Vanderbilt Law Review

Volume 3
Issue 1 *Issue 1 - December 1949*

Article 12

12-1949

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EVIDENTIARY PRIVILEGES AGAINST THE PRODUCTION OF DATA WITHIN THE CONTROL OF EXECUTIVE DEPARTMENTS

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In the conduct of their affairs the various executive departments and administrative agencies acquire much information—reports, documents, records of all kinds, and other data—which may be useful to litigants in civil and criminal actions. 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 disclosure of all evidence relevant to the issues in dispute.[1] This public interest calls for the production and disclosure of relevant evidence within the control of executive departments and administrative agencies.[2] 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.[3] The courts, the legislatures and the executive departments and administrative agencies have sometimes found that the public interests opposed to disclosure should prevail where certain types of evidence within the control of executive departments or administrative agencies has been sought. No acceptable term

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1. Public interests are those "demands or desires involved in or looked at from the standpoint of life in a politically organized society, asserted in title of political life." POUND, OUTLINE OF JURISPRUDENCE 97 (5th ed. 1943).

2. This public interest might be phrased in terms of a general rule, such as, "So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it, unless some exception is shown to the general rule." Mr. Justice Holmes, in *Ex parte* Uppercu, 239 U. S. 435, 440, 36 Sup. Ct. 140, 60 L. Ed. 368 (1915). For a vigorous statement of the importance of this public interest see 8 WIGMORE, EVIDENCE § 2378 (a) (3d ed. 1940). For early English statements as to the general policy behind this public interest see, Maharajah Nundocomar's Trial, 20 How. St. Tr. 923, 1057 (1775); Pawlett v. The Attorney-General, Hardres 465, 469, 145 Eng. Rep. 550, 552 (Ex. 1667). There is no exemption for officials as such from the general duty to give evidence (but distinguish the question of appearing in court). Hodgson v. Butts, 12 Fed. Cas. 282, No. 6,563 (C. C. D. C. 1807); Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N.W. 357 (1913); *see* United States v. Burr, 25 Fed. Cas. 30, No. 14,692d at 34 (C. C. Va. 1807); Rex v. Baines, [1909] 1 K. B. 258 (1908). *But see* United States v. Cooper, Whart. St. Tr. 659, 662 (C. C. Pa. 1800); Appeal of Hartranft, 85 Pa. 433, 449 (1877). See also 8 WIGMORE, EVIDENCE § 2370 (3d ed. 1940); Fallon, *Executive Officials and Process of Subpoena to Testify*, 2 VA. L. REV. 207 (1922). TENN. CODE ANN. § 9806 (Williams 1934) provides that evidence of a witness may be taken by deposition when he is an officer of the state or of the United States. In general a court has the power to order the production of "public records." Dunham v. Chicago, 55 Ill. 357 (1870); State v. Williams, 110 Tenn. 549, 75 S. W. 948 (1903).

3. Query if "privilege" is a proper term here? The "privileges" dealt with here are only distantly related to those "privileges" based on confidential relationships. *See* Duncan v. Cammell, Laird & Co., [1942] A. C. 624, 641. A more exact term might be "immunity," but that term has too broad a scope for the limited meaning intended here. It would include the totality of reasons for denying production or disclosure, while the only reasons intended here are those arising out of the nature of the data sought. See note 11 *infra*.

has been coined to cover all the privileges asserted as to data within the control of executive departments and administrative agencies. For want of such a term they will be called executive privileges herein.

Requests for the production or disclosure of evidence in the control of an executive department or administrative agency give rise to a number of problems distinct from but interrelated with the problems of executive privilege.[4] Among these are: (1) the general scope of discovery, interrogatories and other pre-trial methods of disclosure;[5] (2) questions of substantive privilege;[6] (3) the power of the courts to compel executive and administrative officers to act;[7] (4) questions of admissibility and exclusion of evidence on other grounds, *e.g.*, the hearsay rule and its exceptions;[8] (5) questions involving the removability of official records;[9] (6) the amenability of the state to suit.[10] All of these are beyond the scope of this article.[11]

I. THE PRESENT STATE OF THE LAW AS TO EXECUTIVE PRIVILEGES

A. *Privileges Established by Courts*

(1) Data Affecting the National Security (Military and Diplomatic 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 re-

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4. An analogous problem is the question of the *power* of congressional committees to compel the production of executive papers. Ehrmann, *The Duty of Disclosure in Parliamentary Investigations: A Comparative Study*, 11 U. OF CHI. L. REV. 1 (1943); Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. BAR J. 103 (1949).

5. *E.g.*, People *ex rel.* Lemon v. Supreme Court, 245 N. Y. 24, 156 N. E. 84, 52 A. L. R. 200 (1927), 41 HARV. L. REV. 519 (1928); State v. Rhoads, 81 Ohio St. 397, 91 N. E. 186, 27 L. R. A. (N. S.) 558 (1910); O'Reilly, *Discovery Against the United States: A New Aspect of Sovereign Immunity?* 21 N. C. L. REV. 1 (1942); Pike and Fischer, *Discovery Against Federal Administrative Agencies*, 56 HARV. L. REV. 1125 (1943); Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L. J. 863 (1933).

6. *E.g.*, Spalding v. Vilas, 161 U. S. 483, 16 Sup. Ct. 631, 40 L. Ed. 780 (1896); PROSSER, TORTS 829 (1941); 3 RESTATEMENT, TORTS § 591 (1938).

7. *E.g.*, Martin v. Ingham, 38 Kan. 641, 17 Pac. 162 (1888); People v. Governor, 29 Mich. 320 (1878); State *ex rel.* Latture v. Frazier, 114 Tenn. 516, 86 S. W. 319 (1908); FERRIS, EXTRAORDINARY LEGAL REMEDIES §§ 283-302 (1926). See note 2 *supra*.

8. *E.g.*, State v. Yegen, 74 Mont. 126, 238 Pac. 603 (1925); 5 WIGMORE, EVIDENCE §§ 1630-1684 (3d ed. 1940).

9. *E.g.*, Dunham v. Chicago, 55 Ill. 357 (1807); 8 WIGMORE, EVIDENCE § 2273 (3d ed. 1940). As to the right of citizens to inspect public records, Egan v. Board of Water Supply, 205 N. Y. 147, 98 N. E. 467 (1912).

10. *E.g.*, Lefebvre v. Somersworth Shoe Co., 93 N. H. 354, 41 A. 2d 924 (1945); O'Reilly, *Discovery Against the United States: A New Aspect of Sovereign Immunity?* 21 N. C. L. REV. 1 (1942).

11. The decision of any particular case will require the consideration of several of these interrelated problems. Perhaps it is unsound to consider any one of these problems in isolation. The question put herein is, "Is the data privileged?" The answer to this question does not necessarily answer the question, "Should (or must) the data be produced?" A sound answer to this latter question can be had only from a consideration of the totality of interests (or rules, or problems) involved in a particular situation. But the answer to the question, "Is this data privileged?" will perhaps provide a partial answer to the larger question.

quires efficient armed forces and diplomatic services.[12] 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 impossible to draw any hard and fast line to set off matters within this category.[13] Plans for rangefinders,[14] the plans of a submarine,[15] a letter discussing agreements as to oil located in a foreign country;[16] a contract between the United States and a commissary company at an atomic energy plant,[17] and drawings of armor-piercing projectiles [18] have been held to be privileged from production or disclosure.[19] The privilege has also been extended to documents in the archives of a foreign consulate.[20] The fact that the information is in the hands of a private individual does not affect the privilege.[21] The privilege is to be exercised by the government and not the party litigant.[22] There is some suggestion in the cases that if a party should attempt to introduce matter which the court deemed within this privilege, the court should not allow it to be presented even though no objection were made.[23] There are indications that in some cases secondary evidence may be introduced to prove the nature of the contents of the privileged matter.[24]

(2) Communications from Informers

There is a strong public interest in the efficient administration of the criminal law, which gives rise to a duty of the citizen to report to his govern-

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12. An efficient secret service is also required. The spy and the counter spy, not to mention the secret police, have become commonplace, if not necessary, figures in the contemporary scene.

