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Discovery Against the Government of Military and Other Confidential Matters

By Charles R. Gromley

No one has more eagerly resorted to the discovery machinery of the Federal Rules of Civil Procedure than the government; no one has been more grudging in making it reciprocally available. Viewed against traditional notions of fair play, it is not surprising that government attempts to thwart the efforts of a plaintiff to obtain disclosure have been judicially labeled as an “unjust and tyrannical exercise of power.” The mounting volume of litigation in which the government is involved, coupled with the increasing tendency to suppress information under the guise of national security, presents a problem of growing importance in the relationship between state and citizen. When the government is confronted by some industrial giant, there is relative equality in such litigation. But too often, it is the little man who is overwhelmed by the government’s vast resources. For example, injustice may be done to litigants of small means prosecuting claims under the Federal Tort Claims and Suits in Admiralty Acts if the government withholds the written statements of witnesses to the accident. Government consent to suit in such cases may become meaningless if linked with a right to suppress facts in its possession.

In the conduct of their affairs the various executive departments and administrative agencies acquire much information—reports, documents, records of all kinds—which may be useful to litigants in actions against the government. The public interest in a full and fair hearing of all disputes between individuals and between individuals and the state calls for the production and dis-

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1 Fed. R. Civ. Proc. 26-37. This article deals with two of the pre-trial instruments of discovery: the subpoena-deposition procedure under Rules 26 and 45, and discovery under Rule 34. Facts are also elicited and the issues narrowed before trial by admissions, interrogatories, and the pre-trial conference. While the problems discussed in the article may in some instances involve disclosure at trial as well as pre-trial discovery, emphasis is upon the latter area.

2 U.S. v. General Motors Corp., 2 F.R.D. 528, 530 (1942).
closure of all evidence relevant to the issues in dispute. This public interest calls for the production and disclosure of relevant evidence within the control of executive departments and administrative agencies. The evidence sought, however, may be of such a nature that its production and disclosure would be inimical to other public interests. When it is determined that the latter interests should prevail, the evidence is said to be privileged. Should the records contain state, military, or diplomatic secrets they would unquestionably be privileged and not subject to discovery. There the interest of the individual litigant must bow to the superior interest of the public welfare. Many situations arise, however, which lie within the fringe area, making it extremely difficult to determine whether the public interest calls for the production of government data or for the non-disclosure of such evidence as privileged. *Reynolds v. United States* presents a typical situation.⁶

In that case, a military aircraft on a flight to test secret electronic equipment crashed and three civilian engineers aboard were killed. Their widows sued the United States under the *Tort Claims Act*⁷ and moved under Rule 34 of the Federal Rules of Civil Procedure for production of the Air Force's accident investigation report and statements made by surviving crew members during the investigation. The district court found good cause and ordered the defendant to surrender the documents. The Attorney General and the Secretary of the Air Force thereupon entered a formal claim of privilege, asserting that the material could not be made available without prejudice to national security, and without hampering the improvement of safety in flying and the development of very technical and secret military apparatus. However, the government did offer to produce the surviving crew members for examination by plaintiffs and to permit them to testify as to all matters except those of a classified nature. After an extended hearing, the court ordered the records produced for judicial examination to determine whether the disclosure would violate the government's privilege against disclosure of

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⁵ *Totten v. United States*, 92 U.S. 105 (1875).
⁸ *345 U.S. 1* (1953).
matters involving the national security and public interest. The
government refused to comply and the court therefore ruled
that, under the authority of 37(b)(2) (Fed. R. Civ. P.), the issue
of negligence on the part of the Air Force had been established.
Judgment was entered for plaintiffs and on appeal the Court of
Appeals for the Third Circuit affirmed the decision. In a 6 to 3
decision, the Supreme Court reversed, holding that where neces-
sity for production of classified government material is somewhat
uncertain, a formal claim of privilege by a department head on
grounds of national security prevents examination by the court
and in such a case no penalty can be attached to the withholding
of the documents.

The action of the District Court in presuming negligence
against the government was said by the plaintiffs to be authorized
by Federal Rule 37(b). The Supreme Court held, however, that
this argument overlooked the fact that 37(b) must be read in the
light of Federal Rule 34, which prevents discovery of privileged
evidence. The requirement of Rule 34 that “good cause” be
shown is strictly construed in these cases to prevent harassment
of government agencies and any undue interference with the
efficient operation of the administrative organization. Generally,
as against the government, good cause must be founded on clear
necessity, such as a strong indication that the information sought
is in the complete control of the government, or that it is highly
difficult, if not impossible, to obtain elsewhere. Since our judicial
system remains adversary, the requirement of a showing of good
cause seems a proper one. To demand that an opponent surrender
information gathered through diligent effort would be uncon-
scionable, unless it be necessary procedure designed to guarantee
a just result in litigation. The fact that the government is the
defending party should not cause relaxation of the requirement.

