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SCOPE OF DISCOVERY AGAINST THE UNITED STATES

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In the interpretation and application of the discovery provisions of the Federal Rules of Civil Procedure,[1] one of the most controversial problems is the extent to which discovery is available against the United States when it is a party to an action. Undeniably, the Government is entitled to use the discovery procedures, and it has not hesitated to do so; however, it has often fought vigorously the use of the same procedures against it.[2] At one time the Government argued unsuccessfully that it was entirely exempt from the discovery provisions of the Rules. It has apparently abandoned this argument, but it continues to fight discovery by urging not only its well-recognized evidentiary privileges, but also an all inclusive privilege which, it contends, executive officers alone can apply. In answer to claims of this latter privilege, the courts have gone in all directions, often assuming or inventing such a privilege, and sometimes even applying it, but more frequently finding a way to avoid it.

The purpose of this article is to discuss the unique problems arising as to discovery against the United States as a party litigant.[3] The discussion does not cover the situation where discovery is sought against the United States although it is not a party.[4] Nor does it

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1. FED. R. CIV. P. 26-37. Rules 26 to 32 provide for taking depositions, both upon oral examination and upon written interrogatories, before and after an action is commenced. Rule 33 provides for written interrogatories to parties, Rule 34 for production of documents for inspection and copying, Rule 35 for physical and mental examination of persons and Rule 36 for admission of facts and of genuineness of documents. Rule 37 provides sanctions for refusal to make discovery.

Substantially the same problems are presented under Admiralty Rule 31, as to interrogatories, and Rule 32, as to production of documents. The following discussion relates to these rules as well, and some of the cases cited arose under them.

2. For a statement as to the Government's reluctance to submit to discovery in antitrust cases, see Yankwich, "Observations on Anti-Trust Procedures," 10 F.R.D. 165, 168 (1951).

3. Included are suits brought in the name of a Government official, such as those to enjoin violations of the Fair Labor Standards Act., *e.g.*, Walling v. Comet Carriers, Inc., 3 F.R.D. 442 (S.D.N.Y. 1944); Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265 (E.D.N.Y. 1943); or the Price Control Act, *e.g.*, Bowles v. Ackerman, 4 F.R.D. 260 (S.D.N.Y. 1945). A suit against a Collector of Internal Revenue has also been considered to be against the United States for this purpose. Brewer v. Hassett, 2 F.R.D. 222 (D. Mass. 1942). For a borderline case, see Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Hawaii 1947), where the court in effect treated a suit for wrongful imprisonment against government officials as an action against the United States because plaintiff alleged "federally protected rights" and because attorneys from the Department of Justice appeared for the defendants.

4. The leading cases on this subject are: United States *ex rel.* Touhy v.

cover the usual problems which are presented in seeking discovery against any private litigant and which are, of course, also present when the United States is involved.[5] The subject to be discussed can be divided into three parts: (1) whether the United States is subject to discovery; (2) whether there are any special privileges available to it which are not available to an ordinary litigant; and (3) to the extent that there are such special privileges, who decides their application.

I. APPLICABILITY OF DISCOVERY PROCEDURES TO THE UNITED STATES

A discussion of the Government's argument that it is exempt from discovery appears in only one reported case.[6] The Government there argued (1) that since discovery replaces the old bill for discovery in equity which was a separate action that could be brought against the sovereign only with its independent consent, independent consent still is necessary for the present method of discovery; and (2) that since the discovery provisions do not mention the United States, they do not apply to it, because a law does not bind the sovereign unless it specifically so states.

Both arguments are fallacious. The first overlooks the change made by the Federal Rules; the method of discovery is a matter of procedure, and a party litigant is subject to the procedures and rules of the court at the time of the action, not to the procedures and rules as they existed sometime in the past. Just as the need for a separate action for discovery is abolished, so the need for separate consent by the sovereign is abolished. The second argument applies a general rule of construction to a situation in which all evidence indicates that the contrary result was intended.[7] If accepted, this argument would

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Ragen, 340 U.S. 462, 71 Sup. Ct. 416, 95 L. Ed. 417 (1951); Boske v. Comingore, 177 U.S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846 (1900); *Ex parte* Sackett, 74 F.2d 922 (9th Cir. 1935). For a collection of the cases and a discussion thereof, see 4 MOORE, FEDERAL PRACTICE 1164-70 (2d ed. 1950). See also Note, 58 YALE L.J. 933 (1949). Rules 33 and 34 are available only as to parties. If the United States were not a party, it would be necessary to use the deposition procedure and, in order to obtain documents, a subpoena *duces tecum* under Rule 45(d).

5. For example, the rule of Hickman v. Taylor, 329 U.S. 495, 67 Sup. Ct. 385, 91 L. Ed. 451 (1947) applies. Many cases discuss its application in cases involving the United States; *e.g.*, Durkin v. Pet Milk Co., 14 F.R.D. 385, 391-94 (W.D. Ark. 1953); United States *ex rel.* TVA v. Bennett, 14 F.R.D. 166, 167 (E.D. Tenn. 1953); United States v. 50.34 Acres of Land, 13 F.R.D. 19, 21 (E.D.N.Y. 1952); United States v. Shubert, 11 F.R.D. 528, 536 (S.D.N.Y. 1951); United States v. Deere & Co., 9 F.R.D. 523, 527-28 (D. Minn. 1949); Henz v. United States, 9 F.R.D. 291, 294-95 (N.D. Cal. 1949); Anglo-Saxon Petroleum Co. v. United States, 78 F. Supp. 62, 63-64 (D. Mass. 1948).

6. United States v. General Motors Corp., 2 F.R.D. 528 (N.D. Ill. 1942). For a discussion of the case, and the Government's arguments in it, see O'Reilly, *Discovery Against the United States: A New Aspect of Sovereign Immunity?*, 21 N.C.L. REV. 1 (1942).

7. See Rule 37(f) and the discussion of it in United States v. General Motors Corp., 2 F.R.D. 528, 530 (N.D. Ill. 1942). But see O'Reilly, *supra* note 6, at 8. Statements made by members of the Advisory Committee make it clear that discovery was intended to be available against the United States. For

mean that to a large extent, the Federal Rules do not control actions to which the United States is a party, so that as to most matters no rules at all exist for such actions.[8] Apparently the Government has recognized the weakness of these arguments, since it has now abandoned its position that it is not subject to the discovery rules.[9]

II. GOVERNMENTAL PRIVILEGES

The United States has not, however, abandoned its many claims of privilege which it vigorously and frequently asserts. There is no question but that a party is not entitled to discovery of matters which are privileged.[10] "Privileged" as used in this respect refers to evidentiary privileges.[11] Thus to the extent that an actual evidentiary privilege exists, the Government's position must be sustained. The special privileges which it claims fall into four general categories: (1) the informer privilege; (2) military and state secrets privilege; (3) specific statutory privileges; and (4) a general, all inclusive "housekeeping" privilege.