13. See the concurring opinion of Clark, J., in Bank Line v. United States, 163 F. 2d 133, 139 (2d Cir. 1947).

14. Pollen v. Ford Instrument Co., 26 F. Supp. 583 (E. D. N. Y. 1939); Pollen v. United States, 85 Ct. Cl. 673 (1937).

15. *See In re* Grove, 180 Fed. 62, 67 (3d Cir. 1910).

16. Asiatic Petro. Co. v. Anglo-Persian Oil Co., [1916] 1 K. B. 822 (C. A.).

17. United States v. Haugen, 58 F. Supp. 436 (E. D. Wash. 1944). This case also illustrates the difficult position of the Government when it attempts to obtain a conviction where privileged matter is essential to its case. As to this difficulty see Note, 47 COL. L. REV. 1356 (1947).

18. Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed. 353 (E. D. Pa. 1912).

19. In an action against the Federal Government for secret services allegedly performed during the War between the States, the United States Supreme Court said, "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." Totten v. United States, 92 U. S. 105, 107, 23 L. Ed. 605 (1875).

20. Kessler v. Best, 121 Fed. 439 (C. C. S. D. N. Y. 1903); *see* Crosby v. Pacific S. S. Lines, 133 F. 2d 470 (9th Cir. 1943), *cert. denied,* 319 U. S. 752 (1943); Viereck v. United States, 130 F. 2d 945, 961 (D. C. Cir. 1942).

21. Pollen v. Ford Instrument Co., 26 F. Supp. 583 (E. D. N. Y. 1939); Asiatic Petro. Co. v. Anglo-Persian Oil Co., [1916] 1 K. B. 822 (C. A.).

22. Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed. 353 (E. D. Pa. 1912); *In re* Grove, 180 Fed. 62 (3d Cir. 1910); Pollen v. United States, 85 Ct. Cl. 673 (1937).

23. Duncan v. Cammell, Laird & Co., [1942] A. C. 624, 642.

24. United States v. Haugen, 58 F. Supp. 436, 439 (E. D. Wash. 1944).

ment any information which he may have concerning the commission of crimes. The citizen will be encouraged to perform this duty if his identity and the contents of his communications to the government are not revealed. There is, therefore, a public interest in not revealing these matters. This interest may conflict not only with the general public interest favoring the disclosure of all relevant evidence, but also with the public interest in the acquittal of the innocent. The criminal and the civil cases must therefore be distinguished.

The civil cases have largely been actions against the informer or against a public official who took some action based on information given by the informer.[25] Most of the cases have involved the production of the contents of communications from informers,[26] and most of them have found such contents privileged.[27] Some courts have held the privilege to be absolute.[28] Wigmore says that the privilege should apply only to the identity of the informer and not to the contents of the communication.[29] A recent Massachusetts decision held that the privilege was not applicable where both the identity of the informer and the contents of his statement were no longer secret.[30] An early Illinois decision denied the privilege altogether.[31]

The leading case in this field, *Worthington v. Scribner*,[32] was an action for defamation in which the plaintiff sought to compel the defendant to answer interrogatories telling whether or not the defendant wrote the Secretary of the Treasury accusing the plaintiff of breaking the law. The court held that this matter was privileged, saying, "The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy. . . ." [33] The courts generally recognize that the privilege is that of the government and not that of the party litigant or the witness.[34]

25. *E.g.*, Vogel v. Gruaz, 110 U. S. 311, 3 Sup. Ct. 12, 28 L. Ed. 158 (1884) (slander against informer); Granger v. Warrington, 8 Ill. 299 (1846) (malicious prosecution against informer); Gabriel v. McMullin, 127 Iowa 426, 103 N. W. 355 (1905) (slander against informer); Worthington v. Scribner, 109 Mass. 487 (1872) (slander against alleged informer); Lewis v. Roux Trucking Corp., 222 App. Div. 204, 226 N. Y. Supp. 70 (2d Dep't 1927), 41 HARV. L. REV. 921 (1928) (attempt to get from district attorney records of interrogatories of witnesses to accident in issue); Dellastatious v. Boyce, 152 Va. 368, 147 S. E. 267 (1929) (false arrest against officer).

26. See note 25 *supra*.

27. *E.g.*, Vogel v. Gruaz, 110 U. S. 311, 3 Sup. Ct. 12, 28 L. Ed. 158 (1884); Gabriel v. McMullin, 127 Iowa 426, 103 N. W. 355 (1905); Lewis v. Roux Trucking Corp., 222 App. Div. 204, 226 N. Y. Supp. 70 (2d Dep't 1927), 41 HARV. L. REV. 921 (1928). *Contra:* Granger v. Warrington, 8 Ill. 299 (1846); *cf.* Egenes v. Morse Dry Dock & Repair Co., 131 Misc. 428, 226 N. Y. Supp. 68 (Sup. Ct. 1925).

28. *E.g.*, Vogel v. Gruaz, 110 U. S. 311, 3 Sup. Ct. 12, 28 L. Ed. 158 (1884).

29. 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940).

30. Pihl v. Morris, 319 Mass. 577, 66 N. E. 2d 804 (1946); Commonwealth v. Congdon, 265 Mass. 116, 165 N. E. 467 (1928). *Contra:* Shinglemeyer v. Wright, 124 Mich. 230, 82 N. W. 887 (1900). See also cases cited *supra* note 25.

31. Granger v. Warrington, 8 Ill. 299 (1846).

32. 109 Mass. 487 (1872).

33. *Id.* at 488.

34. Gabriel v. McMullin, 127 Iowa 426, 103 N. W. 355 (1905); Pihl v. Morris, 319

In criminal cases, where the innocence of the accused might be established by the disclosure of the identity of an informer or the contents of his communications, the public interest in the acquittal of the innocent favors the disclosure.[35] In a number of cases, however, disclosure has been denied, usually on the basis that the public interest in the efficient administration of criminal justice requires that result.[36] Other courts have ordered disclosure, usually on some basis grounded on the public interest in the acquittal of the innocent. Disclosure has been ordered on the broad ground of promoting justice,[37] and as being necessary to show the prisoner's innocence.[38] It has been indicated that a trial court may compel disclosure if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony.[39] Witnesses for the state have been compelled, over objections of privilege, to testify on cross examination concerning statements made to and conversations had with law enforcement officers.[40] Disclosure of the identity of informers has been ordered where the issue was the existence of probable cause to make an arrest without a warrant and the cause claimed was information given by an informer.[41] Disclosure has been compelled where what was asked was deemed

Mass. 577, 66 N. E. 2d 804 (1946); Lewis v. Roux Trucking Corp., 222 App. Div. 204, 226 N. Y. Supp. 70 (2d Dep't 1927); Dellastatious v. Boyce, 152 Va. 368, 147 S. E. 267 (1929). *But see* Oliver v. Pate, 43 Ind. 132, 141 (1873).

35. The state's "interest is that accused parties shall be acquitted, unless upon all the facts they are seen to be guilty; and if there shall be in the possession of any of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it." People v. Davis, 52 Mich. 569, 18 N. W. 362, 363 (1884). This interest may be clothed with constitutional sanctions. State v. Cooper, 67 A. 2d 298 (N. J. 1949).

