Michigan Law Review

Volume 53 | Issue 8

1955

Evidence - Privilege - Maintaining Action Where the Evidence May Affect the National Security

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EVIDENCE—PRIVILEGE—MAINTAINING ACTION WHERE THE EVIDENCE MAY AFFECT THE NATIONAL SECURITY—The plaintiff brought an action for the breach of a contract for the manufacture of certain arming mechanisms for the use of the United States Army. The defendant moved to dismiss the action on the grounds that the contract in question was classified as confidential by the army and that the disclosures of certain facts asserted to be material in the prosecution and defense of the action would be a violation of the Federal Espionage Laws.[1] *Held,* motion denied. The court should invoke every proper

[1] 18 U.S.C. (1952) §793(a).

judicial technique to keep state secrets unrevealed, but it should not dismiss a valid action until the court determines that further proceedings would actually disclose information injurious to the national security. *Ticon Corp. v. Emerson Radio & Phonograph Corp.*, 206 Misc. 727, 134 N. Y. S. (2d) 716 (1954).

Both the English and the American authorities are in complete agreement that courts should not compel the disclosure of military secrets when such a disclosure would endanger the national security.[2] The consequent recognition of a privilege for security information extends to cases where the government is not a party to the action[3] and exists irrespective of the fact that the information claimed to be secret is in the hands of a private litigant.[4] The courts, however, are not in agreement on the weight to be given an assertion of the privilege by a government executive.[5] In England an objection to evidence made by the head of a department is conclusive on the courts of the existence of a state secret.[6] The American courts, theoretically at least, have supported a judicial determination of the scope and existence of the privilege.[7] This theory has largely been the result of a judicial fear of possible abuses by executive officials if their assertions of the privilege were not subject to review or appeal.[8] It has also been a recognition that the conflict in interests between the requirements of national defense and the needs of private litigants can be more impartially and effectively weighed by a court than by the very party asserting the privilege.[9] While paying lip service to a judicial determination of the scope of the privilege, some courts have given such great weight to the executive request for secrecy as almost to nullify the effectiveness of the judicial determination.[10] While

[2] Beatson v. Skene, 5 H. & N. 838, 157 Eng. Rep. 1415 (1860); Bank Line v. United States, (2d Cir. 1947) 163 F. (2d) 133; 32 A.L.R. (2d) 391 (1953); 58 AM. JUR., Witnesses §535 (1948); 8 WIGMORE, EVIDENCE, 3d ed., 789 (1940).

[3] Firth Sterling Steel Co. v. Bethlehem Steel Co., (D.C. Pa. 1912) 199 F. 353.

[4] Pollen v. Ford Instrument Co., (D.C. N.Y. 1939) 26 F. Supp. 583. See also the peculiar facts of Totten v. United States, 92 U.S. 105 (1875), where the Court sustained the need for secrecy on the grounds it was implied in the contract sued upon.

[5] Haydock, "Some Evidentiary Problems Posed by Atomic Energy Security Requirements," 61 HARV. L. REV. 468 at 472 (1948); McAllister, "Executive or Judicial Determination of Privilege of Government Documents," 41 J. CRIM. L. & CRIM. 330 (1950).

[6] Duncan v. Cammell, Laird & Co., [1942] A.C. 624, 1 All E.R. 587, criticized in 56 HARV. L. REV. 806 (1943). See also, Street, "State Secrets—A Comparative Study," 14 MOD. L. REV. 121 (1951).

[7] Pollen v. Ford Instrument Co., note 4 supra; United States v. Reynolds, 345 U.S. 1, 73 S.Ct. 528 (1953).

[8] In Mercer v. Denne, [1904] 2 Ch. 534, maps of fortifications prepared in 1647 were excluded as evidence in 1904 because such material could be held confidential by the War Office. See also Wadeer v. East India Co., 8 DeG. M. & G. 182, 44 Eng. Rep. 360 (1856).

[9] Sanford, "Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments," 3 VAND. L. REV. 73 (1949); Berger & Krash, "Government Immunity from Discovery," 59 YALE L.J. 1451 (1950); 36 GEO. L.J. 656 (1948).

