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GOVERNMENT PRIVILEGE AGAINST DISCLOSURE
OF OFFICIAL DOCUMENTS*

PRIVATE parties seeking to subpoena records held by Government agencies are frequently met by a claim that the agency is privileged not to disclose documents in its possession. In sanctioning this claim courts have rationalized their decisions in terms of the nature of the information contained in the documents,¹ of the public or private character of the litigants,² and of "public interest."³ But no clear delineation of the scope of the Government's privilege to withhold official information has been developed.

While in some instances the privilege is defined by statute,⁴ it consists mainly in an amorphous concept developed by case law.⁵ Originally the common law privilege protected only the identity of informers⁶ and secrets affecting the national security.⁷ In a few cases, however, under cover of the phrase "public interest" the privilege has been extended to protect disclosure which would merely hamper "efficient public service."⁸


1. United States v. Ebeling, 146 F.2d 254 (2d Cir. 1944) (defendant denied permission to inspect FBI reports following examination by court and determination that their importance to the Government outweighed possible advantage to the defendant); Jacoby v. Delfner, 183 Misc. 250, 51 N.Y.S.2d 478 (Sup. Ct. 1944) (in a private suit for services rendered, plaintiff denied access to Department of Justice records because of their "confidential" nature); Shallow v. Markert Mfg. Co., 175 Misc. 613, 24 N.Y.S.2d 823 (Sup. Ct. 1941) (in action by employees to recover overtime wages, information obtained by Wage and Hour Division of the United States Department of Labor held privileged since employees could obtain the same information from the corporation).


4. See 8 WIGMORE, EVIDENCE 786 (3d ed. 1940); 165 A.L.R. 1302 (1946). A good example of a state statute creating a privilege is a Texas provision barring the use in a court of accident reports filed pursuant to state law. 19 TEX. CIV. STAT. art. 6687b, § 42 (1943).

5. See, e.g., United States v. Schine Chain Theatres, 4 F.R.D. 103, 109 (W.D.N.Y. 1944) (Apart from statutes "there may be certain ... files ... privileged and others ... not."); Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265, 269 (E.D.N.Y. 1943) (denying disclosure because "information of such employees and complainants is of such a highly confidential character that it is privileged..."). See 8 WIGMORE, EVIDENCE § 2378a (3d ed. 1940); O'Reilly, Discovery Against the United States, 21 N. C. L. REV. 1, 9 (1942); Pike and Fischer, Discovery Against Federal Administrative Agencies, 56 HARV. L. REV. 1125, 1129 (1943).

6. 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940); O'Reilly, supra note 5, at 10-1.

7. 8 WIGMORE, EVIDENCE § 2378a (3d ed. 1940); O'Reilly, supra note 5, at 9-10.

Whether the privilege be narrowly or broadly defined in terms of the Government's needs, the difficulty with either definition is that it fails to reflect the other major interest involved—the interest of the litigants. It might well be, for example, that disclosure should be required as a condition precedent to further prosecution in cases where a man's life is at stake, regardless of inconvenience to a Government agency; conversely, where a document would be merely additional evidence on a point otherwise well established, a court in its discretion might sustain a claim of privilege based merely on inconvenience.

The only doctrine which perhaps attempts to hinge the privilege on some rough balancing of the two interests is the general rule that an asserted privilege is to be granted in a suit between private litigants, but denied where the Government is a party. The courts may feel that the detriment to a party from non-disclosure in a private suit is not likely to be so significant as the potential obstruction of governmental activities; in public suits, on the other hand, the Government has had the documents available in preparing its own case, and the courts may feel that the private adversary's need to use them for rebuttal tilts the scales in favor of permitting discovery.

It is apparent, however, that the "public-private" dichotomy fails to strike a desirable balance in many cases. Not surprisingly, therefore, the rule has occasionally been disregarded: even in public suits the privilege has

v. Dravo Corp., 5 F.R.D. 51, 53 (E.D.Pa. 1945) ("... [T]he disclosing of such information might be prejudicial to the government and to the public interest."); Shallow v. Markert Mfg. Co., 175 Misc. 613, 24 N.Y.S.2d 823 (Sup. Ct. 1941) ("... [T]he prohibition [against disclosure] relates to cases between private parties and ... unless against public policy in the particular case, a court should require disclosure in an action in which the United States is a party. One of the purposes of the [federal] rules is to enable a defendant to learn the particulars of a charge against him so that he may properly prepare for trial and it seems to me it would be an unjust and tyrannical exercise of power for the Government to refuse to make the same sort of disclosure of its case as would be required of an individual plaintiff."