A. *Informer Privilege*

There is a well-recognized common-law privilege which protects the identity of an informer.[12] Some courts, including the federal, apply this privilege as well to the contents of his communication.[13]

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statements by Judge Clark and Mr. Mitchell that the rules were intended to apply to the United States except as otherwise stated, see: ABA, PROCEEDINGS OF THE INSTITUTE AT WASHINGTON AND SYMPOSIUM AT NEW YORK CITY ON THE FEDERAL RULES OF CIVIL PROCEDURE 50, 333 (1939). For statements by Professor Sunderland and Mr. Mitchell that the discovery provisions specifically apply, see *id.* at 266-67, 333.

8. "To hold that the rules do not apply to the United States except where it is particularly mentioned would lead to absurd results. Then there would be no rule in such cases as to many matters of procedure. Or does the Government contend that as to matters covered by rules in which the United States is not mentioned we should conform to state practice as under the old procedure?" United States v. General Motors Corp., 2 F.R.D. 528, 530 (N.D. Ill. 1942).

9. Brief for Appellant, p. 56, United States v. Reynolds, 345 U.S. 1, 73 Sup. Ct. 528, 97 L. Ed. 519 (1953).

10. "[T]he deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." FED. R. CIV. P. 26(b). This rule applies to depositions; it is made applicable to interrogatories by Rule 33 and to the production of documents by Rule 34. Rule 34 as to the production of documents also requires a showing of good cause by the movant.

11. See United States v. Reynolds, 345 U.S. 1, 6, 73 Sup. Ct. 528, 97 L. Ed. 519 (1953).

12. 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940); Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73, 75-78, 81 (1949). See also MODEL CODE OF EVIDENCE, Rule 230 (1942).

13. Vogel v. Gruaz, 110 U.S. 311, 4 Sup. Ct. 12, 28 L. Ed. 158 (1884); Arnstein v. United States, 296 Fed. 946 (D.C. Cir. 1924). See *In re* Quarles, 158 U.S. 532, 535-36, 15 Sup. Ct. 959, 39 L. Ed. 1080 (1895). Wigmore would limit the privilege strictly to the identity of the informant. 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940). To the same effect is MODEL CODE OF EVIDENCE, Rule 230 (1942).

Its rationale is that "such communications ought to receive encouragement and because that confidence which will lead to such communications can be created only by holding out exemption from a compulsory disclosure of the informant's identity."[14] Although this privilege is usually applied to persons who furnish information concerning criminal prosecutions, it seems proper to apply it also to those who furnish information concerning civil actions which are designed to end public wrongs, when they give such information to a government official who has the responsibility of enforcing the law.[15] Thus it has been applied, both to the identity of the informer and the contents of his communication, in civil antitrust[16] and Fair Labor Standards Act[17] cases.

The privilege is that of the Government and can be waived by it by revealing the matter protected.[18] If the Government waives the privilege, or intends to waive it at a trial, then there ordinarily would seem to be no reason to respect it in pre-trial discovery proceedings. Thus, it has been held that when the Government intends to reveal the privileged information at the trial, it can be compelled to reveal it through pre-trial discovery.[19] This result seems correct.[20]

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14. 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940).

15. "The privilege applies to communications to such officers only as have a *responsibility or duty* to investigate or to prevent public wrongs, and not to officials in general. This ordinarily signifies the *police*, and officials of *criminal justice* generally.

"But it may also include *administrative officials* having a duty of inspection or of law-enforcement in their particular spheres. The truth is that the principle is a large and flexible one; it applies wherever the situation is one where without this encouragement the citizens who have special information of a violation of law might be deterred otherwise from voluntarily reporting it to the appropriate official." *Ibid.*

The Government has argued that the privilege should be extended to statements made in the investigation of an airplane crash, since such witnesses "might otherwise be reluctant to make statements to an investigating board inculpating themselves or their colleagues." Brief for Appellant, p. 43, United States v. Reynolds, 345 U.S. 1, 73 Sup. Ct. 528, 97 L. Ed. 519 (1953). Any such extension of the privilege is wholly unwarranted and would go beyond the policy and theory of the privilege. It is particularly inappropriate in this particular case, since the Government offered to produce these very witnesses for the plaintiffs to examine.

16. United States v. Shubert, 11 F.R.D. 528 (S.D.N.Y. 1951); United States v. Lorain Journal Co., 10 F.R.D. 487 (N.D. Ohio 1950); United States v. Sun Oil Co., 10 F.R.D. 448 (E.D. Pa. 1950); United States v. Deere & Co., 9 F.R.D. 523 (D. Minn. 1949); United States v. Kohler Co., 9 F.R.D. 289 (E.D. Pa. 1949).

17. Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265 (E.D.N.Y. 1943). *Contra:* Durkin v. Pet Milk Co., 14 F.R.D. 385 (W.D. Ark. 1953).

18. Sanford, *supra* note 12, at 76.

19. United States v. Shubert, 11 F.R.D. 528 (S.D.N.Y. 1951). See Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265 (E.D.N.Y. 1943). *But cf.* United States v. Deere & Co., 9 F.R.D. 523 (D. Minn. 1949). In United States v. Sun Oil Co., 10 F.R.D. 448 (E.D. Pa. 1950), a case in which the court refused discovery because of the informer privilege, the Government, before the decision on this point, offered to make available to defendant, at such time before trial as the court might direct, a complete list of Government witnesses to be called at the trial.

20. It is conceivable that such disclosure would be inadvisable, *e.g.*, it might

B. *Military and State Secrets*

Although the cases involving it are few, there is no question that there should be, and is, a privilege for military and state secrets.[21] The exact nature of the subject matter covered by this privilege is not clear. Wigmore states that it covers "acts of pending international negotiations or military precautions against foreign enemies."[22] There should be no doubt, for instance, that it would currently apply to atomic secrets.[23] In cases involving discovery, it has been applied to submarine plans,[24] to plans for devices which determine sighting data for guns[25] and to statements concerning the crash of a military plane carrying secret electronic equipment.[26]

C. *Special Statutory Privileges*

There are also various privileges created by specific statutes. These often protect information required by law to be reported to the Government, or reports to be made by governmental officials.[27] There is a qualified privilege, for instance, for income tax returns.[28] Railroad accident reports required to be made to the Interstate Commerce Commission, as well as the reports of investigations made by the

interfere with obtaining additional information from the particular informant. Such a remote possibility can be dealt with when it arises and should not be the basis of a general rule denying disclosure in all cases.

21. 8 WIGMORE, EVIDENCE §§ 2378, 2378a (3d ed. 1940); Sanford, *supra* note 12, at 74-75. See also MODEL CODE OF EVIDENCE, Rule 227 (1942).

22. 8 WIGMORE, EVIDENCE § 2378a (3d ed. 1940). The MODEL CODE OF EVIDENCE, Rule 227 (1942), defines a secret of state as "information not open or theretofore officially disclosed to the public concerning the military or naval organizations or plans of the United States, or a State or Territory, or concerning international relations."

23. It was indicated that the privilege applied to a Government contract during World War II in connection with an atomic energy project. See Haugen v. United States, 153 F.2d 850 (9th Cir. 1946) and United States v. Haugen, 58 F. Supp. 436 (E.D. Wash. 1944). For a discussion of litigation involving such secrets, and the problems it presents, see Note, 19 TENN. L. REV. 477 (1946). See also, Haydock, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements*, 61 HARV. L. REV. 468 (1948).

24. Duncan v. Cammell, Laird & Co., Ltd., [1942] A.C. 624. The privilege was claimed here by the defendant which built the submarine and which had possession of the documents.