36. Boehm v. United States, 123 F. 2d 791 (8th Cir. 1941); Segurola v. United States, 16 F. 2d 563 (1st Cir. 1926); Smith v. United States, 9 F. 2d 386 (9th Cir. 1925); Arnstein v. United States, 296 Fed. 946 (D. C. Cir. 1924); State v. Brown, 2 Marv. 380, 36 Atl. 458 (Del. Oy. & Ter. 1896); State v. Soper, 16 Maine 293, 33 Am. Dec. 665 (1839); State v. Viola, 82 N. E. 2d 306 (Ohio App. 1947); Webb v. Commonwealth, 137 Va. 833, 120 S. E. 155 (1923); State v. Paun, 109 W. Va. 606, 155 S. E. 656 (1930); Att'y Gen. v. Briant, 15 M. & W. 169, 153 Eng. Rep. 808 (Ex. 1846); Rex v. Watson, 2 Stark. 116, 171 Eng. Rep. 591 (N. P. 1817); Rex v. Hardy, 24 How. St. Tr. 199, 753 (1794); Laver's Case, 16 How. St. Tr. 94, 224 (1722). In People v. Laird, 102 Mich. 135, 60 N. W. 457 (1894) the court said, "The reason for the rule is that such disclosures can be of no importance to the defense, and may be highly prejudicial to the public in the administration of justice by deterring persons from making similar disclosures." Query if the court failed to recognize the interests favoring disclosure. See also Shore v. United States, 49 F. 2d 519 (D. C. Cir. 1931).

37. Application of Heller, 184 Misc. 75, 53 N. Y. S. 2d 86 (Sup. Ct. 1945).

38. Marks v. Beyfus, 25 Q. B. 494 (1890). See also United States v. Li Fat Tong, 152 F. 2d 650 (2d Cir. 1945); United States v. Ebeling, 146 F. 2d 254 (2d Cir. 1944); Wilson v. United States, 59 F. 2d 390 (3d Cir. 1932), 32 COL. L. REV. 1244, 46 HARV. L. REV. 343; Regina v. Richardson, 3 F. & F. 695, 176 Eng. Rep. 318 (N. P. 1863). In Parsons v. State, 38 So. 2d 209, 213 (Ala. 1948), the court, speaking obiter, said that as a general rule communications by informers were privileged, but that there were exceptions based on constitutional grounds where disclosure appeared necessary to show the innocence of a prisoner.

39. *See* State v. Hull, 189 Wash. 174, 64 P. 2d 83, 85 (1937).

40. King v. United States, 112 Fed. 988 (5th Cir. 1902); Riggins v. State, 125 Md. 165, 93 Atl. 437 (1915); Centoamore v. State, 105 Neb. 452, 181 N. W. 182 (1920), 5 MINN. L. REV. 570 (1921); State v. Archer, 32 N. M. 319, 255 Pac. 396 (1927); People v. Walsh, 262 N. Y. 140, 186 N. E. 422 (1933).

41. United States v. Keown, 19 F. Supp. 639 (W. D. Ky. 1937); Mapp v. State, 148 Miss. 739, 114 So. 825 (1927); Smith v. State, 169 Tenn. 633, 90 S. W. 2d 523 (1936).

essential to the proper disposition of the case.[42] The government has been held to have waived the privilege by bringing into light the transaction to which the communication related.[43] In a proceeding to remove a district attorney for alleged misconduct, the introduction of communications to the district attorney was objected to on the ground that all such communications were absolutely privileged; the court held that the privilege had been waived by the state.[44] Communications to a county attorney have, however, been held to be absolutely privileged.[45]

The public interest in the efficient administration of criminal justice would not be involved in communications to all public officers. Wigmore suggests that the privilege is applicable only to communications to such officials as have a responsibility or duty to investigate or to prevent public wrongs.[46]

(3) Communications between Public Officials

A public interest in the unrestrained flow of official communications has been asserted as the basis for holding such communications privileged from production or disclosure. Most of the cases holding official communications privileged as such have been English, and have involved actions for defamation based on the communications in question.[47] These decisions do not always draw a clear distinction between substantive and evidentiary privileges.[48] There is very little American authority on the question.[49] Ordinary communications between private citizens and public officials,[50] and communications

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Contra: Goetz v. United States, 39 F. 2d 903 (5th Cir. 1930). See also United States v. Li Fat Tong, 152 F. 2d 650 (2d Cir. 1945).

42. Wilson v. United States, 59 F. 2d 390 (3d Cir. 1932). See also, Scher v. United States, 305 U. S. 251, 59 Sup. Ct. 174, 83 L. Ed. 151 (1938), 17 TEX. L. REV. 522 (1939); United States v. Nichols, 78 F. Supp. 483 (W. D. Ark. 1948).

43. United States v. Krulewitch, 145 F. 2d 76 (2d Cir. 1944).

44. Attorney-General v. Tufts, 239 Mass. 458, 132 N. E. 322 (1921).

45. Ratzlaff v. State, 122 Okla. 263, 249 Pac. 934 (1926). In some cases where the question of the privileged nature of communications by informers was raised, the courts have based their decisions on the presence or absence of an attorney-client relation. Fite v. Burnett, 142 Ga. 660, 83 S. E. 515 (1914). See also, Granger v. Warrington, 8 Ill. 299 (1846); Ratzlaff v. State, *supra*. Query if this rationale is sound?

46. 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940). See also United States v. Funk, 84 F. Supp. 967 (E. D. Ky. 1949).

47. Stace v. Griffith, L. R. 2 P. C. 420 (1869); Chatterton v. Secretary of State for India, [1895] 2 Q. B. 189; Beatson v. Skene, 5 H. & N. 838, 157 Eng. Rep. 1415 (Ex. 1860); Dickson v. Wilton, 1 F. & F. 419, 175 Eng. Rep. 790 (N. P. 1859); Wyatt v. Gore, Holt 299, 171 Eng. Rep. 250 (N. P. 1816); Anderson v. Hamilton, 8 Price 244n., 146 Eng. Rep. 1191 (Ex. 1816); *see* Gardner v. Anderson, 9 Fed. Cas. 1158, 1159, No. 5,220 (C. C. Md. 1876); *cf.* Cooke v. Maxwell, 2 Stark. 183, 171 Eng. Rep. 614 (N. P. 1817).

48. *E.g.*, Wyatt v. Gore, Holt 299, 171 Eng. Rep. 250 (N. P. 1816).

49. *See* United States v. Six Lots of Ground, 27 Fed. Cas. 1097, No. 16,299 (C. C. D. La. 1872); 15 OPS. ATT'Y GEN. 378 (1877).

50. Cox v. Montague, 78 Fed. 845 (6th Cir. 1897); Blake v. Pilford, 1 Mo. & Rob. 198, 174 Eng. Rep. 67 (N. P. 1832); *see* Egan v. Board of Water Supply, 205 N. Y. 147, 98 N. E. 467, 470 (1912). *But cf.* State *ex rel.* Douglas v. Tune, 199 Mo. App. 404, 203 S. W. 465 (1918); Gray v. Pentland, 2 Serg. & Rawle 22 (Pa. 1815).

between public officials which relate to private matters have been held to have no inherent privilege.[51]

(4) Miscellaneous Data

There are many records, reports and other data within the control of executive departments and administrative agencies which cannot be conveniently classified, but which do have one thing in common—they fall within none of the established executive privileges, and their production is not expressly controlled by statute. The courts have reacted variously to attempts to compel the production of such data over objections of privilege.

A number of courts have refused to compel production. In *Gerry v. Worcester Consolidated St. Ry.*,[52] for example, the Massachusetts Supreme Court held that the state Industrial Accident Board could not be compelled, in a wrongful death action against an employer, to produce an accident report filed by the employer as required by statute. The basis of the court's decision was that such reports were not public records and were not intended to be used as evidence, but were in the nature of privileged communications, the production of which would defeat the purpose of the statute. The case was severely criticized by Dean Wigmore.[53]

In In re *Marks* [54] the Pennsylvania Supreme Court refused, on the basis of an executive privilege, to compel the production of certain records of the Bureau of Infectious Diseases of the City of Pittsburgh. The rationale of the decision was that the "general public interest" opposed to production must be considered superior to the "individual interest" of the litigant.

Under the English practice these miscellaneous records might be privileged, if the political minister or the permanent head of the department in control of them so determined.[55]

Two fairly early American cases held that the governor of a state could not be compelled to produce matters which his official duty, in his opinion, required him not to produce.[56] But these decisions are based more on notions of separation of powers than on executive privilege.

