Discovery of Information in Possession of Government Agencies and Bureaus Over a Claim of Privilege by the Government

The Federal Discovery Provisions and their Applicability to the United States Government

The Federal Rules of Civil Procedure provide for pre-trial discovery of testimony and pre-trial inspection of documentary evidence.[1] The discovery provisions allow a party to inquire into his opponent's case prior to trial in order to know what issues and facts exist. In addition to eliciting facts, such discovery narrows the issues and eliminates unfair elements of surprise.[2] Before provisions were made for discovery in the various codes of procedure, the only method available to obtain knowledge of the opponent's case, outside of his pleadings, was in equity through a bill of discovery. The broadening of the discovery provisions in the Rules in 1937 was a wise step, both in streamlining civil procedure and in affording justice to litigants.

It is generally conceded that the provisions pertaining to discovery apply to the United States as a party. Such appears to be the intent of the drafters of the Rules as evidenced by their statements made con-

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[1] Fed. Rules Civ. Proc. rule 34, 28 U.S.C.A. (1950). "Upon motion of any party showing good cause therefore . . . the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing . . . of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted . . . ." Rules 26-32 and 45 (b) and (d) authorize the issuance of similar orders to persons not parties to the action.

[2] "The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revalation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device . . . to narrow and clarify issues . . . and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." Hickman v. Taylor, 329 U.S. 495 (1946).

temporaneously to the drafting of the Rules.[3] The rules of statutory construction providing that provisions of a statute that are binding do not apply to the Government unless specifically mentioned does not appear to be applicable here because whenever it has been intended to exempt the United States from provisions of the Rules specific mention of that intent has been made. An example of such an exemption is Rule 37 (f) which forbids the imposition of expenses and attorney fees on the United States.[4] It follows that since the United States is not elsewhere mentioned, the discovery provisions are fully applicable to it as a party, and the courts have so held.[5] A different result is often reached when the United States is not a party in the litigation. The Rules are broad enough to allow subpoenas *duces tecum* and *ad testificandum* to be issued to government officials who have custody of information relevant to the trial even when the Government and such officials are not interested in the trial. Whether such discovery will or should be compelled will be discussed later.

The discovery provisions are still subject to the objection of "privilege", and a person, including the United States, served with a subpoena or interrogatory will not be compelled to comply with either if the information sought is of the type privileged against disclosure in court. Thus, all courts will refuse a motion to compel the delivery of information in the hands of the Government that contains state or military secrets involving the security of the United States.[6] The public policy behind such a privilege is obvious. A like privilege allows the government to withold the names of those who provide it with information regarding the activities of others who are violating laws.[7] The reason for this privilege is to encourage such disclosures to the Government and to protect the informant. Finally, a similar privilege is afforded the Government concerning information delivered to it by individuals under compulsion of law.[8] The policy behind this privilege is not too clear but seems to be one largely of fairness; secrecy should

3 Charles E. Clark, reporter for the Advisory Committee stated " . . . it was our theory that except as we made special provisions these rules apply to the United States as a litigant as much as to anyone else." Proceedings of the Institute of the Am. Bar Ass'n., F.R.C.P., Wash., N.Y. 50 (1938).

4 Other sections of the Rules providing for special treatment of the United States are Rules 4(4); 12(a); 25(d); 39(c); 54(d); 55(e); 62(e); 65(c).

5 United States v. Yellow Cab Co., 340 U.S. 543, 553 (1951); United States v. General Motors Corp., 2 F.R.D. 528, 530 (N.D.Ill. 1942).

6 United States v. Haugen, 58 F. Supp. 436 (E.D.Wash. 1944); Pollen v. Ford Instrument Co., 26 F. Supp. 583 (E.D.N.Y. 1939).

7 *In re* Quarles & Butler, 158 U.S. 532 (1894); Vogel v. Granz, 110 U.S. 311 (1884). When a disclosure of the information does not disclose its source, then the privilege should only cover the identity of the informer and not the information itself. 8 WIGMORE, EVIDENCE §2374, p. 755 (3rd ed. 1940).