25. Pollen v. Ford Instrument Co., 26 F. Supp. 583 (E.D.N.Y. 1939). Here again the privilege was successfully claimed by a corporate defendant which manufactured the equipment for the Government. The court stated: "It is as though the Government were manufacturing the alleged infringing devices itself." *Id.* at 585.

26. United States v. Reynolds, 345 U.S. 1, 73 Sup. Ct. 528, 97 L. Ed. 519 (1953). The court seems to have misapplied the privilege here. See discussion of case below.

27. 8 WIGMORE, EVIDENCE § 2377 (3d ed. 1940); Sanford, *supra* note 12, at 82-86. See MODEL CODE OF EVIDENCE, Rule 228 (1942). Even in the absence of a statute, a few cases apply a privilege to matters similar to those protected by statute and to communications between public officials, but these cases are not numerous enough or clear enough in their reasoning to create a separate, independent privilege. 8 WIGMORE, EVIDENCE §§ 2367, 2378, 2378a (3d ed. 1940); Sanford, *supra* note 12, at 78-81, But see MODEL CODE OF EVIDENCE, Rule 228 (1942).

28. INT. REV. CODE § 55.

Interstate Commerce Commission, are privileged.[29] There is also a privilege for reports of the Civil Aeronautics Board of investigations of airplane accidents.[30] To the extent that such statutes create genuine privileges, they must, of course, be respected in discovery proceedings.

D. *General Housekeeping Privilege*

When a request is made for information which the Government does not wish to reveal but which does not come within the scope of the relatively limited privileges discussed above, the Government regularly asserts a general "housekeeping" privilege. It is broad enough to cover all public business, all internal affairs of the Government, all papers and all information in the Government's possession. In practice no attempt is made to apply it so broadly;[31] but it can be made to cover any matter the executive does not want to disclose.

The claimed general privilege is usually based on R.S. § 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."[32]

Under this statute, the typical regulation provides that all documents and information in the possession of the department are confidential and shall be divulged only on authorization by the head of the department.[33]

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29. 36 STAT. 350, 351 (1910), 45 U.S.C.A. §§ 38, 40, 41 (1943).

30. 52 STAT. 1012 (1938), 49 U.S.C.A. § 581 (1951). This statute does not specifically cover reports made to the CAB, and it has been held not to cover such reports. Tansey v. Transcontinental & Western Air, Inc., 97 F. Supp. 458 (D.D.C. 1949). Nor does it cover testimony given before the CAB in the course of an accident investigation. Ritts v. American Overseas Airlines, Inc., 97 F. Supp. 457 (S.D.N.Y. 1947).

31. In a number of cases, presumably the Government has not argued privilege, since the court has granted the discovery with no discussion of privilege. United States v. 50.34 Acres of Land, 12 F.R.D. 440, 13 F.R.D. 19 (E.D.N.Y. 1952); United States v. 1278.83 Acres of Land, 12 F.R.D. 320 (E.D. Va. 1952); Miehle v. United States, 11 F.R.D. 582 (S.D.N.Y. 1951); Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Clark, 9 F.R.D. 263 (D.D.C. 1949); United States v. New York, C. & St. L.R.R., 8 F.R.D. 258 (N.D. Ohio 1948); United States v. 300 Cans of Black Raspberries, 7 F.R.D. 36 (N.D. Ohio 1946); United States v. American Solvents & Chemical Corp. of California, 30 F. Supp. 107 (D. Del. 1939); Curtis v. United States, 27 F. Supp. 459 (D. Mass. 1939); Galanos v. United States, 27 F. Supp. 298 (D. Mass. 1939). And in many cases in which it claimed a privilege, the Government has given some information without objection, *e.g.*, United States v. Reynolds, 345 U.S. 1, 73 Sup. Ct. 528, 97 L. Ed. 519 (1953); United States v. Cotton Valley Operators Committee, 9 F.R.D. 719 (W.D. La. 1949), *aff'd*, 339 U.S. 940 (1950) (on appeal Court equally divided).

32. REV. STAT. § 161 (1875), 5 U.S.C.A. § 22 (1927).

33. E.g., Department of Justice Order 3229, 11 FED. REG. 4920 (1946):

"All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal

As a general matter there is little or no justification for such a general housekeeping privilege. The alleged basis for it is the "public interest" in keeping governmental records confidential. But there is seldom any analysis to determine why or whether there is a public interest in such secrecy. Generally, the other privileges cover matters which it is actually not in the public interest to disclose. Of course, it would not be desirable to have the public at large make a general practice of invading governmental offices every day to satisfy its collective curiosity; unlimited access could be a substantial nuisance. But such danger is slight when the access is limited to parties to litigation with the United States,[34] especially since the judge can thwart any attempts at abuse by using Rules 30(b) and (d).[35]

On the other hand, there are valid reasons why there should not be such a general privilege. We must assume, as certainly is true in the great majority of cases, that a party seeks information by discovery because it is important to his case, and not because of some idle curiosity or desire to harass. The efficient administration of justice requires that this information be made available to him, unless there is an overriding conflicting interest. In no case has any such conflicting interest been shown to exist in connection with this claimed privilege. The desire of the Government to keep its many activities secret does not justify denying or impeding justice in a

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and correctional institutions, or in the custody or control of any officer or employee 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 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 there in, on the ground that the disclosure of such records is prohibited by this regulation."

34. For an example of how the discovery provisions can be abused, see United States v. Bridges, 86 F. Supp. 931 (N.D. Cal. 1949).

35. Rule 30(b) as to depositions authorizes the judge to limit the scope of the examination and generally to make any "order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." Rules 33 and 34 respectively make this provision applicable to interrogatories and motions for production of documents. Rule 30(d) also provides that the court may limit the scope of, or the manner of taking, a deposition, or may order the examination ended, "upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party . . ."

It has been suggested that Rules 30(b) and 30(d) form a more valid basis than privilege for protecting the Government from disclosure. Pike and Fischer, *Discovery Against Federal Administrative Agencies*, 56 HARV. L. REV. 1125, 1134-36 (1943). These provisions were intended to prevent abuses of the discovery procedure, and not to prevent discovery within its legitimate area because of some vague "public interest" in nondisclosure. The courts have not used this provision for such a purpose, and apparently the Government has not even argued the point.

particular case.[36]

Of course, if a statute establishes such a privilege, it must be applied, regardless of how erroneous the reason for it is. But nothing in R.S. § 161 compels, or even justifies, finding a privilege for matters purportedly made confidential by regulations under it. Nothing in the statute refers to privilege. Its wording is entirely different from that of statutes designed to create a privilege,[37] and obviously is intended merely to confer on the department head the authority to supervise the day to day operation of his office.[38] As to records, papers, and property, such authority only goes so far as to authorize him to make regulations as to their "custody, use, and preservation." In context, this language obviously is just as limited as the rest of the statute, and refers only to such matters of internal management as deciding where and how to file and store records, appointing someone to perform these functions, etc. It is an unwarranted distortion of language to extend a statute concerned with routine administration and not with court proceedings so as to create an evidentiary privilege.