A theory of waiver is often used to justify denial of the privilege in public suits. When the Government elects to bring the suit, it takes the initiative in revealing informa-
been successfully invoked where the need for security is overriding; conversely it has been denied in private litigation where there is no valid reason for withholding the documents. Whether or not the rule is followed, however, its existence can only obscure and confuse the basic equities in the particular case. An example of the attenuated reasoning which may result is the recent opinion in Zimmerman v. Poindexter. The plaintiff, suing the Ex-Governor of Hawaii for false imprisonment under wartime martial law, sought discovery from an Army officer of "confidential investigative reports" of the Federal Bureau of Investigation concerning his case. Although these reports had been transferred from the Department of Justice to the War Department, the Attorney General opposed the plaintiff's motion for a subpoena duces tecum, claiming that such documents were legally privileged under his departmental regulation expressly forbidding subordinates to disclose confidential files. The court ordered delivery of the reports to the trial judge primarily on grounds that transfer of the documents to the Army removed them from the protection of that regulation, which applied only to Justice Department employees directed to produce documents in court. Going beyond the

13. United States v. Cohen, 148 F.2d 94 (2d Cir. 1945) (in criminal prosecution for conspiracy to violate the Selective Training and Service Act, the notes of an FBI agent held privileged); United States v. Ebeling, 146 F.2d 254 (2d Cir. 1944) (in criminal prosecution, report to FBI made by Government witness held privileged).

14. In re Hirsch, 74 Fed. 928 (C.C.Conn. 1896) (in a state prosecution for the maintenance of an establishment for dispensing intoxicating liquors, the internal revenue collector could not refuse to produce defendant's federal tax return); Parsons v. State, 38 So.2d 209 (1948) (in state criminal prosecution, trial court should request Attorney General of the United States to produce articles which are deemed necessary for a fair trial).

Although these cases were state criminal prosecutions, they were "private" suits insofar as the United States was concerned. In both cases discovery was ordered even though the United States had not been a party to the suit.


16. Plaintiff was imprisoned, with only a perfunctory hearing, by order of the Governor immediately after the Japanese attack on Pearl Harbor. See Ex parte Zimmerman, 132 F.2d 442 (9th Cir. 1942), in which habeas corpus was denied.

primary holding, the court also indicated that denial of the privilege was consistent with the "public-private" test.\textsuperscript{18}

Implicit in the primary basis of the decision is the assumption, perhaps arguendo, that the regulation, if applicable, would have created a statutory privilege. The assumption was at least convenient in that it allowed the court to avoid a difficult question: the existence of a statutory privilege is far from clear. The statutory authority for promulgation of the regulation merely empowers the Attorney General to make rules, not inconsistent with existing law, for the custody and disposition of documents within his control.\textsuperscript{19} Pursuant to this power the Attorney General might classify certain documents as within those categories considered privileged by existing law. But in fact this regulation attempts no such classification, and a regulation purporting to create a blanket privilege at the discretion of the Attorney General would appear to be "inconsistent with law" and thus invalid as beyond the scope of the statute.\textsuperscript{20} Rather than authorizing a department head to create an all-encompassing privilege, the statute's function is to insure that he can offer his objection in court before the judiciary rules on the existence of a privilege.\textsuperscript{21} Thus, even if only by a refusal to disclose, the opinion of a fully informed official on the treatment of important governmental papers is to be made available to the court.\textsuperscript{22}

18. "But we think from a broader viewpoint, as well, the position of the Department of Justice ... is untenable. This case is not one involving the authority of a State court over Federal officers, nor is the action before the court purely a private one." Zimmerman v. Poindexter, 74 F.Supp. 933, 936 (D.Haw. 1947).

19. "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." Rev. Stat. § 161 (1789), 5 U.S.C. § 22 (1946).


21. The reason for the promulgation of the regulation is the fear that subordinates would expose information at the court's request without realizing that it might be confidential. Application of the regulation in earlier cases does not indicate that the courts attributed to it any further meaning or power. In Fowkes v. Dravo Corp., 5 F.R.D. 51 (E.D.Pa. 1945), for example, discovery from a subordinate Treasury Department official was not granted. Instead the court directed the plaintiff first to make application to the Secretary of the Treasury prior to seeking disclosure in the courts. "[W]here the public interest requires that the information and documents be kept undisclosed, that interest ought not to be encroached upon, and the Secretary of the Treasury, in whom the custody of the matters sought herein is reposed, should be permitted the opportunity of making the initial decision." Id. at 53. Accord, Boske v. Comingo, 177 U.S. 459 (1900).

In the instant case the Attorney General had already offered his objections, and the applicability of the rule requiring employees to clear with the Attorney General seems to have little relevance.

22. The subpoena \textit{duces tecum} is issued typically to the subordinate employee who is the actual custodian of the documents. He then appears in court and states that the regulation precludes compliance with the subpoena without the consent of the department head. The court may then discuss the matter with the executive official in chambers in order to arrive at a solution satisfactory to all parties. But at no point could disclosure be re-
But regardless of whether or not the regulation validly created a privilege, a denial of the regulation's applicability would not logically dispose of the issue in the Zimmernzan case: the question of the existence of a common law privilege would still remain. The court's assumption that on broader grounds the privilege was barred by the "public-private" test, since federally protected rights were involved and United States attorneys appeared on the defendant's behalf, might indicate that the common law privilege was considered and denied. Literally interpreted, however, the opinion seems to indicate a misconceived effort to superimpose the "public-private" test on the alleged privilege under the regulation.