In *State* ex rel. *Lykens v. Bouchelle*,[57] a mandamus proceeding to compel

51. Prymek v. Herink, 131 Kan. 77, 289 Pac. 412 (1930).

52. 248 Mass. 559, 143 N. E. 694 (1924); *cf.* Bank of America Nat. Trust & Sav. Ass'n v. Douglas, 105 F. 2d 100 (D. C. Cir. 1939). *But cf.* Stowe v. Mason, 289 Mass. 577, 194 N. E. 671 (1935).

53. Note, 19 ILL. L. REV. 196 (1924).

54. 121 Pa. 181, 183 Atl. 432 (1936); McGowan v. Metropolitan Life Ins. Co., 234 App. Div. 366, 255 N. Y. Supp. 130 (1st Dep't 1932), *appeal dismissed*, 259 N. Y. 454, 182 N. E. 81 (1932).

55. Duncan v. Cammell, Laird & Co., [1942] A. C. 624. The objection of a subordinate official has been held sufficient to justify refusing to order production. *In re* J. Hargreaves, Ltd., [1900] 1 Ch. 347.

56. Thompson v. The German Valley R. R., 22 N. J. Eq. 111 (1871); Appeal of Hartranft, 85 Pa. 433 (1877).

57. 122 W. Va. 498, 11 S. E. 2d 119 (1940).

the disclosure of reports of officers who investigated an accident, the West Virginia Supreme Court said that the head of a state department would not ordinarily be compelled to disclose matters when disclosure in his judgment would be contrary to the public interest; but that if it appeared to the court that disclosure would be essential to a proper determination of the case, then a paramount public policy would require disclosure. Disclosure was not ordered in that case, however.

Some courts have ordered the production of such data. In *Mayor v. Maxa*,[58] for example, a witness was questioned as to his connections with the WPA. He claimed privilege, relying on a letter from the WPA Administrator, which said that questions of disclosure were to be decided only by the Administrator. The Maryland Court of Appeals held that whatever might be the interdepartmental effect of the Administrator's "edict," it could not prevent the production of material and relevant evidence in a court of law.

In *Thomas v. Morris*,[59] an action in which the defendant was alleged to be a typhoid carrier, the New York Court of Appeals compelled the production of records from the state health department which might have shown whether the defendant was such a carrier. The court said that there was no inherent privilege in such records, and that they would not be privileged unless a statute expressly made them so.

When the defendant in a criminal case has sought the production of data material to his defense, there has been some indication that such production cannot constitutionally be denied. In *State v. Cooper*,[59a] a recent New Jersey case, the defendant directed a subpoena duces tecum to the supervisor of the state Police Identification Bureau to produce the results of certain fingerprint tests. In denying a claim of privilege the court held that, "There is no privilege which puts beyond the reach of compulsory processes evidence in the power of police or prosecuting authorities bearing upon the truth of the fact in issue in a criminal case. The suppression by this means of evidence upon which the innocence of the accused might depend would infringe his constitutional rights and offend against the plainest principles of justice and policy." [59b]

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58. 177 Md. 168, 9 A. 2d 235 (1939); *cf. In re* Hirsch, 74 Fed. 928 (C. C. D. Conn. 1896); State v. Flory, 198 Iowa 75, 199 N. W. 303 (1924); Edison Electric Light Co. v. United States Electric Lighting Co., 44 Fed. 294 (C. C. S. D. N. Y. 1890); White Mt. Freezer Co. v. Murphy, 78 N. H. 398, 101 Atl. 357 (1917); Zuppa v. Maltbie, 190 Misc. 778, 76 N. Y. S. 2d 577 (Sup. Ct. 1947); Robinson v. State of South Australia, [1931] A. C. 704 (P. C.).

59. 286 N. Y. 266, 36 N. E. 2d 141 (1941); Peden v. Peden's Adm'r, 127 Va. 147, 92 S. E. 984 (1917); *see* Conn. Importing Co. v. Continental Distilling Co., 1 F. R. D. 190, 192 (D. C. Conn. 1940); Dwelly v. McReynolds, 6 Cal. 2d 128, 56 P. 2d 1232, 1234 (1936); Altman v. Third National Bank, 30 Tenn. App. 81, 203 S. W. 2d 701, 706 (M. S. 1947); *cf.* Lefebvre v. Somersworth Shoe Co., 93 N. H. 354, 41 A. 2d 924 (1945); Parkhurst v. Cleveland, 77 N. E. 2d 735 (Ohio C. P. 1947).

59a. 67 A. 2d 298 (N. J. 1949).

59b. *Id.* at 305. *Cf.* Parsons v. State, 251 Ala. 467, 38 So. 2d 209 (1948).

(5) Generalizations

The pattern of the cases indicates that it would be incorrect to conclude either that data in the control of executive departments or administrative agencies is generally privileged from production, or to conclude that it is generally not so privileged. Generalizations based on either alternative would not form adequate bases for predicting the results of particular cases. It should be noted, however, that the English courts have adopted a general rule of practice with respect to all data within the control of executive departments and administrative agencies.[60] In *Duncan v. Cammell, Laird & Co.*[61] the House of Lords held that the courts could not compel the production or disclosure of such data, where objections were duly made by a political minister or the permanent head of a department. While the court made some suggestions as to what matters should and should not be produced, it laid down no rule of law to guide the executive or administrative officials who are to decide the question, or to furnish a basis for predicting their decisions. No corresponding position has developed in the United States.

Production or disclosure of matters-deemed to be military or diplomatic secrets will generally not be ordered.

No inclusive generalization can be drawn from the cases involving communications from informers. A distinction might be made between civil and criminal cases. A further distinction might be made between cases involving only the contents of the communications and cases involving the identity of the informer. In the civil cases, most courts have held both the contents of the communications and the identity of the informers to be privileged. But query whether this fact furnishes the basis for a satisfactory generalization? In the first place most of the cases in point are old, and some of them not well reasoned.[62] Second, there has been a general restriction as to the scope of privilege and a relaxation as to its absoluteness.[63] Third, the many exceptions to the rule of privilege in the criminal cases may have some effect upon the civil.

No satisfactory generalizations can be drawn in the criminal cases. While the courts usually state, as a recognized rule of law, that communications from informers are privileged, the exceptions to the so-called rule are so numerous, so varied and so vague that the "rule" no longer represents a satisfactory generalization.

There is not sufficient American authority to form the basis for any satisfactory generalization as to communications between public officials.

While the pattern of the cases with regard to the production of miscel-

60. See WILLIAMS, CROWN PROCEEDINGS 128 (1948).
61. [1942] A. C. 624.
62. *E.g.*, Vogel v. Gruaz, 110 U. S. 311, 4 Sup. Ct. 12, 28 L. Ed. 158 (1884).
63. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447 (1938).

laneous data is not sufficiently definite to warrant an inclusive generalization, certain preliminary generalizations are possible. First, the argument that the "general public interest" must prevail over the individual's interest is not widely accepted. Second, where the only basis asserted for denying production of such data is a claim of executive privilege, the courts will probably compel production.

B. *Privileges Established by Statute*

In the furtherance of the public interest in the efficient administration of administrative agencies and executive departments the various legislatures have enacted statutes to control the production and disclosure of evidentiary matters within the control of the various departments and agencies. These statutes cover a wide variety of subjects and impose varying degrees of secrecy.[64] The following is offered as a representative sampling of these statutes and the cases decided under them; no attempt will be made at an exhaustive treatment.

(1) General Statutes

Eleven states have enacted statutes providing that, "A public officer cannot be examined as to communications made to him in official confidence, when the public interest will suffer by disclosure." [65] It should be noticed that these statutes relate only to communications; that there is only the vaguest sort of indication as to what they purport to cover; and that there is no indication as to who is to determine when the statute is applicable. These statutes have been invoked in several cases involving informers. In two criminal cases where a prosecuting attorney was questioned as to statements made to him, the answers were excluded on the basis of this type of statute.[66] In an action for malicious prosecution where a county attorney was asked about statements made to him, the statute was held not to apply because the statements were not made in confidence, because the defendant had declared in his answer that he made the statements, and because there was no showing as to how the public interest would suffer.[67] In the prosecution of a district

64. For a fairly comprehensive survey of these statutes see 8 WIGMORE, EVIDENCE § 2377 (3d ed. 1940). Cases construing these statutes are collected in Note, 165 A. L. R. 1302 (1946).