Another ground which has been advanced for not applying this statute so as to create a privilege is that since it gives authority only to prescribe regulations "not inconsistent with law," and since the Federal Rules have the "force of a federal statute,"[39] the regulations

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36. "In any community under a system of representative government and removable officials, there can be no facts which require to be kept secret with that solidity which defies even the inquiries of a court of justice. . . . Such a secrecy can seldom be legitimately desired. It is generally desired for the purposes of partisan politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption. . . . To concede to them a sacrosanct secrecy in a court of justice is to attribute to them a character which for other purposes is never maintained,—a character which appears to have been advanced only when it happens to have served some undisclosed interest to obstruct investigation into facts which might reveal a liability.

"It is urged, to be sure . . . that the 'public interest must be considered paramount to the individual interest of a suitor in a court of justice.' As if the public interest were not involved in the administration of justice! As if the denial of justice to a single suitor were not as much a public injury as is the disclosure of any official record! When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight." 8 WIGMORE, EVIDENCE § 2378a (3d ed. 1940).

See also Street, *State Secrets—A Comparative Study,* 14 MOD. L. REV. 121 (1951). But see MODEL CODE OF EVIDENCE, Rule 228 (1942).

37. See statutes cited in notes 28, 29 and 30, *supra,* and note 100 *infra.* See also Berger and Krash, *Government Immunity from Discovery,* 59 YALE L.J. 1451, 1461 (1950).

38. Wigmore states that such a statute or regulation thereunder is "usually aimed simply at imposing upon the staff a proper silence in everyday intercourse outside of the office and at defending the records from the intensive scrutiny of the public having no interest therein." 8 WIGMORE, EVIDENCE § 2378a (3d ed. 1940). See also Note, 58 YALE L.J. 993, 996 (1949).

39. 28 U.S.C.A. § 2072 (1950); Sibbach v. Wilson & Co., 312 U.S. 1, 13, 61 Sup. Ct. 422, 85 L. Ed. 479 (1941).

prohibiting discovery are rendered invalid as inconsistent with law.[40] This argument appears erroneous. The Federal Rules specifically provide that discovery cannot be required of "privileged" matters,[41] and if this statute or the regulations thereunder create a privilege, there is no inconsistency, since then the Federal Rules do not require production of the privileged matters.

The cases involving claims of this housekeeping privilege are so completely confused that it is not possible to say whether or to what extent such a privilege exists. A few cases have recognized the existence of such a privilege, and have applied it to prevent discovery.[42] More cases have rejected the claim of privilege, at least as to the specific information requested.[43] Two cases have allowed discovery of information by depositions or interrogatories, but have indicated that documents in government files are privileged and cannot be inspected or copied under Rule 34.[44] In other cases the courts have refused to sustain a blanket claim of privilege and have ordered the discovery, but have given the Government a right to raise the issue as to specific items.[45] In some instances, the court has ordered that the documents be shown first to it, so that it can decide whether or not they are privileged.[46]

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40. See Berger & Krash, *supra* note 37, at 1460-62.

41. See note 10 *supra*.

42. United States v. Shubert, 11 F.R.D. 528 (S.D.N.Y. 1951); Walling v. Comet Carriers, Inc., 3 F.R.D. 442 (S.D.N.Y. 1944). See Pacific-Atlantic S.S. Co. v. United States, 175 F.2d 632, 636-37 (4th Cir.), *cert. denied*, 338 U.S. 868 (1949); United States v. Kohler Co., 9 F.R.D. 289, 291 (E.D. Pa. 1949). In the *Shubert* case, the court sustained the claim of privilege, but said that the same issue could be presented at trial by a subpoena *duces tecum* served on the Attorney General (the documents sought were in the Department of Justice files). The court said that "Then a clear cut ruling on the claim of privilege may be obtained." United States v. Shubert, *supra*, at 538. This statement would have validity when the United States was not a party. United States *ex rel.* Touhy v. Ragen, 340 U.S. 462, 71 Sup. Ct. 416, 95 L. Ed. 417 (1951). But it had none here. See note 59 *infra*.

43. Durkin v. Pet Milk Co., 14 F.R.D. 385 (W.D. Ark. 1953); Mandel v. United States, 93 F. Supp. 692 (E.D. Pa. 1950), *rev'd on other grounds*, 191 F.2d 164 (3d Cir. 1951); Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Hawaii 1947); United States v. General Motors Corp., 2 F.R.D. 528 (N.D. Ill. 1942). *Accord*, Bowles v. Ackerman, 4 F.R.D. 260 (S.D.N.Y. 1945). *Cf.* Royal Exchange Assur. v. McGrath, 13 F.R.D. 150 (S.D.N.Y. 1952); Evans v. United States, 10 F.R.D. 255 (W.D. La. 1950); Standard X-Ray Co. v. United States, 3 FED. RULES SERV. 34.42, Case 2, at 393 (N.D. Ill. 1940) (opinion ordered withdrawn, June 12, 1940).

44. See Brewer v. Hassett, 2 F.R.D. 222, 223 (D. Mass. 1942); Fleming v. Bernardi, 1 F.R.D. 624, 626 (N.D. Ohio 1941).

45. United States v. Weinblatt, 11 F.R.D. 398 (S.D.N.Y. 1951); *cf.* O'Keefe v. Shaughnessy, 95 F. Supp. 900 (N.D.N.Y. 1951). Such right is not expressly stated in Evans v. United States, 10 F.R.D. 255 (W.D. La. 1950), but it seems implicit in the opinion.

46. United States v. Cotton Valley Operators Committee, 9 F.R.D. 719 (W.D. La. 1949), *aff'd*, 339 U.S. 940 (1950) (on appeal Court equally divided); Cresmer v. United States, 9 F.R.D. 203 (E.D.N.Y. 1949). *Cf.* Royal Exchange Assur. v. McGrath, 13 F.R.D. 150 (S.D.N.Y. 1952); Henz v. United States, 9 F.R.D. 291 (N.D. Cal. 1949). See Evans v. United States, *supra* note 45. The

Some courts have assumed or uncritically accepted the privilege but have then found a waiver of it. Thus it has been held that the United States waives its privilege when it brings an action.[47] When the United States is a defendant, it has been held that the consent to be sued constitutes a waiver.[48] And in a habeas corpus proceeding, the court indicated that the act of detaining the petitioner was sufficient to constitute a waiver.[49]

This doctrine of waiver is obviously a fiction.[50] It is incorrect to say that the United States or any other party waives an evidentiary privilege by bringing a suit. Similarly, it is erroneous to allow discovery, as some cases have, on the basis that the Federal Tort Claims Act[51] or the Suits in Admiralty Act,[52] puts the Government in the same position as a private litigant[53] and therefore constitutes something analogous to a waiver of a privilege which might otherwise exist. It is true that when the United States brings an action and when it is sued pursuant to its consent, it is on the same terms as any other litigant;[54] but other litigants obviously do not waive their evidentiary privileges by suing or being sued, and thus if the United States does, it is not in the same position as a private litigant. Obviously, when the court finds a waiver, it is in effect holding that there is no privilege.[55]

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same course was followed in Brauner v. United States, 10 F.R.D. 468 (E.D. Pa. 1950), *rev'd sub nom.* United States v. Reynolds, 345 U.S. 1 (1953).

