Judge Rejects Bell's Argument; Orders FBI To Produce Files On USLP

On March 14 Judge Damon Keith of the U.S. District Court for the Eastern District of Michigan, ignoring a supposed precedent established by Attorney General Griffin Bell, issued a landmark decision in the two-and-a-half-year-old case of *Ghandhi v. FBI and Detroit Police Department.* Judge Keith ordered the FBI to turn over to the plaintiffs, without further delay, virtually all FBI files and records on the National Caucus of Labor Committees and the U.S. Labor Party during the period 1968-74; the plaintiffs had charged that these files would document ongoing FBI Cointelpro operations against them, including disruption of the USLP's 1974 election campaign in Michigan by FBI agent provocateur Vernon Higgins, an admitted explosives expert involved in the Pontiac Ku Klux Klan school bus bombings.

Judge Keith's decision provides an important opening for political opponents of the Carter Administration currently subject to the same kind of illegal "dirty tricks" operations by private political intelligence agencies operating through the Justice Department and the federal intelligence apparatus. *Ghandhi v. Detroit FBI* may well produce evidence leading to Carter's Watergate. Already the FBI has been forced to admit large scale destruction of its files on the NCLC and USLP while the case was under litigation, an event which recalls the affair of the Nixon Watergate tapes.

Extremely noteworthy is Judge Keith's rejection, as not binding on his court, of an oft-cited precedent established by Carter's Attorney General Griffin Bell during his previous career on the federal bench. On behalf of the FBI, Bell attempted to use his own decision in *Cates v. LTV Aerospace* to forestall FBI production of records and documents in *Ghandhi v. FBI.*

In Fifth Circuit federal court in *Cates v. LTV Aerospace*, Bell ruled that plaintiffs in a suit seeking the production of government documents could not subpoena those documents from the district office of the agency where the suit was filed. Rather plaintiffs must determine *who* controlled the documents and then attempt to subpoena materials through the court which had jurisdiction over the area in which that person could be found.

Federal agencies have used this decision to conceal documents in their possession by failing to designate any individual in control of the documents and then refusing to produce from any office, citing *Cates v. LTV Aerospace* and claiming the court has no jurisdiction to issue a subpoena.

In effect, Bell's decision has allowed federal agencies to play a variety of "shell game" with the evidence.

Judge Keith also ruled that the FBI's attempt to cloak its records in vaguely defined "confidentiality" and to characterize document production as burdensome could not excuse them from discovery. This has been a traditional defense which the FBI has used to conceal records which would prove or lead to evidence which would prove that the so-called "investigatory" activities are actually harassment and disruption operations.

In overruling the FBI's vague claims of burdensomeness and difficulty in producing records, Judge Keith has again made significant case law. In an earlier U.S. Labor Party case, *LaRouche v. Kelley* filed in U.S. District Court in the Southern District of New York, Judge Owen ruled that FBI claims of burdensomeness in producing records under the federal Freedom of Information Act justified the essentially unlimited delay.

The relevant excerpts from Judge Keith's decision are reprinted below.

The FBI objects to the production of any material requested by the plaintiffs which is not within the custody or control of the FBI's Detroit Field Office, citing *Cates v. LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir. 1973) (subpeona issued pursuant to Rule 30(b) (6) and served on Commanding Officer, Dallas Naval Air Station, to obtain Aircraft Accident Report located in Norfolk, Va., which was in the custody of the Secretary of the Navy in Washington, D.C., ordered quashed where Navy regulations provided that document should be sought directly from the Navy Secretary), for the proposition that this Court is without jurisdiction to order a non-party government agency to produce at a pre-trial deposition documents which are not within the control of the particular unit of the agency upon which the subpoena was served. In *Cates v. LTV Aerospace Corp., supra*, the Fifth Circuit stated:

> We find nothing in Rule 30 (b) (6) which would vest a court issuing a subpoena with the power to require that documents, in the custody or control of the head of an agency located outside the judicial district, be brought into the judicial district. Similarly, a person designated by an organization pursuant to Rule 30 (b) (6) could not be required to travel outside of the limits imposed by Rule 45 (d) (2). In short, Rule 30 (b) (6) provides a procedure to use in determining the proper person to depose. It does not deal with the issue of where the deposition is to be taken or where documents are to be produced. That is reserved to Rule 45 (d) (2).

480 F.2d at 623. The conclusion that documents located outside the judicial district may not be ordered produced within the district does not necessarily follow from the statement that this determination is controlled by Rule 45 (d) (2) and not Rule 30 (b) (6). Rule 45 (d) (2) provides:

> A resident of the district in which the deposition is to

> be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

This rule defines where a person will be required to attend a deposition, but does so within rather broad limits. In the instant case, the plaintiffs served their subpoena upon the Bureau in this district, and now seek to depose the Bureau within the county in which it was served. . . .

Plaintiffs' subpoena was directed to the FBI, and not just to its Detroit Field Office. The Bureau was served in Detroit, but the subpoena seeks the production of documents in the custody of the Bureau whether or not those documents are located in Detroit. The location of the documents is of less importance than the jurisdiction of this Court over the agency having control of those documents. If this Court does have jurisdiction over the FBI through the presence in this district of its field office in Detroit, then documents kept beyond the territorial jurisdiction of this Court are nonetheless within the range of this Court's subpoena power. . . .