65. CAL. CODE CIV. PROC. ANN. § 1881 (5) (1946); IDAHO CODE ANN. § 9-203 (1948); CODE OF IOWA § 622.11 (1946); MINN. STAT. ANN. § 595.02(5) (West 1947); MONT. REV. CODE ANN. § 10536(5) (1935); NEB. REV. STAT. § 25-1208 (1948); NEV. COMP. LAWS ANN. § 8975 (1930); N. D. REV. CODE § 31-0106 (1943); ORE. COMP. LAWS ANN. § 3-104(5) (1940); S. D. CODE § 36.0101(5) (1939); WASH. REV. STAT. ANN. § 38-9 (Supp. 1943). Georgia has a similar statute. GA. CODE ANN. § 38-1102 (1937).

66. State v. McClendon, 172 Minn. 106, 214 N. W. 782 (1927); State v. Ayer, 122 Ore. 537, 259 Pac. 427 (1927); *accord,* Anderson v. State, 72 Ga. App. 487, 34 S. E. 2d 110 (1945). *But cf.* State v. Poelaert, 200 Minn. 30, 273 N. W. 641 (1937). See also People v. King, 122 Cal. App. 50, 10 P. 2d 89 (1932).

67. Cole v. Andrews, 74 Minn. 93, 76 N. W. 962 (1898); *cf.* Commercial Union Ins. Co. v. Connolly, 183 Minn. 1, 235 N. W. 634 (1931).

attorney a letter charging some of his subordinates with accepting bribes was allowed to be introduced because the statute was invoked for the interest of the defendant and not the public.[68] The privilege has been held to be that of the officer which he could therefore waive.[69] The statute has been held to relate especially to matters of state, state secrets and communications from informers.[70] In order for the statute to be applicable it must be shown in what way the public interests will suffer,[71] and that question has been held to be for the court.[72] A Colorado statute specifically provides that the communications are privileged when the public interests, in the judgment of the court, would suffer from disclosure.[73]

(2) Statutes Relating to Specific Matters

(a) *Accident Reports.*

The various governments in their regulation of the highways, of common carriers and of industry have made the reporting of certain accidents compulsory. A public interest in prompt and accurate reports demands that such reports be beyond the reach of court processes. A number of statutes, with varying provisions, have been enacted to effectuate this public interest. The federal statute with regard to railroad accident reports typifies one variety of such statutes. It provides that such reports shall not be admitted as evidence or used for any purpose in any suit for damages growing out of matters mentioned in the report.[74] The Arkansas statute with regard to motor vehicle accident reports typifies another type of such statutes. It provides that the reports shall be for the confidential use of the State Police Department, except that the department may disclose the identity of a person when it is not otherwise known and when such person denies he was in the accident, and that the department on court order may issue a certificate that a report was made for the purpose of proving compliance with the statute.[75] In the absence of such statutes the courts have often allowed such reports to be introduced.[76] Many

68. Metzler v. United States, 64 F. 2d 203 (9th Cir. 1933).
69. State v. Yee Guck, 99 Ore. 231, 195 Pac. 363 (1921).
70. State v. Hoben, 36 Utah 186, 102 Pac. 1000 (1909).
71. Cole v. Andrews, 74 Minn. 93, 76 N. W. 962 (1898); Agnew v. Agnew, 52 S. D. 472, 218 N. W. 633 (1928); State v. Hoben, 36 Utah 186, 102 Pac. 1000 (1909).
72. Simonsen v. Barth, 64 Mont. 95, 208 Pac. 938 (1922).
73. COLO. STAT. ANN. c. 177, § 9(5) (1936); construed in Lindsey v. People, 66 Colo. 343, 181 Pac. 531 (1919).
74. 36 STAT. 916 (1911), 45 U. S. C. A. § 33 (1943); Louisville & N. R. R. v. Stephens, 298 Ky. 328, 182 S. W. 2d 447 (1944). See also, 49 STAT. 563 (1935), 49 U. S. C. A. § 320(f) (Supp. 1948); N. Y. PUB. SERV. LAW § 47 (1939); TENN. CODE ANN. § 5366 (Williams 1941); TEX. REV. CIV. STAT. art. 8309, § 5 (1941).
75. ARK. STAT. ANN. § 75-910 (1947). See also, KY. REV. STAT. ANN. § 189.610 (1943); ILL. ANN. STAT. c. 95½, § 141 (Supp. 1948).
76. *E.g.*, Atlantic Coast Line R. R. v. Tiller, 142 F. 2d 718 (4th Cir. 1944); Little Fay Oil Co. v. Stanley, 90 Okla. 265, 217 Pac. 377 (1923); Zuppa v. Maltbie, 190 Misc. 778, 76 N. Y. S. 2d 577 (Sup. Ct. 1947). *Compare* Texas Employers' Ins. Ass'n v. Mummey, 200 S. W. 251 (Tex. Civ. App. 1918), *with* Liberty Mutual Ins. Co. v. Boggs, 66 S. W. 2d 787, 795 (Tex. Civ. App. 1933).

courts have held that though the report itself was privileged, the person who made the report can testify as to his personal observations.[77] It has also been held that to be privileged the report must come within the express terms of the statute; therefore a report was admitted when it was not made in the correct form, nor filed as required by the statute.[78]

(b) *Tax Returns.*

The public interest in the collection of taxes gives rise to a public interest in complete tax returns. To encourage complete returns the legislatures have imposed various restrictions on the production or disclosure of such returns.[79] The typical statute in this field provides that it shall be unlawful for any employee or public officer to disclose tax returns. The statutes then provide for certain specific exceptions, usually including disclosures in actions under the particular act, and disclosures to tax officials of other jurisdictions.[80] Usually the statutes contain an apparently broad exception such as, "Except in accordance with proper judicial order or as otherwise provided by law." [81] These broad words have been narrowly construed by some courts.[82] In In re *Valecia Condensed Milk Co.,* for example, the court said, "[I]t is not lightly to be presumed that the public policy manifested by such statute was intended to be practically neutralized by the excepting words." [83] Some courts have held that the exceptions to the rule of nondisclosure are confined to those specifically mentioned in the act.[84] In some cases copies of the returns in the hands of taxpayers have been ordered to be produced.[85] In a recent case a taxpayer was ordered to obtain copies of his federal income tax return and to produce them.[86]

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77. Stroud v. Hansen, 48 Cal. App. 2d 556, 120 P. 2d 102 (1941); Gerow v. Seaboard Air Line Ry., 188 N. C. 76, 123 S. E. 473 (1924); Brown & Root, Inc. v. Haddad, 142 Tex. 624, 180 S. W. 2d 339 (1944). *But see* Lowen v. Pates, 219 Minn. 566, 18 N. W. 2d 455, 457 (1945). *Compare* Bachelder v. Woodside, 233 Iowa 967, 9 N. W. 2d 464 (1943), *with* McBride v. Stewart, 227 Iowa 1273, 290 N. W. 700 (1940).

78. Dwelly v. McReynolds, 6 Cal. 2d 128, 56 P. 2d 1232 (1936).

79. That state governments have the power to provide for the secrecy of tax returns, see Featherstone v. Norman, 170 Ga. 370, 153 S. E. 58 (1920).

80. *E.g.,* N. Y. TAX LAW § 384 (1943); TENN. CODE ANN. § 1123.27 (Williams 1943). See also, 53 STAT. 29 (1940), 26 U. S. C. A. § 55 (1948).

81. TENN. CODE ANN. § 1123.27 (Williams 1943).

82. *In re* Valecia Condensed Milk Co., 240 Fed. 310 (7th Cir. 1917); Application of Manufacturers Trust Co., 269 App. Div. 108, 53 N. Y. S. 2d 923 (1st Dep't 1945), 59 HARV. L. REV. 626 (1946); People v. Johnson & Co., 213 App. Div. 402, 210 N. Y. Supp. 92 (1st Dep't 1925).