With regard to air crash tort cases such as Reynolds, however,
it is submitted that the requirement of showing good cause
should not be strictly construed. The instrumentality involved
in the accident is exclusively in the possession and control of the
Air Force. The military investigating body is certain to be on
the scene shortly after the accident, and the investigation and re-

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port is likely to be completed before the victim is in a position to understand what has occurred, or before the next of kin have been notified. Furthermore, military expediency will generally demand security guard of the area, immediate demolition of the wreckage, and reassignment of the surviving personnel. The victim is denied the opportunity of determining the circumstances surrounding the accident, and is placed in a most precarious position, since that information will be vital to his case. Depositions or interrogation of the survivors, providing they can be reached many months after the accident, cannot substitute for the information contained in the report. It may well be that without the report data, or the right to examine or have experts examine the site of the crash, the plaintiff will be unable to establish even the preliminary aspects of his cause of action. In the Reynolds case, plaintiffs argued that the memory of the witnesses was not fresh, since 18 months had elapsed, and that the only reliable evidence would be the aircraft accident investigation report. This, however, was evaluated as “dubious necessity” because of failure to determine what could be learned from the survivors.

**Analysis of the Problem of Government Privilege**

The basis of the claim of privilege by the government is threefold: (a) specific statutory immunity; (b) state secrets, military or diplomatic; and (c) policy. The latter has sometimes been termed the “housekeeping” privilege, in that it is grounded on the premise that disclosure in a given case would hamper performance by a government agency of its greater duty to serve the overall public interest.

(A) *Statutory Immunity*. The government has repeatedly claimed that Section 22 of Title 5 of the United States Code gives a general statutory immunity to the documents of a government agency, whenever it has promulgated regulations prohibiting disclosure.\(^{11}\) Section 22 reads as follows:

> 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

\(^{11}\) U.S. v. Schine Chain Theaters, 4 F.R.D. 108 (1944); Walling v. Comet Carriers, 3 F.R.D. 442 (1944).
the custody, use and preservation of its records, papers, and property appertaining to it.

Under the authority of this statute the various departments of the government have adopted regulations controlling the production and disclosure of department records when sought by court processes. The regulations of the Department of Justice in this regard are typical. They provide that when an official or employee of the department is served with a subpoena to produce records of the department, he will appear in court, produce a copy of the regulation, and respectfully decline to produce the records.12

The contention of the government that Section 22 authorizes federal agencies to claim immunity from discovery ignores the phrase "not inconsistent with law." If regulations promulgated under Section 22 cannot be "inconsistent with law," they cannot be "inconsistent with" the Rules of Civil Procedure, which have the force of law.13 The discovery rules do not exempt the United States. The authority to prescribe regulations "not inconsistent with law" therefore does not confer an administrative power to carve out an exemption from rules having the force of law any more than from the coverage of any other statute. Furthermore, under the doctrine of statutory construction, Congressional approval of the Rules exhibits an intention to withhold governmental immunity from discovery. The exemption expressly granted the United States from certain of the Rules was withheld in the discovery provisions. The pattern of express exemption thus established precludes the possibility of implied exemptions elsewhere. The omission of an express exemption in the discovery rules must therefore be considered a studied omission which would be made futile if Section 22 were interpreted as conferring an exemption. Lacking express provision for absolute executive privilege, the Rules are equivalent to a Congressional adoption of the view that there is none. As the government has recognized, most courts follow this interpretation, and insist on their right to determine the scope of the government privilege.14 The express requirement as to regulations promulgated not being inconsistent with law,
has been interpreted to mean that no new privilege exists, and the Supreme Court apparently accepts this view in the Reynolds case. (B) State Secrets. In the contemporary state of international affairs, where there is always a real danger of a serious international dispute, the security of the state requires efficient armed forces and diplomatic services. To achieve this efficiency it is necessary that all possible precautions be taken to prevent certain matters from becoming known to other powers. A public interest demands that such matters be beyond the reach of court processes for production or disclosure. It would be extremely difficult, if not impossible, to draw any hard and fast line to set off matters within this category. Plans for range-finders, the plans of a submarine, a contract between the United States and a commissary company at an atomic energy plant, and drawings of armor-piercing projectiles have been held to be privileged from production or disclosure. In the final analysis, the decisions are based on a weighing of what justice demands in the individual case and the interests involved in protecting national security.