8 O'Connell v. Olsen & Ugelstadt, 10 F.R.D. 142 (N.D.Ohio 1949); See 8 WIGMORE, EVIDENCE §2377 (3rd ed. 1940).

be promised to those who, by law, are compelled to furnish the Government with reports and other information to aid it in the conduct of its administrative functions.

No difficulty is ordinarily encountered by the Government in refusing to comply with a discovery order when one of the above three privileges has been established. The only problem is in deciding who is to determine if the privilege exists, the court or the executive who is claiming the privilege. The problem is shown, for instance, when the Government refuses to comply with a court order to disclose certain documents on the ground that the information contains state secrets involving the security of the nation. Will the court abide by this refusal and thereby leave the discretion with the executive to declare privileged what he will, or will it demand proof that the information contains state secrets? The courts have held that any claim of privilege against disclosing relevant evidence in a pending law suit involves a justiciable question to be decided by a court.[9] The merits of this reasoning by the courts will be discussed more fully later.

Discovery of Federal Housekeeping Records

A fourth type of privilege often claimed by the Government is a broad one against any disclosure of the results of what the Government calls its "housekeeping" investigations.[10] This claim on the part of the Government has arisen as a result of Section 161 of the Revised Statutes[11] which gives to the head of each department the authority to prescribe regulations for the custody of its records. In pursuance of Section 161 the various departments have promulgated custody regulations usually denying disclosure of any information without the approval of the head of the department.[12] Whether the court will still

9 Reynolds v. United States, 192 F. 2d 987 (3rd Cir. 1951); *cert. granted,* 96 L. Ed. 555 (1952); Evans v. United States, 10 F.R.D. 255 (W.D. La. 1950); Cresmer v. United States, 9 F.R.D. 203 (E.D.N.Y. 1949).

10 Reynolds v. United States, *supra* note 9; Bank Line v. United States, 76 F. Supp. 801, 803 (S.D.N.Y. 1948).

11 "Sec. 161. The head of each department is authorized to prescribe regulations, not inconsistent with 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."

12 For example, the Department of Justice has provided that "all official files, documents, records and information in the offices of the Department of Justice . . . are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

"Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena

require disclosure of the information in spite of this privilege claimed by the Government depends largely on the relation of the Government to the action. There are three situations in which a demand for disclosure of information in possession of the Government may arise: first, when the Government is not a party to the action; second, when the Government is a party plaintiff in the action; third, when the Government is a party defendant in the action. Each situation will be treated separately.

When the Government Is Not a Party To the Action.

Ever since Boske v. Comingore[13] it has been felt that in actions between private parties the Government would not be required to disclose any records they had declared confidential. The Boske case arose when the State of Kentucky held a federal Collector of Internal Revenue in contempt of court because he refused to disclose records in compliance with a subpoena issued by the state court. The subpoena ordered production of the Internal Revenue Bureau's records pertaining to a private party being sued in the state court for collection of back taxes on stored whiskey. The Collector refused to disclose the records because the Secretary of the Treasury, in accordance with Section 161 of the Revised Statutes, had declared the records confidential,[14] and when committed for contempt, the Collector sued out a writ of *habeas corpus.* The Court said, in granting the writ, it was lawful for the Secretary of the Treasury to forbid disclosure of the Department's records by subordinates. All that the Court did in this case was to protect the Treasury official from being held in contempt for simply following his superior's orders.[15]

A result similar to that in the Boske case was reached in *Ex parte* Sackett.[16] The plaintiff in a private action to enforce the Sherman Anti-Trust Law sought to compel an agent of the Department of Justice to disclose information obtained by that Department in its

is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation." Department of Justice Order No. 3229, 28 C.F.R. §51.71, 14 Fed. Reg. 4920 (1946).

13 177 U.S. 459 (1900).

14 In addition to the general regulation making such information confidential, Section 3167 of the Revised Statutes provided for the imprisonment, not to exceed one year, or the subjection to a fine, not to exceed $1000, or both, of any collector, inspector, or other officer divulging such information as the state court sought.