[10] United States v. Haugen, (D.C. Wash. 1944) 58 F. Supp. 436. This has led some writers to conclude that the American cases follow the English rule. 36 GEO. L.J. 656 at 657 (1948).

both constitutional[11] and statutory[12] rationalizations have been offered for this judicial deference to the executive, perhaps the best explanation lies in the unwillingness of the courts to test their powers of enforcement against the executive.[13] These arguments are likely to be discarded, however, in favor of public policy considerations when, as in the principal case, the information is already in the hands of a private litigant and the state is not a party to the action. One of the considerations most likely to influence the court to allow the executive to maintain the privilege is the danger of public exposure of the secret during the public hearings necessary to a court determination.[14] Another argument is the desirability of having the decision made by a technically trained executive expert.[15] Even more important, however, is the basic realization of the courts that some secrets must be kept secret perhaps even from the court itself, and regardless of the injury to the private litigant. With this in mind, the primary function of the court may not be an independent investigation of the evidence claimed to be privileged,[16] but rather the creation of a judicial climate in which the exercise of the privilege by the executive would be so difficult both procedurally and substantively that abuse would not be worthwhile. That this is the rationale of the courts is becoming increasingly evident. Under this theory the courts will limit the privilege to the government itself,[17] refuse to recognize the mere classification of secrets as an assertion of the privilege,[18] and require in court the presence of a high department official to assert the objection to the evidence.[19] Requirements such as these can largely eliminate the ordinary abuse of the privilege caused by the lethargy, indiffer-

[11] This argument holds that to force the executive to give up records or papers would be a breach of the constitutional doctrine of separation of powers. Hartranft's Appeal, 85 Pa. 433 (1877). But this argument may be applicable only to the chief executive of the state or nation. United States v. Burr, (C.C. Va. 1807) 25 Fed. Cas. 55, No. 14,694e. See also 51 COL. L. REV. 881 (1950).

[12] By the authority of Rev. Stat. §161 (1875), 5 U.S.C. (1952) §22, each department head may ". . . prescribe regulations, not inconsistent with law, for . . . the custody, use, and preservation of the records, papers, and property appertaining to it." The contested phrase, of course, is "not inconsistent with law." See Boske v. Comingore, 177 U.S. 459, 20 S.Ct. 701 (1900).

[13] For a discussion of the problem of sovereign immunity, see 65 HARV. L. REV. 466 (1952) and 4 MOORE, FEDERAL PRACTICE, 2d ed., 1167 (1950).

[14] But statutory authority for closed hearings in civil cases may be inferred from the statutory prohibitions of the publication of restricted data. Haydock, "Some Evidentiary Problems Posed by Atomic Energy Security Requirements," 61 HARV. L. REV. 468 at 483 (1948).

[15] 47 N.W. UNIV. L. REV. 519 (1952); 19 TENN. L. REV. 477 (1946).

[16] Most authors have proposed various ways of allowing the court to examine the evidence in secret to determine the merits of the objection to its admission. See, e.g., the articles cited in note 5 supra.

[17] Firth Sterling Steel Co. v. Bethlehem Steel Co., note 3 supra; In re Grove, (3d Cir. 1910) 180 F. 62. But the privilege may also be exercised by the court itself in the absence of an objection by the government. Duncan v. Cammell, Laird & Co., note 6 supra. See also A.L.I. MODEL CODE OF EVIDENCE, rule 227 (1942).

[18] "It is not a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential.'" Duncan v. Cammell, Laird & Co., note 6 supra, at 642.

[19] United States v. Reynolds, note 7 supra.

ence and lack of initiative of executive officials.[20] Calculated abuse of the privilege will be made more difficult by placing on the government the burden of showing affirmatively the need for secrecy in the interest of national security. The United States Supreme Court has recently held that the amount of proof the government must show to sustain the objection is directly proportionate to the private litigant's need for the evidence in order to prove his claim or defense.[21] Such rigorous procedural and substantive requirements will cause a real evaluation by the executive of the relative advantage of asserting the privilege, and may limit its use to the most necessary cases. In this way the issue of executive versus judicial control of the privilege may be avoided entirely. This seems to be the result of the principal case.

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[20] For a discussion of this type of executive abuse, see 8 WIGMORE, EVIDENCE, 3d ed., 792 (1940).

[21] United States v. Reynolds, note 7 supra.