A basic factor in all issues involving state secrets is the nature of the evidence sought. The nature and quantity of public interests involved will vary as this factor varies. The other basic factors present are the needs of the litigants, and the harm which might result from disclosure. The quality or degree of interests involved will vary as these factors vary.

In the Reynolds case, the government took the position that the official accident investigation report and written statements of the survivors could not be made available without prejudice to national security. It is somewhat uncertain whether or not an Air Force accident report, stating testimony as to circumstances surrounding the accident and containing data gleaned from examination of the wreckage is likely to contain confidential information. Consequently, it would seem that the order of the District Court directing the government to produce the records for examination was not without justification. Faced by a claim of secrecy in the public interest, the court could adequately protect the na-

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26 In re Grove, 180 Fed. 62 (1910).
tional security by making an independent personal *in camera* examination of the documents in question. In that manner the court would not abdicate to an executive department official its function of determining the admissibility of evidence in a law suit. It may safely be assumed the judiciary would weigh carefully the public interest prior to issuing a discovery order, which may have the effect of publicizing confidential government records. Situations will undoubtedly arise in which the judge, faced with a wealth of material of a complicated and technical nature, would not be competent to decide whether such matter need be classified as secret. Under those circumstances, the judge will be forced to rely almost wholly on the recommendation of the executive department official in charge of the records as to the confidential matter contained therein. The independent judicial examination, however, will assure the litigant of some check on arbitrary government refusal to produce documents.

The decision in *Reynolds* that the claim of privilege by the head of the department will be conclusive where the necessity for the production of the documents is dubious and there is a possibility that they contain state secrets, is a step in the direction of the English view that the mere formal claim of privilege by the proper official will establish it conclusively. The majority, in analogizing this privilege to that against self-incrimination and arguing that disclosure to the judge would expose the very thing being protected, has ignored the fundamental distinction between the two. Whereas with incriminating matter there is the danger that a judge might feel impelled to disclose information regarding the commission of a crime, with state secrets he would be motivated by the welfare of the nation as well as by duty to remain mute. Unless the Supreme Court considers members of the judiciary less trustworthy than those of the executive, there is no reason why the judge cannot examine the documents *ex parte*.

By the *Reynolds* decision, the Court has, in practical effect, relinquished to an executive officer discretion to determine whether government documents shall be produced in the courts. The dangers of such an approach are manifold. No substantial barrier now exists to the imposition, under the guise of "state secrets," of the doctrine of "official secrets" heretofore steadfastly

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rejected by the courts. In Reynolds for example, the original claim of privilege by the government was that the disclosure of the report would be detrimental to the morale of the department involved. This claim was properly rejected by the district court, which was not disapproved by the appellate court. Yet as soon as the department re-phrased its refusal in terms of a formal claim of state secret privilege, under the Supreme Court's formula such claim was sufficient to withhold the documents, although the court received no additional enlightenment on the basis therefore, or why if a secret was in fact involved, such claim was not made originally.

In addition, such an approach makes possible the suppression of material merely because it is unflattering to important officials. These dangers are particularly apparent today when there is a noticeable tendency for officials to apply "secret," "confidential" and "classified" stamps to government papers indiscriminately.

It is submitted that in suits under the Federal Tort Claims Act, even if the government is asserting a valid claim of the state secret privilege, it would be more equitable to allow judgment for plaintiff, at least in those cases where there is a reasonable probability that the withheld material would establish the government's negligence. In a criminal prosecution, the government must forego its privilege or allow a directed verdict for defendant. The same reasoning could be applied to protect the individual plaintiff here. Although some unmerited claims would undoubtedly be allowed, this danger can be mitigated by insisting upon a substantial showing of probable negligence. At any rate, as the loss must fall somewhere, justice would be better served by imposing it upon the government, which is in a better position to bear and distribute this cost of preserving necessary secrets.

(C) Considerations of Policy. The usual claim of government privilege is not that of state secret, but rather a right of the executive branch of the government to refuse to disclose to outsiders

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22 There is a basis for distinguishing the civil from the criminal cases. Whereas Rule 34 of the Rules of Civil Procedure specifically exempts privileged documents from discovery, there is no corresponding exemption in Rule 16 of the Rules of Criminal Procedure.
the results of its housekeeping investigations. The contention stems from the concept of separation of powers inherent in the constitutional organization of our government. From its inception each branch, legislative, executive and judicial, has sought to operate in its own sphere and to refrain from infringing upon the independent provinces of the others. True, this arbitrary organization has not been consistently maintained in practice, and could not be even if desired. Yet, the courts early decided not to interfere with discretionary acts of executive officials.