83. 240 Fed. 310, 315 (7th Cir. 1917).

84. Fayette Co. v. Martin, 279 Ky. 387, 130 S. W. 2d 838 (1939); Brackett v. Commonwealth, 223 Mass. 119, 111 N. E. 1036 (1916); Williams v. Brown, 137 Mich. 569, 100 N. W. 786 (1904); Peterson v. Peterson, 70 S. D. 385, 17 N. W. 2d 920 (1945). It has been indicated that disclosure might be ordered in proceedings affecting the truthfulness, validity, and legality of the report itself. People v. Johnson & Co., 213 App. Div. 402, 210 N. Y. Supp. 92, 95 (1st Dep't 1925).

85. The Sultana, 77 F. Supp. 287 (W. D. N. Y. 1948); Conn. Importing Co. v. Continental Distilling Co., 1 F. R. D. 190 (D. Conn. 1940); Watwood v. Potomac Chemical Co., 42 A. 2d 728 (D. C. 1945); Samish v. Superior Court, 28 Cal. App. 2d 685, 83 P. 2d 305 (1938).

86. Reeves v. Pennsylvania R. R., 80 F. Supp. 107 (D. Del. 1948); *cf. In re* Hines, 69 F. 2d 52 (2d Cir. 1934).

In two cases in which the Commissioner of Internal Revenue was a party litigant disclosure was ordered.[87] In a recent Pennsylvania case the court, in construing a statute which provided that certain tax returns were to be confidential, "except for official purposes," held that the legislature did not intend by this statute to thwart proper judicial inquiry.[88]

(c) *Banking Reports.*

The public interest in the efficient administration of the banking laws gives rise to a public interest in complete and accurate reports of the examination and investigation of the various banks. To effectuate this public interest many legislatures have enacted statutes making such reports confidential.[89] The New York statute provides that, "All reports of examinations and investigations . . . shall be confidential communications, and shall not be subject to subpoena, and shall not be made public unless, in the judgment of the superintendent, the ends of justice and public advantage will be served by the publication thereof. . . ." [90] A similar Missouri statute was held unconstitutional as a violation of the equal protection clause, and as an unwarranted interference with the function of the courts.[91] In construing similar statutes, which, however, merely made such reports confidential and did not mention production in court, the Michigan and Virginia courts held that the statutes were not applicable to court proceedings.[92] The Virginia court said, "These statutes should be strictly construed, when invoked for the limitation of judicial inquiry, and are subject to the right of every litigant to call for and produce evidence affecting his substantial rights." [93] The Wisconsin Supreme Court, however, held, in construing a statute which enjoined secrecy, except "in any criminal proceeding or trial in a court of justice," that it was error to compel production in a civil action, even though the bank in question was closed.[94]

(d) *Generalizations.*

A number of other matters are covered by such statutes; among them

87. Blair v. Oesterlein Machine Co., 17 F. 2d 663 (D. C. Cir. 1927), *modified on other grounds,* 275 U. S. 220 (1927); Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co., 55 F. Supp. 65 (W. D. Ky. 1944).

88. Commonwealth v. Mellon National Bank & Trust Co., 360 Pa. 103, 61 A. 2d 430 (1948).

89. *E.g.,* MD. ANN. CODE GEN. LAWS, art. 11, § 23 (1939); N. Y. BANKING LAW § 36(10) (Supp. 1949).

90. N. Y. BANKING LAW § 36(10) (Supp. 1949). Query if this statute nullifies the rule announced in Werner v. Crippen, 245 App. Div. 363, 282 N. Y. S. 722 (4th Dep't 1935).

91. *Ex parte* French, 315 Mo. 75, 285 S. W. 513 (1926); *see* State *ex rel.* Ross v. Sevier, 384 Mo. 977, 69 S. W. 2d 662, 665 (1934).

92. *In re* Culhane's Estate, 269 Mich. 68, 256 N. W. 807 (1934); Maryland Casualty Co. v. Clintwood Bank, Inc., 155 Va. 181, 154 S. E. 492 (1930); *accord,* Werner v. Crippen, 245 App. Div. 363, 282 N. Y. Supp. 722 (4th Dep't 1935).

93. Maryland Casualty Co. v. Clintwood Bank, Inc., 155 Va. 181, 154 S. E. 492, 496 (1930).

94. Cousins v. Pereles, 169 Wis. 438, 172 N. W. 953 (1919). Compare the language of the Missouri court in *Ex parte* French, 315 Mo. 75, 285 S.W. 513, 516 (1926).

are fire marshals' records,[95] welfare reports,[96] price control records,[97] venereal disease reports,[98] and many others. The three most typical provisions as to secrecy are: (1) that the data shall be confidential;[99] (2) that the public officers and employees in control of the data shall not divulge it;[100] (3) that the data shall not be used as evidence.[101] Each statute usually contains some exceptions to the secrecy enjoined. These statutes have been variously construed; and no satisfactory generalizations can be made as to the construction either of these statutes as a whole or of particular types of statutes.

C. *Privileges Established by an Executive Department or Administrative Agency Acting under the Authority of Statute*

By far the most important of the privileges established by administrative regulations are those established under the federal statute which provides that, "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." [102] Under the authority of this statute the various departments of the Federal Government have adopted regulations controlling the production and disclosure of department records when sought by court processes. Such regulations have the force and effect of law.[103] 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.[104] Several public interests furnish bases for these regulations—*e.g.*, the public interest in unrestrained communications between government officials, the public interest in the complete and accurate filing of compulsory reports, and the public interest in the executive control of executive records.

In cases between individuals and between individuals and state governments, where the Federal Government was not a party, the courts have uniformly held that the departmental regulation is binding and that production

95. *E.g.*, TENN. CODE ANN. § 5707 (Williams 1941).
96. *E.g.*, MO. REV. STAT. ANN. § 9414(a) (1943); N. Y. SOCIAL WELFARE LAW, § 136 (1941); TENN. CODE ANN. § 6901.35 (Williams, Supp. 1948).
97. *E.g.*, 56 STAT. 30 (1942).
98. *E.g.*, TENN. CODE ANN. § 5813 (Williams 1941); TEX. CIV. STAT. art. 4445 § 8 (1940).
99. *E.g.*, MICH. STAT. ANN. § 5.2314 (Henderson 1936).
100. *E.g.*, 53 STAT. 29 (1940), 26 U. S. C. A. § 55 (1948).
101. *E.g.*, TENN. CODE ANN. § 5366 (Williams 1941). Such a statute might still leave the data in question open to public inspection. Pressman v. Elgin, 187 Md. 446, 50 A. 2d 560 (1947).
102. REV. STAT. § 161 (1875), 5 U. S. C. A. § 22 (1926).
103. Boske v. Comingore, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846 (1900).
104. Attorney-General, Order No. 3229 (May 2, 1939).

or disclosure cannot be compelled.[105] Most of the early cases involving these regulations were habeas corpus proceedings brought by Federal Revenue agents in the federal courts after they had been held in contempt by state courts for refusing to testify in prosecutions under state liquor laws.[106] The decisions in some of these cases seemed based not so much on testimonial privilege as on federal supremacy—that the state courts in the absence of express congressional consent, had no power to force production of federal property.[107] Secondary evidence of the contents of records within the scope of these regulations has been held inadmissible.[108] In a recent federal district court case, however, involving an action for wrongful imprisonment, FBI reports in the hands of the Army were ordered to be produced over the objections of both the Army and the Department of Justice.[109]

The Federal Government has been held to have abandoned its privilege by instituting criminal proceedings in which the evidence is important to the defense.[110] A conviction has been reversed because the defendant was denied access to documents relevant to his defense on the basis of privilege under department regulations.[111] The Government has the choice of waiving the privilege or of letting the alleged offense go unpunished. In a habeas corpus proceeding against the director of immigration a federal district court held the privilege had been waived, saying, "[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. That public policy is that a person should not be deprived of his liberty without giv-

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105. 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); United States *ex rel.* Bayarsky v. Brooks, 51 F. Supp. 794 (D. N. J. 1943); Harwood v. McMurtry, 22 F. Supp. 572 (W. D. Ky. 1938); Stegall v. Thurman, 175 Fed. 813 (N. D. Ga. 1910); Shallow v. Markert Mfg. Co., 175 Misc. 613, 24 N. Y. S. 2d 823 (Sup. Ct. 1941); First National Bank v. Williams, 142 Ore. 648, 20 P. 2d 222 (1933); Nye v. Daniels, 81 Vt. 75, 53 Atl. 150 (1902). The head of the department in question can waive the privilege. D'Amico v. State, 6 Boyce 598, 102 Atl. 78 (Del. 1917).