47. Fleming v. Bernardi, 1 F.R.D. 624 (N.D. Ohio 1941); *cf.* Bowles v. Ackerman, 4 F.R.D. 260 (S.D.N.Y. 1945).

48. Bank Line, Ltd. v. United States, 76 F. Supp. 801 (S.D.N.Y. 1948). This case was settled without disclosure by the Government. Brief for Appellant, p. 59, United States v. Cotton Valley Operators Committee, 339 U.S. 940, 70 Sup. Ct. 793, 94 L. Ed. 1356 (1950).

49. United States *ex rel.* Schlueter v. Watkins, 67 F. Supp. 556 (S.D.N.Y. 1946), *aff'd on other grounds,* 158 F.2d 853 (2d Cir. 1946).

50. 3 MOORE, FEDERAL PRACTICE 1174-75 (2d ed. 1948). See United States *ex rel.* Schlueter v. Watkins, *supra* note 49, at 561: "[T]he theory of waiver upon which the requirement of disclosure has been based seems to me to be the kind of useful fiction which the law invents to express an underlying public policy."

51. "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C.A. § 2674 (1950).

52. "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 41 STAT. 526 (1920), as amended, 49 STAT. 1987, 2016 (1936), 46 U.S.C.A. § 743 (1944).

53. Cresmer v. United States, 9 F.R.D. 203 (E.D.N.Y. 1949); Wunderly v. United States, 8 F.R.D. 356 (E.D. Pa. 1948); O'Neill v. United States, 79 F. Supp. 827 (E.D. Pa. 1948), *rev'd on other grounds sub nom.* Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949), *cert. denied,* 339 U.S. 967 (1950).

54. Luckenbach Steamship Co. v. Norwegian Barque "Thekla," 266 U.S. 328, 45 Sup. Ct. 112, 69 L. Ed. 313 (1924); Daitz Flying Corp. v. United States, 4 F.R.D. 372 (E.D.N.Y. 1945). See Jones v. Watts, 142 F.2d 575, 577 (5th Cir. 1944), *cert. denied,* 323 U.S. 787 (1944); United States v. Alexander, 47 F. Supp. 900, 907 (W.D. Va. 1942).

55. Although the court did not refer to waiver, a similar result was reached

Although waiver is used to obtain a desirable result, it is unfortunate that the courts have resorted to such a fiction. Apparently this approach developed as a method to distinguish certain cases which upheld the validity of departmental regulations under R.S. § 161 and held that in an action between private litigants, a subordinate Government official could not be compelled to produce documents in his possession.[56] The courts seized on the obvious difference that the Government was a party in the one action and not the other, and because of it, invented a waiver when the Government was a party. The idea of waiver gained support from a line of cases in the second circuit which hold that in a criminal case, the Government cannot withhold from the defendant documents relevant to his defense on the basis of privilege, and that the Government must choose between producing the evidence and letting the offense go unpunished.[57]

However, these cases between private litigants are properly distinguishable on the basis that the department head was not before the court and that the orders to produce were directed at subordinate officers.[58] The regulations under R.S. § 161 generally provide that records can be produced only with the approval of the department head, and to this extent, they are valid and controlling. When the United States is a party, and the order is directed at it, it becomes the duty of the department head as an employee of the United States to produce the records.[59] It would have been much simpler and more logical to distinguish the cases between private litigants properly on such basis, rather than to go through the circumlocution of waiving a privilege which does not properly exist in the first place.

It has been suggested that discovery should be more liberally permitted when the Government appears in a proprietary capacity (as in a contract or tort action) than when it seeks to enforce the laws

in Fireman's Fund Indemnity Co. v. United States, 103 F. Supp. 915 (N.D. Fla. 1952), where the court held that statements made in an investigation and testimony before a Navy Court of Inquiry were privileged, but that they lost such status if and when given to the Government attorneys in the case. Discovery was allowed as to such documents, if any, given to Government counsel. This result is a fair one, but does not appear sound, since a party should not be held to waive a privilege by communicating the matter to his attorney; an attorney-client relationship should be held to exist between attorneys in the Department of Justice and the other agencies of the Government.

56. Cases cited note 4 *supra.*

57. United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950), *cert. denied,* 342 U.S. 920 (1952); United States v. Grayson, 166 F.2d 863, 870 (2d Cir. 1948); United States v. Beekman, 155 F.2d 580, 584 (2d Cir. 1946); United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944).

58. The limitation of the decisions in these cases to orders directed at a subordinate official is emphasized by Justice Frankfurter in his concurring opinion in United States *ex rel.* Touhy v. Ragen, 340 U.S. 462, 470, 71 Sup. Ct. 416, 95 L. Ed. 417 (1951).

59. Reynolds v. United States, 192 F.2d 987, 992-93 (3d Cir. 1951), *rev'd on other grounds,* 345 U.S. 1 (1953).

(as in an antitrust action).[60] Such a distinction is invalid. The test of the existence of a privilege is not the nature of the action in which it is claimed, but the nature of the information sought. The revelation of a particular piece of information does no more harm in one type of action than in another. Justice requires furnishing the information in one type of case just as much as in the other. The United States does not have other special rights or procedural advantages in enforcing the laws by a civil action, and there is no justification for creating them in respect to discovery. Furthermore, the Federal Rules do not make distinctions among types of actions, and any distinction created, regardless of its merit or lack of merit logically, is an unauthorized and unjustified judicial amendment to the Rules.

III. Who Decides Whether Certain Material is Privileged

Just as important as whether a privilege exists is the question of whether the court or the executive decides whether particular information or documents come within whatever privileges there may be, since if the executive makes the final decision, then all judicial attempts at defining what privileges exist are, as a practical matter, futile. Since the application of a privilege is a question of the admissibility of evidence,[61] it is usually unquestioned that at a trial the judge determines whether a privilege exists.[62] Exactly the same type of determination is involved in deciding what is privileged under the discovery rules. There is no reason for departing from the rule in the application of a governmental privilege in either case, since this is as much a judicial question as is the application of any other privilege.[63]

However, in England, in the leading case of *Duncan v. Cammell, Laird & Co., Ltd.*,[64] it was held that the determination by an administrative official that a certain matter is privileged is conclusive and

60. Pike and Fischer, *supra* note 35, at 1128-29. See 3 Moore, Federal Practice 1180 (2d ed. 1948). See United States v. Kohler Co., 9 F.R.D. 289, 290 (E.D. Pa. 1949).

61. See 3 Moore, Federal Practice 1175-79 (2d ed. 1948).

62. 8 Wigmore, Evidence §§ 2212, 2322, 2379 (3d ed. 1940); 9 *id.* § 2550.

63. "The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the Court . . . " 8 *id.* § 2379.

