his office as such collector. This he declined to do for the reason that the secretary of the interior had issued an order prohibiting collectors from testifying concerning official business of their respective offices and from producing records or copies thereof. He was imprisoned for contempt for his refusal to testify and the decision above referred to was made and the opinion rendered in a hearing upon an application for a writ of habeas corpus the court discharging the defendant. The case was subsequently taken to the supreme court of the United States and affirmed in the case of *Boske vs. Comingore*, 177 U. S. 459.

Section 95 et seq, of the Revised Codes of 1907, provide for the attendance and testimony of witness before either branch of the state legislature or any committee thereof, so that there can be no question as to the authority of your committee to subpoena witnesses and to compel their attendance and the giving of testimony in a proper case, but the question now presenting itself is whether the information sought can be properly enforced in this matter. As to the first character of testimony above mentioned, that is, facts within the personal knowledge of the witness or gained by such witness in his individual capacity, there can be no question as to the right of your committee to compel the giving of such testimony, and in case of refusal to punish for contempt as provided in Section 97, Revised Codes of 1907. But as to the second and third classes of testimony, it is my opinion that you cannot compel said witnesses to furnish such testimony within either one of such classes, that is,—if the information obtained by such witness in his official capacity as such government official or employee, or, if it is in the nature of reports or official correspondence passing

between such witness and his superior officers or heads of department.

Section 161, Revised Statutes of the U. S., provides:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the control 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."

I find from an examination of Vol. 38, L. D. 464, that the secretary of the interior has heretofore prescribed a regulation for his department, in substance as follows:

"That special agents, reports, and official correspondence pertaining to his department, are in the nature of confidential and privileged communications, and certified copies thereof cannot be demanded as a matter of right by the parties in interest in the matter to which they relate, and will not be furnished except upon authority of the secretary of the interior."

I am also reliably informed that the secretary of the interior through a commissioner of the general land office has prescribed a regulation that no official of the field service of the general land office should testify in any hearing or proceeding concerning any of his official or investigation without the permission of the secretary of the interior having first been obtained.

In my opinion, by virtue of Section 161, Revised Statutes of the U. S., above quoted, such a regulation is entirely within the authority of the secretary of the interior, and this view is supported by the following authorities:

In re Comingore, 96 Fed. Rep. 552;
Boske v. Comingore, 177 U. S., 459;
In re Lamberton, 124 Fed. 450;
38 L. D. 464;
U. S. v. Moses, 4 Wash. C. C. 726;
In re Huttman, 70 Fed. 699;
Worthington v. Scribner, 109 Mass. 487;
Greenleaf on Evidence, page 251.

While, as stated above you may compel such witness as a mere individual to testify as to what he may know in such individual capacity, but under the authority above quoted your committee has no power to control him as an officer or to regulate the conduct of his official duties with reference to any reports or official correspondence passing between him and his superior officers or head of department, nor of their contents, as those duties can only be fixed by laws of the U. S., and the orders or regulations of his superior officers.

It is apparently clear that a state statute cannot impose duties upon a federal officer as such, neither can a court or committee of such state do so. The papers in the custody of these officers are papers belonging to the United States pertaining to the administrative affairs of the United States and obtained for executive purposes, and over which, through its proper agents and officers the United States has

exclusive control. Therefore, the state cannot demand for purposes of testimony or otherwise contrary to regulations made under authority of the federal statutes.

The views herein above expressed are affirmed in an official opinion given by the Honorable W. H. Moody, the attorney general of the U. S., on January 9th, 1905, to the honorable secretary of commerce and labor, in which the attorney general of the United States advises such secretary, first, that he was not legally bound to obey a subpoena of the court to appear and testify; second, that he could properly decline to furnish official records of his department, or copies thereof, or to give testimony in a cause pending in court, whenever, in his judgement the production of such papers or the giving of such testimony might prove prejudicial for any reason to the government or public interest, and that the records of his department were quasi confidential in their nature and must therefore be classed as privileged communications, whose production could not be compelled by a court without the express authority of a law of the United States; third, that the secretary might legally prohibit the chief of a bureau of his department from producing official records or certified copies thereof.

See, Vol. 25, Opinions Attorney General, (U. S.) p. 326.

In view of the fact, that as a result of the investigation now in hand by your committee, will prove of great benefit to the state of Montana and to the government at large, it seems that an arrangement might readily be made through our representatives in the federal congress whereby the honorable secretary of the interior would direct the officers of the field service of the general land office to supply the committee with the information desired, and it seems to me that such an arrangement would better comport with the dignity of the committee and the twelfth legislative assembly of the state of Montana.

Respectfully submitted,

ALBERT J. GALEN,
Attorney General.