15 The difficult question raised by the case could have been avoided by declaring the information privileged on the ground that it had been given under compulsion of law. See note 8, *supra.*

16 74 F. 2d 922 (9th Cir. 1935).

own investigation of the defendant. When the agent refused to disclose the information because he was forbidden by a Department regulation,[17] the court held him in contempt. In granting a writ of *habeus corpus* to the agent the Circuit Court of Appeals relied on the Boske case. In United States *ex rel* Touhey v. Ragen[18] another Department of Justice order,[19] as in the Sackett case, was held to justify an agent's refusal to produce F.B.I. records in conformance to a subpoena *duces tecum* issued in a suit between private parties and directed to the agent. The court said that the order of the Department promulgated under Section 161 conferred upon the Department the privilege of refusing to produce unless it had waived such privilege.

These cases decided only that a subordinate may not be punished for complying with a regulation of his department. The question of whether the department head could have been required to produce the information sought was not raised. There are feelings both ways. The Attorney General has taken the position, which the Department of Justice still follows, that the head of a department may "properly decline to furnish official records of the Department, or copies thereof, or to give testimony in a cause pending in court, whenever in [his] judgment the production of such papers or the giving of such testimony might prove prejudicial for any reason to the Government or the public interest."[20] Others feel that since private non-litigants may be compelled to give testimony or furnish information, and since the discovery provisions are fully applicable to the United States, there should be no submission by the courts to the claim by an agency that one of its own regulations makes the information privileged.[21] The argument runs that in the light of the Rules any regulation by a department that forbids compliance with the discovery provisions is "inconsistent with law" and therefore not under the authority of Section 161.[22] This seems to be the better reasoned argument. It recognizes that perhaps there is information that in the public interest should not be disclosed, and if so, that information should be privileged from such disclosure; but, just because a rule of evidence involves the public interest is no reason to remove it from the reaches of the judiciary where it inherently belongs. The court should determine in each case if the privilege has been validly claimed.

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17 Section 65, Rules and Regulations of the Division of Investigation, United States Department of Justice.

18 180 F. 2d 321 (7th Cir. 1950).

19 Order No. 3229, note 12, *supra.*

20 25 Op. Atty. Gen. 326 (1905).

21 Berger and Krash, *Government Immunity from Discovery,* 59 YALE L. J. 1451 (1950); 8 WIGMORE, EVIDENCE §§2378, 2378a, 2379 (3rd ed. 1940).

22 Section 161, reprinted in note 11, *supra,* provides only for regulations "not inconsistent with law."

If the court would overrule the Government's claim of privilege, the only sanction it would have to enforce the subpoena would be to hold the department head in contempt of court. The courts have been reluctant to do this.[23] Professor Moore in his work on federal practice said it would be unseemly for a federal court to hold a cabinet officer or department head in contempt, and that therefore the determination of the head of the department not to disclose the information in litigation between private parties is for practical purposes final and unreviewable.[24]

When the Government Is Party-Plaintiff To the Action.

When the government is a party to the action the courts can no longer refuse to allow discovery against it on a basis that the court has no sanctions to which the Government may be subjected. If the Government refuses to comply to a discovery order its proof may be limited, its action can be stayed or even dismissed, or facts may be taken as established against it.[25]

Although in criminal prosecutions there are no broad discovery provisions as in the Rules of Civil Procedure it is held that the Government, by initiating a criminal proceeding waives any privilege it had to withhold testimony or other documents which touch upon the issues in the prosecution. Underlying this fiction is the sound public policy that no one should be convicted without giving him an opportunity to examine the material which might exculpate him.[26] It is certain that the Government can claim no privilege as to docu-

23 "Also it will be observed that we are not called upon to decide whether the Government's contention [that of an executive as opposed to a judicial determination of privilege] is available as a defense against the enforcement of the desired subpoena duces tecum directed to the [executive] or a contempt proceeding against him for failure to obey it. Such a case would indeed, as the Government argues, raise difficult constitutional questions arising out of the separation of powers under our Constitution." Reynolds v. United States, note 9, *supra,* at 993. Cf. Thompson v. German Valley R. Co., 22 N.J. Eq. 111 (1871); Appeal of Hartranft, 85 Pa. 433 (1877).