64. [1942] A.C. 624. For discussions of the case, pro and con, see Note, 56 Harv. L. Rev. 806, 813-14 (1943); 59 L.Q.Rev. 102 (1943); 21 Can. B. Rev. 51 (1943); 58 L.Q.Rev. 436 (1942); 20 Can. B. Rev. 805 (1942). For a critical discussion of this and other recent English cases, and a comparison of them with American cases, see Street, *supra* note 36.

binds the court. In an action between private litigants,[65] in which plaintiffs were seeking to recover damages for deaths caused by the sinking of the submarine *Thetis* which was built by defendants, the House of Lords refused to compel production of certain documents,[66] after the Admiralty had directed defendants not to produce the documents "on the ground of Crown privilege."[67] The basis for the decision was a belief that the executive is better qualified and situated to protect the public interest in reaching a decision on such a question.[68]

There does not appear to be any doubt that these documents did involve military secrets and that the result was correct, since whoever decided the question would have to conclude that they were privileged. However, the opinion makes it clear that a court will not compel any goverument official to reveal documents if he concludes that it is in the public interest not to do so. It is true that the precise holding is that the final decision as to privilege is for the judge, and that he is bound by an administrative decision when properly made.[69] Thus it might be argued that the court in some instance might review such a decision.[70] But no hint is given of when a reversal of the administrative decision would be proper. And although the opinion does set forth the standards the administrative official should apply,[71] there

65. At this time the Government was not subject to discovery in England: "When the Crown . . . is a party to a suit, it cannot be required to give discovery of documents at all. No special ground of objection is needed. The common law principle is well established . . ." Duncan v. Cammell, Laird & Co., Ltd., [1942] A.C. 624, 632. This rule has now been changed by statute. See note 72 *infra*.

66. Demanded were the contract for the hull and machinery of the *Thetis*, letters written before the sinking as to its trim, reports of its condition when raised, plans and specifications for it, and the notebook of a foreman painter employed by defendants. *Id.* at 627.

67. In spite of this holding, plaintiffs were able to prove the facts involved, but eventually it was held that none of the defendants was liable for negligence. Woods v. Duncan, [1946] A.C. 401.

68. Duncan v. Cammell, Laird & Co., Ltd., [1942] A.C. 624, 639-41.

69. "Although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge. Thus, in the present case, the objection raised in the respondents' affidavit is properly expressed to be an objection to produce 'except under the order of this honourable court.' It is the judge who is in control of the trial, not the executive, but the proper ruling for the judge to give is as above expressed." *Id.* at 642.

70. See Street, *supra* note 36, at 123.

71. "It is not a sufficient ground that the documents are 'State documents' or 'official', or are marked 'confidential.' It would not be a good ground that, if they were produced the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claim for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should

is no indication of an inclination on the part of the court to force these standards on him. In any event, the principle of administrative finality seems well-established and the holding of the case has now been enacted by statute as to cases to which the Crown is a party.[72]

In the cases in the United States, the Government has made, broadly speaking, three principal arguments to support its position that the executive's decision is final:[73] (1) the constitutional independence of the executive, and separation of powers; (2) policy considerations, largely based on the idea that the executive is better qualified to weigh the public interest; (3) the statute, R.S. § 161, concerning custody of Government documents.[74]

It appears erroneous to argue that this is a constitutional issue. The judiciary is not attempting to impinge on the executive function, since the only question is the admissibility of evidence, a question purely judicial in nature. The point does not involve the day-to-day administration of the Government, since it arises only when the Government is in court, either because it has seen fit to bring an action or because it has been made a defendant pursuant to its own consent.

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bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, when disclosure would be injurious to national defence or, to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service." Duncan v. Cammell, Laird & Co., Ltd., [1942] A.C. 624, 642.

72. "(1) Subject to and in accordance with rules of court and county court rules:—

(a) in any civil proceedings in the High Court or a county court to which the Crown is a party, the Crown may be required by the court to make discovery of documents and produce documents for inspection; and

(b) in any such proceedings as aforesaid, the Crown may be required by the court to answer interrogatories.

Provided that this section shall be without prejudice to any rule of law which authorizes or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest. . . .

"(2) Without prejudice to the proviso to the preceding subsection, any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if, in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence thereof." Crown Proceedings Act, 1947, 10 & 11 GEO. VI, c. 44, § 28.

It has been said in regard to this statute: "This has a marked tendency toward bureaucratic oppression, yet, in fairness, it must be admitted that none of the experienced members of the judiciary who spoke on the matter in the House of Lords on the passage of the bill thought that judges were competent to decide this matter." Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 MICH. L. REV. 341, 359-60 (1949).

73. See, *e.g.*, Brief for Appellant, pp. 16, 20-47, United States v. Reynolds, 345 U.S. 1, 73 Sup. Ct. 528, 97 L. Ed. 727 (1953); Brief for Appellant, pp. 31-57, United States v. Cotton Valley Operators Committee, 339 U.S. 940, 70 Sup. Ct. 793, 94 L. Ed. 1356 (1950).

74. As to the Court of Claims, another statute, 28 U.S.C.A. § 2507 (1950), is applicable; see note 100 *infra*.

In all other respects, when the Government uses the courts, it must submit to the rules of procedure and practice of those courts.[75] There is no reason why it should not be compelled to do so when discovery is involved.[76]

A court has full power to control proceedings before it, and there is no basis to say that the enforcement of this judicial power is an infringement on the rights of the executive, at least so long as there is no discrimination against it. In enforcing such judicial power, the question of whether the executive is subject to judicial process need not arise; the court can impose sanctions in the pending suit under Rule 37.[77] If separation of powers has any relevance to the question, it should prevent the executive from exercising the judicial function of determining what is privileged under the law of evidence.[78]

The Government has relied on several historical precedents as supporting the constitutional argument,[79] but none of them is controlling. The refusal of the President to disclose information to Congress in the course of the struggle of the executive branch to assert its independence has nothing to do with the power of the courts to impose sanctions in proceedings before them. *Marbury v. Madison* and the Burr trial are cited as recognizing the independence of the executive in respect to the courts, but these cases are open to conflicting interpretations and have little significance.[80]

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75. See note 54 *supra*.

76. See Berger & Krash, *supra* note 37, at 1454-56.

77. Thus when the Government refused to produce documents in United States v. Cotton Valley Operators Committee, 9 F.R.D. 719 (W.D. La. 1949), *aff'd*, 339 U.S. 940 (1950), an action instituted by the Government, the court dismissed the action; and in Brauner v. United States, 10 F.R.D. 468 (E.D. Pa. 1950), *rev'd sub. nom.* United States v. Reynolds, 345 U.S. 1 (1953), where the action was against the United States, the court took the facts on the issue of negligence, which the documents sought involved, as established against the Government.

78. "Neither the executive nor the legislative branch of the Government may constitutionally encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions which arise in cases or controversies submitted to the judicial branch for decision." Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951), *rev'd on other grounds*, 345 U.S. 1 (1953). See also 3 MOORE, FEDERAL PRACTICE 1176 (2d ed. 1948).

79. Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (U.S. 1803); United States v. Burr, 25 Fed. Cas. 30, 187, No. 14,692d, 14,694 (C.C.D. Va. 1807). See Wolkinson, *Demands of Congressional Committees for Executive Papers, Part II*, 10 FED. B.J. 223 (1949). See also precedents where the executive successfully fought congressional attempts to obtain information, discussed in Brief for Appellant, pp. 36-39, United States v. Cotton Valley Operators Committee, 339 U.S. 940, 70 Sup. Ct. 793, 94 L. Ed. 1356 (1950); Brief for Appellant, pp. 23-30, United States v. Reynolds, 345 U.S. 1, 73 Sup. Ct. 528, 97 L. Ed. 519 (1953), and in Wolkinson, *Demands of Congressional Committees for Executive Papers, Part I*, 10 FED. B.J. 103 (1949).