Congress admittedly has the power to consent to allow suit to be brought against the United States, the doctrine of separation of powers notwithstanding. It has been argued that the power to compel executive officials to produce documents in their control must follow from the broader authority in the legislative to waive sovereign immunity from suit. The proponents of such a theory fail to recognize a fundamental distinction between the greater and lesser power. Practically, if Congress had not the prerogative to authorize actions against the United States, no private litigant could seek redress for wrongs committed under the aegis of government. The policy underlying the extension of Congressional power to alleviate the harsh common law rule that the sovereign cannot be sued without its consent is clear. That is not to say, however, that the same policy may underlie an extension of power to one of three supposedly equal arms of government to impinge on the rights of the others. The fact that Congress can require the government as an entity to submit to suit need not compel the inference that Congress and the courts have the power to force the executive department to surrender executive records. Especially should that be true where there is nothing in the Constitution or statutes which suggests that Congress has sought to exercise an inferred power to compel production of executive documents in the case of tort suits against the United States. Where Congress has desired to express a policy in regard to executive records, it has known how to do so. Absence of a direct expression of this policy in the Federal Tort Claims Act would appear to indicate that Congress was satisfied with or

\[8 \text{ Wigmore, Evidence, sec. 2378a (3rd ed. 1940).}\]
\[\text{See Aaron Burr's Trial, I Robertson's Rept. 117 (1875); Marbury v. Madison, 1 Cranch 137 (1803).}\]
felt powerless to change existing executive discretion to refuse to submit official records.

From a policy standpoint, there is implicit in the government's analysis the premise that administrators are more qualified by virtue of their expertise to judge whether publication of a particular document would be detrimental to the public interest. This assumes that it is impossible to brief the court adequately on such matters—a dubious assumption. The problems involved do not transcend the vast range of complexities which are constantly submitted to the courts. Patent cases, for example, illustrate the frequent judicial determination of technical issues of great moment.

Even more serious than the possibility of over-complexity, however, is the consideration that the national security will be threatened if federal agencies are not free to withhold information altogether. The assumption here is that protection of government secrets cannot be safely entrusted to the judiciary—that a judge will be less zealous than an administrative officer in preserving official secrets. That assumption is at war with the unique respect the judiciary enjoys. Then too, private industry has often been compelled to disclose secret processes and the like and to rely for protection on the court's discretion. Disclosure to the courts does not spell widespread disclosure; if the documents are in fact privileged, they will be withheld by the courts from private litigants and the general public.

Insistence that the government disclose relevant documents to the court is not to disparage administrative expertise. Normally only preliminary jurisdiction and not finality is claimed for administrators, and this in a case where the agency is an arbiter without a stake in the outcome. If an administrative agency could be relied upon to weigh wisely and impartially the total public interest against its own convenience, it might then be supererogatory to insist on judicial review. But one must consider the matter in the framework of administrative realities. The diffusion of power in great agencies often lodges actual responsibility in the fourth or fifth tier of the administrative hierarchy. In a great many cases the claim of executive privilege is a result of mere inertia and convenience. Subordinate officers acting

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27 E. I. duPont de Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917).
under general regulations rarely consider merits when faced with demands for documents. Busy with the pressure of routine, the inferior officer has not the time carefully to consider the equities of the particular case. Many times he has little comprehension of the ramifications of his action in approving or disapproving the surrender of documents to the court. His superiors, especially in the military, pressed with matters of national importance, are prone to accept his decision without questioning its propriety. Thus, the claim of privilege develops. There are few situations where it is justified.

Furthermore, the lawyers who litigate the case for the department not infrequently are as set on winning at all costs as counsel for a private litigant. To make the head of a department the ultimate arbiter of disclosure is, under the circumstances, no guarantee that the determination will be founded upon sound principles of national interest. Nor does the record of unflagging departmental opposition to disclosure on any and all grounds conducive to confidence in administrative impartiality on this score. Entrust the administrators with exclusive power to determine which facts shall be divulged, said Wigmore, and the gate to unlimited extension of the privilege categories is open.28