24 4 MOORE'S FEDERAL PRACTICE §26.25 (5), p. 1167 (2d ed. 1950). But in United States v. Burr, 25 Fed. Cas. 1 (C.C. Ky. 1806), where the court had before it the question of whether a subpoena *duces tecum* could issue to the President, Chief Justice Marshall stated, at pp. 191-2, "The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and these motives may be such as to restrain the court from enforcing its production. . . . At the same time, the court could not refuse to pay proper attention to the affadavit of the accused [who requested the paper]."

25 See Rule 37 for a variety of consequences, at the court's discretion, that may follow a refusal to comply with a discovery order.

26 United States *ex rel.* Schlueter v. Watkins, 67 F. Supp. 556 (S.D.N.Y 1946), *aff'd.* without consideration of this point, 158 F. 2d 853 (2d Cir. 1946).

ments which relate to "those very dealings" which the Government is acting against.[27] This is limited to the extent that the Government will not be compelled to disclose state secrets or informer's name.[28]

Similarly, the Government is held to have waived any blanket privilege of withholding information when it institutes civil proceedings against persons to enforce the anti-trust laws, the Fair Labor Standards Act, or other governmental regulations.[29] In United States v. Cotten Valley Operators Committee,[30] in a four-four decision, the Supreme Court affirmed the action of the lower court in dismissing an anti-trust suit against the defendants because the Government refused to produce information relevant to the case in compliance with a discovery order. The Government had contended that the Attorney General had classified the material confidential and that the court could not decide otherwise. The court said that it would consider any privilege the Attorney General claimed, but that to leave the question of privilege entirely in the hands of the Attorney General would be an abdication of the court's duty.[31] The court did say that if it found that disclosure of any of the documents would be injurious to the public interest, such disclosure would not be required.[32] Therefore it appears that if the Government institutes legal proceedings against a party, no regulation of the Government will allow it to refuse to disclose information of the basis that the regulation has taken from the court and given to the executive the discretion of deciding whether the information is privileged.

When the Government is Party-Defendant To the Action.

The Government has continued to claim a privilege from discovery in many actions in which it is defendant, i.e., in actions under the Federal Tort Claims Act or the Suits in Admiralty Act. It continues to claim that Section 161 authorizes the various departments and agencies to forbid the disclosure of any information, even in actions to which it is a party.

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27 United States v. Andolschek, 142 F. 2d 503 (2d Cir. 1944); See 4 MOORE'S FEDERAL PRACTICE §26.25 (6), pp. 1173-75 (2d ed. 1950).

28 Arnstein v. United States, 296 Fed. 946 (D.C. Cir. 1924); United States v. Haugen, note 6, *supra*. But cf. United States v. Coplon, 185 F. 2d 629 (2d Cir. 1950). The informer's privilege is not absolute. If the informer's name is essential to the defendant's case, its disclosure may be compelled. Sorrentino v. United States, 163 F. 2d 627 (9th Cir. 1947).

29 This class of cases includes also those cases in which private parties enjoin the regulatory action of the Government.

30 9 F.R.D. 719 (W.D.La. 1948), *aff'd.*, 339 U.S. 940 (1949).

31 9 F.R.D. 720.