The FBI has a large and active field office within this district. It has far more contacts here, for example, than did the corporation in *Elder-Beerman Stores, supra*, with the district in which it was unsuccessfully subpoenaed. The number of FBI personnel here, the wide scope of their activities, and the unitary structure of the organization, all lead this Court to conclude that service upon the Bureau in this district was proper, and the Court has jurisdiction to compel the production of documents within the custody and control of the Bureau though these documents may be located outside of the district.

The Court finds unpersuasive the suggestion that a subpoena duces tecum issued pursuant to Rule 45 (d) (1), directed to an institutional deponent pursuant to Rule 30 (b) (6), and properly served upon that deponent pursuant to Rule 45 (c) and (d), can compel the production of only those documents located within the judicial district at the time the subpoena is served.

> A subpoena for the production of documents generally reaches all documents under the *control* of the person or corporation ordered to produce. It makes no difference that a particular document is kept at a place beyond the territorial jurisdiction of the court that issues the subpoena, if the subpoena itself is duly served within the limits prescribed in Rule 45 (d) and (e); the test is one of control, not location. (emphasis in original; footnote omitted)

5A *Moore's Federal Practice* Para. 45.07 (1) at 45-63 (1975). The FBI was the 'person' to whom plaintiffs' subpoena was directed. It would torture the meaning of Rule 45 to hold that it requires the plaintiffs to serve upon the Bureau in every federal judicial district where the requested documents might be located a separate subpoena duces tecum for their production. . . .

There has been no assertion by the FBI that the documents sought by the plaintiffs are within the exclusive custody or control of the Director of the FBI or of the Attorney General of the United States. Nor are there any applicable agency regulations, *see, e.g.*, 28 C.F.R. para. 16.21 *et seq.* (1976), which the FBI claims describe a procedure through which these documents must be obtained. Instead, the Bureau has merely claimed that some of the documents sought by the plaintiffs "are located in various areas throughout the United States."

In light of the fact that the Sixth Circuit Court of Appeals has not yet ruled on the question presented in the instant case, and this Court is not bound by the decision of the Fifth Circuit in *Cates, supra,* since a district court is not bound by the decision of a Court of Appeals for another circuit . . . this Court reads Rule 30 (b) (6) and Rule 45 as requiring the FBI to produce in this district all of the documents requested by the plaintiffs in their subpoena duces tecum, as modified, *infra,* subject only to any claim of privilege which the Bureau may assert and the court may uphold. . . .

While the FBI does have an interest in the underlying litigation — the pending action arises out of claimed improprieties by FBI agents in their alleged surveillance and infiltration of plaintiffs' organizations; FBI agents and former Department of Justice officials are among the defendants; and the attorneys representing the FBI on this motion are the same attorneys representing the federal defendants in the underlying action — as a third party deponent it is properly concerned only with whether the subpoena is burdensome, oppressive, unreasonable or seeks the disclosure of confidential information. . . .

The FBI contends that production of the documents requested by the plaintiffs would be burdensome because it would be time consuming. FBI Br. at 3-5. This does not constitute sufficient harm or embarrassment, *In Re Zuckert*, 28 F.R.D. 29, 31 (D.D.C. 1961), or indicate such injurious consequences of compliance, 9 Wright and Miller, *Federal Practice and Procedure:* Civil, para. 2457 at n. 64, and cases cited therein (1971), as to require this Court to quash plaintiffs' subpoena. This subpoena should be modified, however, to reflect the fact that it cannot be used to seek voluminous information of interest to the plaintiffs but of little or no relevance to the pending action.

The scope of discovery allowed and obtained in this case is of as much significance to the parties as the amount of damages which may be ultimately recovered. Hence the protracted wrangling during the past year over the proper scope of discovery. The plaintiffs seek to learn how much information the government has gathered about them and for what purpose; the defendants and the FBI wish to limit plaintiffs access to this information.

The FBI also claims that production of some of the documents requested by the plaintiffs would be "virtually impossible" because the plaintiffs have insufficiently identified the information sought. FBI Br. at 3. If the Bureau cannot in good faith determine from plaintiffs' List of Materials subpoenaed whether or not it has the information requested, or if in fact it does not have the

information requested, it should so inform the plaintiffs when it responds to the subpoena. . . .

The Bureau has indicated that it reserves a right to assert a claim of privilege as to some of the documents sought by the plaintiffs. Such privileged information would include investigatory records, internal government deliberations, state secrets, and a privilege against revealing the names of informants. FBI Br. at 5-6. A suggestion that the government may assert a claim of privilege if a subpoena is not quashed is not grounds to quash the subpoena. *Goodman* v. *United States*, 369 F.2d 166, 169 (9th Cir. 1966). A claim of privilege as to any document must be asserted by the Director of the FBI or by the Attorney General of the United States, *Kinoy* v. *Mitchell*, 67 F.R.D. 1, 11 (S.D.N.Y. 1975), with the exception that a claim of informant's privilege may be asserted by the FBI's attorney. *Kinoy* v. *Mitchell, Id.*, at n. 36. Should a claim of privilege be asserted by the Bureau in objections served upon the plaintiffs pursuant to Rule 45 (d) (1), the Court may order an *in camera* inspection of the documents. . . .

Judge Keith then ordered the FBI to produce the relevant documents.