If indeed the court did deny the privilege only after considering the common law grounds, the opinion underscores the artificiality of the test as a rationalization of a decision probably reached on grounds of the particular equities present. Never before has the federal nature of the individual rights been thought sufficient to remove a suit between private parties into the "public" category for purposes of the claimed privilege. If it were, the existence of a "federal right" might be found in many private suits. Nor has discovery been allowed in cases between private parties merely because United States attorneys represented one of the parties. Their presence does not indicate the Government's legal interest in the outcome: here, for example, the Government was not liable if the defendants lost. Actually, the "public-private" test was here distorted to fit the desired result, and the factors involved in the underlying balance of needs were left unmentioned.

Unrelated though it is to the basic determinants of the privilege, the "public-private" dichotomy is at least related to the enforcement problems involved in discovery. In this context, it has some practical basis. In criminal proceedings, and civil actions in which the Government is plaintiff, a court ordering disclosure can indirectly force compliance with its subpoena by dismissing an indictment or complaint on grounds that refusal to disclose so prejudiced the defendant as to preclude a fair trial. Short of this sanction, a court could refuse to admit Government evidence which the

required even to the judge, and a subpoena directed at the department executive would undoubtedly not be enforced. See note 25 infra. This undoubtedly accounts for the absence of precedents in which the question of disclosure has reached a point of open conflict between a court and an executive official.

23. Fowkes v. Dravo Corp., 5 F.R.D. 51 (E.D.Pa. 1945) and Shallow v. Marlert Mfg. Co., 175 Misc. 613, 24 N.Y.S.2d 823 (Sup. Ct. 1941), for example, involved rights under a federal statute but were treated as "private suits."
25. See, e.g., Parsons v. State, 38 So.2d 209 (1949). The court stated that the judiciary had the burden of securing a fair trial and should the Attorney General fail to produce certain articles, an appellate court could decide whether a trial without the articles would be consistent with the requirements of due process. In United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944), a new trial was ordered partly because the court could not sanction a " . . . prosecution of a crime consisting of the very matters re-
undisclosed documents might tend to refute. But where private litigants alone are involved, a court, in the last analysis, has no direct or indirect means of enforcing a subpoena against a Government officer in his official capacity. The doctrine of separation of powers would seem to bar contempt proceedings against executive department personnel, and, while no cases are squarely in point, courts have apparently recognized this barrier in dicta. The indirect sanctions useful in "public" suits are not generally available, since a private litigant should not be penalized for the Government's refusal to disclose. A court's enforcement authority in private suits consists primarily in its ability to issue the subpoena and the natural reluctance of a Government official to disobey.

While the unavailability of sanctions to enforce a subpoena may perhaps explain the "public-private" test, the explanation does not justify use of the test within the area where the courts, as a practical matter, can effectively direct a disclosure. Recognition or rejection of the privilege should be made on an ad hoc basis, with the decision openly reached by balancing the relative harm to the public occasioned by disclosure against the infringement of individual rights flowing from secrecy. Since the executive official apparently has the ultimate control over disclosure under any rule, there is no need to fear that discard of the mechanical standard which confused the Zimmerman case would ever endanger national security.

This left the choice with the Government of introducing the suppressed evidence or dropping the charges. In Fleming v. Bernardi, 1 F.R.D. 624, 626 (N.D.Ohio 1941) the court stated that the Government "... must either give up [its] privilege to withhold pertinent evidence or ... must abandon [its] suit for relief."

26. See United States v. Krulewitch, 145 F.2d 76, 78 (2d Cir. 1944): "... [I]n any event it must be a condition upon the continuance of any such privilege that the prosecution—its possessor—shall not adduce testimony touching the subject matter communicated."

27. No attempt has ever been made to cite the head of an executive department for contempt for failure to obey a court order to produce documents. See Jacoby v. Delfiner, 183 Misc. 280, 281, 51 N.Y.S.2d 478, 479 (Sup. Ct. 1944) ("... [A]n order of the court directing the United States Department of Justice to furnish plaintiffs with the information desired need not be honored by that Federal agency and, accordingly, the order sought herein would be a mere futility."). Professor Moore states that it is "not clear" whether such a suit, if brought, would be successful. 2 Moore's Federal Practice 2642 (1st ed. 1938). And no court has ever suggested that a contempt action against a department head could be maintained. Although the court in the Zimmerman case ordered an Army officer to turn over certain documents, the problems of possible non-compliance were not reached.

28. The comparative equities in the Zimmerman case probably led the court to its decision. The action taken by the Government in imprisoning the plaintiff undoubtedly militated against suppression of any information which might help him clear his name. In that respect Zimmerman was in a position analogous to a defendant in a criminal prosecution who seeks information to defeat the charges against him. E.g., United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944). Imprisonment of the plaintiff without a fair hearing is as serious an invasion of his freedom as the commencement of a criminal prosecution and more of an invasion than a petition for injunction for violation of the Fair Labor Standards Act. See, e.g., Fleming v. Berdnardi, 1 F.R.D. 624 (N.D.Ohio 1941).