80. *Compare* Brief for Appellant, pp. 39-40, United States v. Cotton Valley Operators Committee, *supra* note 79, Brief for Appellant, pp. 31-33, United States v. Reynolds, *supra* note 79, and Wolkinson, *Demands of Congressional Committees for Executive Papers, Part II*, 10 FED. B.J. 223 (1949), *with*

The argument that only the executive can adequately consider and weigh the public interest shows a natural tendency of the executive to overestimate his own expertness and to underestimate that of the judge. The executive is on one side of an adversary proceeding and may be unconsciously influenced by this fact. Furthermore, his closeness to the public problems involved is likely to make him overemphasize the general importance of the matter and the need for secrecy, while underestimating its importance in the individual's case.[81] And the executive may be too busy with other matters to give the problem the consideration due it.[82] The judge, on the other hand, has no such preconceived bias, and weighing such conflicting interests is his normal function. If the executive is permitted to present his arguments for secrecy to the judge, the judge is an adequate and competent arbitrator of the conflicting interests involved.[83]

The argument for administrative finality based on R.S. § 161 has validity only if that statute be held to create a privilege or to authorize a department head to create a privilege. If he can create a privilege by saying that a certain matter is confidental, all the court can properly do in deciding the application of that privilege is to determine whether or not he has in fact so acted as to the particular matter involved. For the reasons stated above, this statute should be held not to create any privilege, and not to authorize anyone to create a privilege. Consequently, it should be held not to have anything to do with deciding the judicial question of whether a recognized privilege applies.

The question of who applies the privilege was first presented to the Supreme Court in *United States v. Cotton Valley Operators Committee*.[84] Here, in a civil antitrust action, in response to interrogatories under Rule 33 and a motion under Rule 34 to compel production of documents, the Government gave some answers and submitted certain documents, but it refused to produce FBI reports, with exhibits thereto, and communications concerning the case received by the Department of Justice, and replies thereto.[85] The trial court

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Berger & Krash, *supra* note 37, at 1456-60, and 8 WIGMORE, EVIDENCE §§ 2378, 2378a (3d ed. 1940).

81. See Street, *State Secrets—A Comparative Study*, 14 MOD. L. REV. 121 (1951); Comment, 18 U. OF CHI. L. REV. 122, 126-27 (1950).

82. See 8 WIGMORE, EVIDENCE § 2378a (3d ed. 1940).

83. But see 21 CAN. B. REV. 51 (1943). For a suggestion of having a special tribunal to decide such questions of privilege, see Sanford, *supra* note 12.

84. 339 U.S. 940, 70 Sup. Ct. 793, 94 L. Ed. 1356 (1950).

85. The Government offered to supply in place of the FBI reports, verbatim copies of statements by the agents of every interview which they had had, omitting only (1) "technical procedure matters," such as an analysis of a memo from an attorney outlining information to be sought; (2) referrals of leads to other agents; (3) opinions on the merits of the case volunteered by an accountant-agent. The Government attorney even offered to let the court compare the abstract with the original to determine whether the abstract was correct. He stated that in doing this, the Attorney General

ordered the documents produced for his own inspection, stating that he would then decide any claim of privilege. When this order was not obeyed, he dismissed the action.[86] The Supreme Court divided evenly, 4—4,[87] and thus affirmed the district court, but left the question open.

The same question was presented to the Supreme Court again in *Reynolds v. United States.*[88] The Court asserted the right of the judge to decide a question of privilege, but did not answer all questions arising in this connection. The action was brought under the Tort Claims Act to recover damages for the deaths in the crash of an Air Force plane of civilian passengers who were on the plane in order to test secret electronic equipment. There was no indication, however, that this equipment caused or contributed to the accident.[89]

Plaintiff sought under Rule 34 to require the production of written statements of three soldiers who survived the crash, and the report and findings of the Air Force's official investigation. The Government would not produce these documents.[90] Originally, it claimed only a general housekeeping privilege. The trial court denied the existence of such a privilege, and granted plaintiff's motion to produce.[91] Subsequently, the Secretary of the Air Force wrote the district judge that he had determined that it would not be in the public interest to furnish the report. The court held an additional hearing, at which the Secretary submitted a formal claim of privilege, setting forth his right to promulgate regulations under R.S. § 161 and describing the regulations, and stating for the first time that since the plane was on a confidential mission and carried confidential equipment, any disclosure of its mission or operation or performance would be "prejudicial to this Department and would not be in the public interest." At the same time, the Government offered to make available the three witnesses for interrogation by plaintiffs, guaranteeing "to authorize them to testify to all matters pertaining to the cause of the accident except as to 'classified' material."

The trial court then amended its order so as to require the Government to produce the documents for examination by the court so that

waived his privilege but wanted to keep instructions within the Department confidential.

86. United States v. Cotton Valley Operators Committee, 9 F.R.D. 719 (W.D. La. 1949).

87. Justice Clark did not participate in the case.

88. 345 U.S. 1, 73 Sup. Ct. 528, 97 L. Ed. 727 (1953).

89. "There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident." *Id.* at 11.

90. The only information given as to the cause of the crash was in answer to an interrogatory stating, "Describe in detail the trouble experienced." The answer the Government gave was, "At between 18,500 or 19,000 feet manifold pressure dropped to 23 inches on No. one engine." Brauner v. United States, 10 F.R.D. 468, 471 (E.D. Pa. 1950).

91. Brauner v. United States, 10 F.R.D. 468 (E.D. Pa. 1950).

it could determine whether disclosure "would violate the Government's privilege against disclosure of matters involving the national or public interest." The Government did not comply with this order, and the trial court took the facts as to the issue of negligence as established against the defendant. The court of appeals affirmed this judgment.[92] To answer the argument based on R.S. § 161, it relied heavily on the Tort Claims Act,[93] and, without admitting that such a right otherwise existed, said that this statute took away from the executive departments in tort claims cases the right to determine the extent of the privilege against disclosure of Government documents.[94] As for the claim of a military secrets privilege, it stated that the determination of whether such a recognized privilege applied to certain documents was a judicial function,[95] and that the district court's order, requiring submission of the documents to the court, adequately protected any privilege which existed.[96]

This decision was reversed by the Supreme Court.[97] In the Supreme Court, the Government vigorously argued that the constitutional independence of the executive, as recognized by R.S. § 161, gave the right to refuse disclosure.[98] It made only passing reference to the claim of privilege for military or state secrets.[99] But the Court evaded the main issue argued and decided the case on the basis that the Government had presented a valid claim of privilege for military secrets. It did not decide what general housekeeping privilege, if any, exists. The Court clearly stated that the judge must decide the application of a privilege:

> "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[100]