32 *Id.* at 721

Reynolds v. United States[33] presents the problem squarely. In three consolidated suits against the Government by three widows of deceased civilians killed in a crash of an Air Force plane, the United States refused to produce documents requested by order of the court. One of the documents requested was a copy of the investigative report of the accident. The Government refused to produce this document on two grounds:[34] first, that Section 161, in giving to the Secretary of the Air Force authority to prescribe regulations for the control of the records and papers of his Department, gives him the discretionary power in the public interest to declare any such records or papers privileged from disclosure in a judicial proceeding; second, that the Secretary of the Air Force had determined that these documents contained state secrets and this determination by him is conclusive. The district court overruled these contentions by the Government, and when they still refused to produce the information, the district judge entered an order under Rule 37 that the facts in plaintiff's favor on the issue of negligence be taken as established and prohibited the Government from introducing evidence to controvert those facts. In affirming the action taken in the district court, the Court of Appeals, through Judge Maris, discussed each of the Government's contentions separately. In regard to the first contention, Judge Maris said:

> It will be seen that the privilege thus claimed is a broad one against any disclosure of the results of what the Government has aptly called its "housekeeping" investigations .... But we do not think that in the present cases ... the Department... is entitled to the absolute "housekeeping" privilege which it asserts against disclosing any statements or reports relating to this airplane accident regardless of their contents .... Where, as here, the United States has consented to be sued as a private person, whatever public interest there may be in avoiding any disclosure of accident reports in order to promote accident prevention must yield to what Congress evidently regarded as the greater public interest involved in seeing that justice is done to persons injured by governmental operations .... Moreover we regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy.[35]

In answer to the Government's second contention, that the Secretary of the Air Force had determined that the information

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33 Note 9, *supra.*

34 The court also overruled a third contention of the Government, that the plaintiffs had not shown good cause for discovery.

35 192 F. 2d at 995.

contained state secrets and that this determination bound the court, Judge Maris said:

> We cannot accede to this proposition. On the contrary we are satisfied that a claim of privilege against disclosing evidence relevant to the issues in a pending law suit involves a justiciable question, traditionally within the competence of the courts, which is to be determined in accordance with the appropriate rules of evidence, upon the submission of the documents in question to the judge for his examination *in camera.* Such examination must obviously be *ex parte* and *in camera* if the privilege is not to be lost in its assertion. But to hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution.[36]

It appears therefore that in the absence of a valid privilege, no regulation authorized by Section 161 forbidding disclosure of documents will in itself be recognized by a court as permitting the Government to hold back information that relates to a case in which the Government is a party. Neither will a court permit the executive branch the discretionary power to determine itself, in place of the court, whether a valid privilege exists. The Government will be treated like any other private individual when it appears as a litigant, and in order to establish a privilege it must do so in the same manner required of a private individual.[37]

CONCLUSIONS

One can easily raise the question of whether there should be a privilege accorded to government "housekeeping" records at any time; courts should take a dim view of any such blanket claim of privilege. In the *Reynolds* case, the court did admit ". . . that in addition to the privilege against divulging state secrets . . . there is also a less clearly defined privilege against disclosing official information if such disclosure will actually be harmful to the interests of the

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36 *Id.* at 997. Cf. "It would rather seem that the simple and natural process of determination was precisely such a private perusal by the judge. Is it to be said that even this much of disclosure cannot be trusted? Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence?" 8 WIGMORE, EVIDENCE §2379, p. 799 (3rd ed. 1940).

37 Bank Line v. United States, 163 F. 2d 133, 138 (2d Cir. 1947).

nation."[38] When there is no military or diplomatic secret involved, no informer's names being withheld, or no information delivered under compulsion of law involved, it is difficult to perceive any harm to the nation by a disclosure of the internal affairs of our governmental agencies. There are two public interests involved: first, seeing that justice is done to the parties in a law suit by requiring a disclosure of all facts and issues relevant to the case; second, the public interest in keeping the "housekeeping" records of our governmental departments and agencies secret. The two interests are in conflict. When the two are balanced with each other the scales must almost always tip in favor of the former. There may be instances when requiring a disclosure so disrupts the orderly functioning of an agency that any good to be obtained from the disclosure is outweighed by its inconvenience. The burden of proving this should be put upon the agency, and under no circumstances should the courts be foreclosed from making an independent investigation of the validity of the Government's claim of privilege.

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[38] 192 F. 2d at 994.