In a recent Alabama case the state Supreme Court held that while a state court did not have power to compel the production of evidence made privileged by these regulations, it would be a denial of due process to refuse to request the head of the department in question to release the evidence, when requested to do so by a defendant in a criminal case. Parsons v. State, 251 Ala. 467, 38 So. 2d 209 (1948).

106. Boske v. Comingore, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846 (1900); *In re* Lamberton, 124 Fed. 446 (W. D. Ark. 1903); *In re* Weeks, 82 Fed. 729 (D. Vt. 1897; *In re* Huttman, 70 Fed. 699 (D. Kan. 1895).

107. See in particular, *In re* Comingore, 96 Fed. 552 (D. Ky. 1899); *In re* Weeks, 82 Fed. 729 (D. Vt. 1897).

108. *In re* Lamberton, 124 Fed. 446 (W. D. Ark. 1903); *In re* Huttman, 70 Fed. 699 (D. Kan. 1895); Krumin v. Bruknes, 255 Ill. App. 503 (1930); Meyer v. Home Ins. Co., 127 Wis. 293, 106 N. W. 1087 (1906).

109. United States v. Andolschek, 142 Fed. 2d 503 (2d Cir. 1944); *see* United States v. Schine Chain Theatres, 4 F. R. D. 109 (W. D. N. Y. 1944). *But cf.* United States v. Potts, 57 F. Supp. 204 (M. D. Pa. 1944).

110. Zimmerman v. Poindexter, 74 F. Supp. 933 (Hawaii 1947), 58 YALE L. J. 993 (1949).

111. United States v. Grayson, 166 F. 2d 863 (2d Cir. 1948).

ing him an opportunity to have access to material which might exculpate him." [112]

In actions brought by the Federal Government or its administrative agencies the privilege has been held to have been waived.[113] In *Fleming v. Bernardi* the court said, "[W]hen a party seeks relief in a court of law, he must be held to have waived any privilege, which he otherwise might have had, to withhold testimony required by the rules of pleading or evidence as a basis for such relief." [114] In the *Richmond Screw Anchor* case the court said that any and all records of a Government agency were not confidential and therefore privileged, and that the court was not bound by a claim of privilege unless the records were in fact of a confidential nature.[115] The fact that suit was instituted by one department, while the documents sought were in the control of another department, has failed to prevent a holding of waiver.[116]

In actions brought against the Federal Government, the Government has been held to have waived its privilege.[117] The rationale of the cases is that the Government could, as a condition to its being sued, have imposed an absolute privilege as to information in its possession; Congress, however, has not imposed any such condition, but has, on the contrary, provided that the same rules as between private parties should prevail in suits against the Government.

II. Analysis of the Problem of Executive Privilege

A. *Nature of the Problem—A Balancing of Interests*

(1) Statement of the Problem

The solution of any problem depends on the way in which it is stated,—on what questions are asked. This Note is confined to the narrow question of

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

113. Bowles v. Ackerman, 4 F. R. D. 260 (S. D. N. Y. 1945); Walling v. Richmond Screw Anchor Co., 4 F. R. D. 265 (E. D. N. Y. 1943); United States v. General Motors, 2 F. R. D. 528 (N. D. Ill. 1942); Fleming v. Bernardi, 1 F. R. D. 624 (N. D. Ohio 1941). *Contra:* Walling v. Comet Carriers, 3 F. R. D. 442 (S. D. N. Y. 1944).

114. 1 F. R. D. 624, 625 (N. D. Ohio 1941).

115. 4 F. R. D. 265, 269 (E. D. N. Y. 1943). The federal statute provides that the court of claims may call on any department for any information which it deems necessary, but that the head of any department may refuse to comply when, in his opinion, compliance will be injurious to the public interests. 36 STAT. 1140 (1910), 28 U. S. C. A. § 2507 (1926). In Robinson v. United States, 50 Ct. Cl. 159 (1915), an action against the United States on a contract, a call was made on the Secretary of the Treasury for reports concerning the contract in issue. The Secretary refused to comply. The court said that the Secretary had no arbitrary power to refuse to comply, but had instead a legal discretion, and that it was never intended that the Government should withhold information because the response to a call might show a just debt due a claimant.

116. Bank Line v. United States, 76 F. Supp. 801, 804 (S. D. N. Y. 1948).

117. O'Neill v. United States, 79 F. Supp. 827 (E. D. Pa. 1948); Bank Line v. United States, 76 F. Supp. 801 (S. D. N. Y. 1948); Wunderly v. United States, 8 F. R. D. 356 (E. D. Pa. 1948); Brewer v. Hassett, 2 F. R. D. 222 (D. Mass. 1942).

privilege. The interrelated problems are excluded from consideration.[118] Therefore, while it might be more dramatic to state the problem in terms of a struggle between the judicial and executive branches, it would not help to answer the basic question of privilege.

The privileges under discussion here, however, are somewhat different from the privileges based on personal relations such as husband and wife or attorney and client. Those privileges relate only to communications, while these relate to all kinds of evidence. Those privileges are generally in the communicant, while these are in the government regardless of their nature or origin. Those privileges are based on the protection of some personal relationship, while these are based on a wide variety of public interests. Therefore it is not helpful to state the problem in terms of analogies to those privileges, or in terms of *a priori* conceptions of the nature of privilege.

The problem must be stated for what it is, a problem of balancing conflicting interests.

(2) Extent of the Recognition of Interests Under the Present Practice

Satisfactory solutions to problems of executive privilege will require, first of all, a consideration of all the interests involved in particular situations.[119] In many individual cases all of the conflicting interests have been considered in reaching a decision.[120] But the pattern of the cases indicates no development of a general technique and procedure for the recognition and effectuation of those interests.[121]

In the cases involving assertions of privilege as to purported military and diplomatic secrets the most probable source of failure to recognize and give effect to the public interests involved is the likelihood that the mere assertion of the privilege will overshadow the interests favoring disclosure. Important as the interests in preserving such secrets are, their presence should be certain and the possibility of injury definite, before they should serve as the basis for the exclusion of relevant evidence.[122]

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118. See note 11 *supra.*

119. It must be remembered that these interests may be effectuated by devices other than executive privilege.

120. *E.g.,* Bank Line v. United States, 163 F. 2d 133 (2d Cir. 1947); United States v. Kohler Co., 18 U. S. L. WEEK 2035 (E. D. Pa. June 28, 1949).

121. It is recognized that the following attempt to evaluate the present state of the law is inadequate. A sound evaluation requires a thorough and accurate study of the actual effects of the various positions which have been adopted. What effect does the disclosure of the identity of an informer have on the administration of the criminal law? What effect does the disclosure of bank examiners' reports have on the administration of the banking laws? And if the effect is harmful, what is the degree of the harm? But the formulation of laws and the decisions of courts cannot wait on detailed sociological studies.

122. Compare the attitudes of the courts and administrative officials in Mercer v. Denne, [1904] 2 Ch. 534, with those of their counterparts in Bank Line v. United States, 163 Fed. 2d 133 (2d Cir. 1947).

There is some possibility that the interests favoring secrecy will be overlooked. The development of a rigid rule as to the waiver of executive privileges could lead to such a result.