In the Reynolds case, it must be remembered that the Court of Appeals placed to one side the situation where Congress has authorized and the courts have utilized a subpoena directed to an executive department head demanding official records in his control.29 Instead the court issued a discovery order, and in reality gave the executive official a choice to comply or to refuse to submit the department records. Should he decline, the court need not attempt to enforce its order by contempt action, a procedure laden with constitutional dangers. Rather it orders a decree establishing the issues in favor of the plaintiff. It may be that under the Federal Rules, this approach to the problem is a convenient detour from the constitutional dilemma of separation of powers. The executive department head is forced to make the difficult decision whether to press a defense and produce documents or to submit to loss of the case. However, the question remains whether this form of coercion can avoid the substance of con-

stitutional objection. By such an approach the Congress and the courts seemingly accomplish in combination that which neither could do directly alone. But under discovery procedure, and consequent action establishing the issues in favor of the opponent, should a discovery order be not obeyed, the court acts only in its traditional sphere of deciding cases. It has not attempted to use the force and power of its process to compel the executive to act in a specified manner. The choice of their action or non-action is left to executive officials. The result of their decision governs the future action of the court, and they have been given a free choice with full knowledge of the consequences. This differs from the usual attempt by subpoena, mandamus, or injunction to exact obedience to a directive of the court. The conceptual distinction between a court order directing an official to act in a specified manner and court action taken only after an executive official has pursued a specific course of conduct may be sufficient to sustain the constitutionality of the latter type of approach.

The position of the Court of Appeals would seem to be well taken, since the result appears salutary. It is important to protect the rights of the individual tort victim, injured because of negligent activity on the part of the government. To present his case, the victim needs information contained in the report of the investigating board. To allow the Air Force to determine alone whether or not it will produce matter, which may well lead to a determination of fault in favor of the tort victim, can only result in constant refusal to submit that information to the court. Some sanction must be imposed to impress the executive official with the magnitude of the problem, otherwise it becomes too easy to discover privilege where in reality none should exist. The principle of loss of the case, if the documents are not produced, removes temptation to take the easy path in an attempt to escape liability. Should a security matter be present, it would appear that the court could well be taken into strict confidence. In a democratic society, information should be open to all except where its dissemination would endanger the national welfare.

CONCLUSION

From the preceding discussion, several general conclusions can be drawn. (a) Few generalizations can be drawn from the
cases which will serve as guides for decision to the trier of issues of executive privilege and as bases for the prediction of those decisions. (b) There has been no adequate recognition of the interests involved in issues of executive privilege. (c) The courts are the agency best fitted to determine issues of executive privilege.

In the formulation of a technique and a procedure, the distinction to be drawn between the various types of data will depend upon an estimate of the relative importance to society of the interests involved in the production of each type of data. No objective criteria are available to guide the estimate. But it seems obvious that the interests opposed to the production of data affecting the national security are of much greater importance to society than the interests involved in the production of other types of data. The purpose of this distinction is to make the production of data affecting the national security more difficult than the production of other data. This purpose could be effectuated by having different standards for different types of data, or by having different allocations of the burden of persuasion.

When a litigant seeks the production of data within the control of an executive department or administrative agency, the department or agency must determine for itself whether or not it will resist production. This decision is entitled to weight in the courts. There is some basis for saying that such a decision in and of itself is enough to place the ultimate burden of proving that discovery is warranted on the party seeking production. A consideration of the other factors involved in a determination of who should bear the ultimate burden shows, however, that in the absence of special circumstances, the department or agency in control of the data should bear the burden of proving that discovery is not warranted on issues of executive privileges. The department or agency alone knows what interests will be harmed by disclosure and the degree of such harm. The department or agency is asking the court to depart from the general principle that all material evidence is subject to production. Hence, the agency should be required to show that the interests opposed to production should be given effect rather than those favoring it. 30

30 Query: How is the court to decide which interests shall prevail and how is any decision of policy to be made? It is doubtful whether any articulate premises can be formulated to guide the court. We have a science of discovery but no science of evaluation.
The discovery procedure is based upon the conviction that pre-trial knowledge of all the facts is essential to an enlightened judicial system. Suppression of evidence has little to commend it on any theory, and it is even less defensible when the government litigates with its own citizens. No exemption was conferred on the United States from the broad coverage of the discovery provisions. The Rules thus follow our tradition that the government proceeds like any other litigant. In a State that rests on the consent of the governed, the claim of the government to greater privileges than are accorded its citizens must rest not on administrative convenience, not on archaic notions of prerogative alien to our institutions, but on genuine necessity. Our nation has again and again risen above partisan strife because of general confidence in the fairness of the government. That confidence is indispensable to continuance of our democratic institutions. It can only be impaired by governmental claims of special privilege against the citizenry.