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92. Reynolds v. United States, 192 F.2d 987 (3d Cir. 1951).
93. For the text of the section involved, see note 51 *supra*.
94. Reynolds v. United States, 192 F.2d 987, 993 (3d Cir. 1951).
95. "[W]e are satisfied that a claim of privilege against disclosing evidence relevant to the issues in a pending lawsuit 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*." *Id.* at 997.
96. *Id.* at 996.
97. United States v. Reynolds, 345 U.S. 1, 73 Sup. Ct. 528, 97 L. Ed. 727 (1953). Justices Black, Frankfurter and Jackson dissented, "substantially for the reasons" stated by the court of appeals.
98. Brief for Appellant, pp. 21-35, United States v. Reynolds, *supra* note 97.
99. *Id.* at pp. 42-43.
100. United States v. Reynolds, 345 U.S. 1, 9-10, 73 Sup. Ct. 528, 97 L. Ed. 727 (1953). Prior lower court decisions had reached the same result. Crosby v. Pacific S.S. Lines, Ltd., 133 F.2d 470 (9th Cir. 1943), *cert. denied*, 319 U.S. 752 (1943); Evans v. United States, 10 F.R.D. 255 (W.D. La. 1950); Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Hawaii 1947). *See* Bank Line, Ltd. v. United States, 163 F.2d 133, 139 (2d Cir. 1947) (concurring opinion).
A different rule, however, is applicable to the Court of Claims. By 28 U.S.C.A. § 2507 (1950), the Court of Claims is given the power to call on any

However, it did not hold that when the military secret privilege is involved, complete disclosure to the judge must always be made. Rather, it held that this privilege is analogous to the privilege against self-incrimination so that the rule for the two should be the same:

> "[T]he court must be satisfied from all the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' Hoffman v. United States, 341 U.S. 479, 486-487 (1951). If the court is so satisfied, the claim of the privilege will be accepted without requiring further disclosure."[101]

The Court stated that there was a "reasonable danger" that the accident report referred to the secret electronic equipment, although the Court also stated that there was nothing to suggest that such equipment had any causal connection with the accident.[102]

The only reason suggested why this privilege is similiar to the one against self-incrimination, and not like the numerous other privileges where the matter must be disclosed to the judge,[103] is that the court should not jeopardize the security which the privilege is meant to protect by insisting on examining the evidence.[104] But this objection to disclosure applies to any privilege. Furthermore, this statement shows too little faith in the ability and loyalty of judges. In some instances it should not be necessary to disclose the information to show that a privilege exists. For instance, if an interrogatory sought a description of the process by which the hydrogen bomb is made, it should not be necessary to present this information to the judge in order for him to decide that the privilege applies. But where there is doubt as to the privilege, there is no valid reason for not requiring disclosure to the judge.

The rule stated, however, is a workable one, at least as to this military and state secrets privilege, and if properly applied, could produce fair results. Unfortunately, the Court went further and beclouded the issue by saying that in investigating to see whether a privilege should exist, the court must consider the degree of necessity:

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department or agency for "any information or papers it deems necessary," but the section provides: "The head of any department or agency may refuse to comply when, in his opinion, compliance will be injurious to the public interest." The court has indicated that the department head's discretion is a legal one, and not an arbitrary one which can be exercised without some just or legal reason, and that if he refuses without just reason, the court may admit secondary evidence. See Pollen v. United States, 85 Ct. Cl. 673, 678 (1937); Robinson v. United States, 50 Ct. Cl. 159, 165-66 (1915).

101. United States v. Reynolds, 345 U.S. 1, 9, 73 Sup. Ct. 528, 97 L. Ed. 727 (1953). See also 8 WIGMORE, EVIDENCE § 2271 (3d ed. 1940).

102. United States v. Reynolds, *supra* note 101, at 10, 11.

103. See note 62 *supra*.

104. United States v. Reynolds, *supra* note 101, at 10.

> "In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. *A fortiori,* where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail."[105]

Any such qualification is undesirable. Necessity should not be a factor in this determination. The judge cannot always make an intelligent decision as to whether a certain item of information is necessary until he knows what that information is. The result should depend only on how clear it is that a military secret is involved. Although necessity may result in a court's not applying a privilege,[106] necessity should not control how hard the court looks to find the privilege. The court may have been confusing privilege with the showing of "good cause" which is required by Rule 34. The discussion of necessity, of course, is relevant in this respect, and it may be that the court meant only that good cause was not shown here. This interpretation of the case, however, appears erroneous, since it would mean that the holding does not apply to depositions and interrogatories, for which a showing of good cause is not required.[107] The principles of the case should, and apparently were intended to, apply to all methods of discovery.

Even granting that necessity should be a factor, the application of the stated rule to this particular case appears erroneous. The principal argument of the Government as to the reason for the privilege was that revealing such information would interfere with investigating airplane crashes.[108] The only military secrets alleged to be involved related to the electronic equipment, and there was no indication that this equipment had anything to do with the crash.[109] For this reason, the documents probably did not refer to this equipment. Even if they did, the judge could have permitted the deletion of the material, if any, relating to the secret equipment.[110] Plaintiffs probably would still have obtained all the information they sought as

105. *Id.* at 11.

106. "Even when the privilege is strictly applicable, the *trial court may compel disclosure* [of the identity of an informer], if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony." 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940). See also MODEL CODE OF EVIDENCE, Rule 230 (1942).

107. FED. R. CIV. P. 26, 30, 31, 33.

108. Brief for Appellant, pp. 43-47, United States v. Reynolds, *supra* note 101.

109. See note 89 *supra.*

110. For a similar solution, see Bank Line, Ltd. v. United States, 76 F. Supp. 801 (S.D.N.Y. 1948), where the court ordered the Government to produce the record of a Court of Naval Inquiry, except for the portions thereof dealing solely with disciplinary action.

to the crash. Instead of approving any such limited order, the Court jumped at the Government's offer to make the witnesses available, assumed that because of such offer there was no necessity and denied any access to the documents. For reasons stated by the trial court, this was not a satisfactory substitute.[111] This offer to produce the witnesses might just as logically be interpreted to show the importance to the case of particular statements in the original report which the Government wanted to avoid producing. If there was no military secret or if it could have been deleted, and the Government resisted only because the documents would have been harmful to its case, plaintiffs should have been allowed discovery.

IV. CONCLUSION

It appears clear that discovery should be, and is, available against the United States. The only limitations peculiar to the Government should be based on its established privileges discussed above. If it is desirable to make certain additional information or documents confidential and unavailable in court, Congress should act to do so, as it has as to some matters. The courts should not assume this task by creating a privilege. The cases are too confused for it to be possible to say whether or to what extent a general housekeeping privilege exists. However, it is significant that in most cases presenting the issue, the courts have allowed discovery for one reason or another. It is illogical to talk of the existence of any such privilege and then find a waiver of it when the Government brings an action itself or is made a defendant, for the very purpose of a privilege is to protect certain matters in a law suit.

In order to make the discovery procedure and the judicial process effective, the judge must decide when a privilege applies. Courts are surrendering a judicial function when they accept as final a determination by an administrative official. No provision of the Constitution or any statute or other rule of law requires that this be done. The court should always make an inquiry sufficient to determine whether a privilege applies; the nature and extent of such inquiry should depend on the nature of the information sought, and not on its necessity or importance in the particular case, since whether the privilege should apply depends on the nature of the information claimed to be privileged.

111. Brauner v. United States, 10 F.R.D. 468, 471 (E.D. Pa. 1950). This, of course, offered a substitute only for the prior statements of the witnesses and no substitute for the accident report.