In any event the Government will find itself in a difficult position when it attempts to base a criminal prosecution or a civil action on such matters. It would be difficult to make out a case without disclosure, and yet disclosure might well imperil the national security.[123]

In the informer cases the development of the many exceptions to the early rule of absolute privilege indicates the judicial dissatisfaction with a rule which ignored the interests favoring production. But the resultant confusion does not promise that future decisions will be based on a consideration of those interests.

In the cases involving miscellaneous data the courts have generally rejected the argument expressed in the *Marks* case that the "general public interest" must of necessity prevail over the "individual's interest" in production;[124] and have recognized that there is a general public interest favoring production.[125] In giving effect to the latter interest, however, some of the courts seem to have swung to the other extreme and ignored the interests opposed to production.

Thus far the statutory regulation of executive privileges has been unsatisfactory. The fault lies not in the administration of the statutes, but in inept draftsmanship. Little consideration has been given to the interests favoring production and consequently, in many cases, the courts are compelled to adopt strict constructions. Moreover, the terminology of the statutes has generally been so vagne as to give little indication as to their intended scope and purpose.

The various departmental regnlations established under authority of the federal statute give little, if any, effect to the interests favoring disclosure, while the judicially developed rules of waiver go to the other extreme and ignore the interests opposed to disclosure.

B. *What Technique of Decision Should Be Used in Issues of Executive Privilege?*

A basic factor in all issues of executive privilege is the nature of the evidence sought; *i.e.*, accident reports, military plans, communications from informers, etc. The nature and quantity of public interests invloved will vary as

123. Possible solutions are suggested in Note, 47 COL. L. REV. 1356 (1947). See also Haydock, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements*, 61 HARV. L. REV. 468 (1948).

124. *In re* Marks, 121 Pa. 181, 183 Atl. 432 (1936).

125. "When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance in our very way of putting it." Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943).

this factor varies.[126] The other basic factors present in all issues of executive privilege are (1) the needs of the litigant, and (2) the harm which might result from disclosure. The quality or degree of interests involved will vary as these factors vary.

The satisfactory solution of issues of executive privilege requires a technique of decision which will insure a consideration of all the interests involved (the quantitative aspect) and a weighing of those interests in the light of the particular fact situation (the qualitative aspect).

Four possible techniques of decision are: (1) the use of a general principle of law; (2) the use of standards; (3) the use of rules of law covering specific types of situations; (4) decision of particular cases upon a consideration of all the interests involved in each case, but without reference to any generalization. Little consideration has been given the problem of what technique should be used. As a result there is neither consistency nor uniformity in the present practice. There is, however, some authority for the use of each of the above alternatives.

(1) The Development and Use of a General Principle of Law

The two possible all-inclusive principles as to executive privileges are: (1) that all data in the control of executive departments or administrative agencies be privileged from production or disclosure, or (2) that all such data be subject to production or disclosure. Either principle would obviously be unsatisfactory. The choice would have to be arbitrary. It could not be based on a consideration of the interests involved in particular cases.

Much could be said, however, for the use of either principle with certain exceptions, limited specifically to those situations which the principle covered least adequately. The inclusiveness of such a technique would make for certainty and uniformity, while the exceptions would make the technique tolerable. The development and use of such a technique would involve much the same difficulties as would be involved in the use of rules covering specific types of situations; therefore, what is said with regard to the latter can be applied to the former.

(2) Rules of Law Covering Specific Types of Situations

The production of a particular type of evidence—*e.g.*, reports from bank examiners—will involve only a certain number of public interests and no more. A rule based on the nature of the evidence could be developed which would take all those interests into account. However, under such a rule the trier of

126. Query: Does the concept of *the* public interest (as distinguished from particular public interests) have any relation to reality? Is the concept useful in the determination of particular cases? This Note has been written on the assumption that the answer to both questions is no. But that assumption may well be erroneous. See Fuller's concept of "the principle of the common need." FULLER, THE PROBLEMS OF JURISPRUDENCE 694 (Temporary ed. 1949).

particular issues could not weigh the quality or degree of the interests involved. Consequently, the trier, attempting to work justice in particular situations, would react much as the courts have reacted to the statutes making bank examiners' reports privileged—the rule would be "strictly construed"; where possible, exceptions would be made; or the rule, if statutory in origin, might be declared unconstitutional. In the resulting confusion the real issues would be obscured.

Rules based on the identity of the parties involved (recall the rules as to waiver in cases involving federal regulations) would be even more unsatisfactory, since neither the quantitative nor the qualitative aspect of the problem could be considered in particular cases.

No rules, or exceptions to principles, could be worked out which would allow a consideration of both aspects and retain any semblance of the nature of rules (recall the exceptions in the criminal cases involving communications from informers—more standards than rules).

(3) Standards

A common technique of decision where flexibility is desired is the use of standards. The general statutes previously discussed represent an attempt to apply such a technique to the problems of executive privilege.[127] The inadequacy of those statutes has been pointed out, but the approach they suggest has considerable merit. The use of a standard would allow the trier of the issue to consider all the interests involved and to weigh them in the light of the particular fact situation. The standard would serve as a guide to decision and as a basis for review. The decisions would fall into patterns, developing a sense of continuity and permitting the prediction of results. Yet the flexibility of the technique would permit the satisfactory effectuation of all the interests involved in the particular case.

(4) A Case-by-Case Technique

Apparently the technique used in the English practice is to allow the trier of issues of executive privilege to determine each case without reference to any generalization. The flexibility of such a technique would permit a full consideration of the quantitative and the qualitative aspects of any particular issue. But flexibility of decision can become arbitrariness of decision. Is it wise to leave the determination of issues of executive decision to the openly unfettered discretion of the trier of those issues, whoever he may be?

C. *Who Should Determine Issues of Executive Privilege?*

Whatever technique of decision is adopted, the determination in particular cases will depend in a large measure on who has the final decision in the mat-

127. See *supra* pp. 82-83.

ter.[128] The three most likely alternatives in this regard are: (1) determination by the courts; (2) determination by the department or agency in control of the data sought; (3) determination by a special tribunal.

The English courts, since *Duncan v. Cammell, Laird & Co.*, seem definitely committed to the second alternative.[129] In the *Duncan* case the court held that when an objection to production or disclosure is duly made by a political minister or the permanent head of a department the judge must regard it as conclusive. Two rather early American cases have indicated that whether or not a governor of a state should disclose matter within his immediate control was solely within his discretion.[130] Neither of these cases seems based so much on the idea of an executive privilege as on the doctrine of executive immunity from court processes. No American court has dealt with the problem in the comprehensive way in which the House of Lords handled the *Duncan* case. Some American courts have ordered production or disclosure over the objection of department or agency heads.[131] Many courts have indicated an underlying hostility to the idea of the conclusiveness of the determination of executive and administrative officials.[132]

There are persuasive arguments for and against each of the alternatives suggested above. The choice is a matter of valuation. No value judgment is meaningful outside the context of postulated value premises. For the purpose of this discussion the following characteristics of an agency and a procedure are postulated: (1) the agency should be impartial; (2) it should be in a position to consider all the interests involved in a particular case; (3) its decision should be quickly rendered; (4) that the hearing should not defeat the very secrecy that is claimed; (5) that there should be provisions for such review of its decisions as would be necessary for protection against abuses.

(1) The Courts

The most probable source of bias on the part of the court would be a

128. This question has evoked considerable discussion. See, *e.g.*, HAGEMAN, PRIVILEGED COMMUNICATIONS § 312 (1889); 5 JONES, EVIDENCE § 2201 (2d ed. 1926); 8 WIGMORE, EVIDENCE § 2379 (3d ed. 1940); Emden, *Documents Privileged in Public Interest*, 39 L. Q. REV. 476 (1923); Haydock, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements*, 61 HARV. L. REV. 468 (1948); O'Reilly, *Discovery Against the United States: A New Aspect of Sovereign Immunity?* 21 N. C. L. REV. 1 (1942); Pike and Fischer, *Discovery Against Federal Administrative Agencies*, 56 HARV. L. REV. 1125 (1943).

129. Duncan v. Cammell, Laird & Co., [1942] A. C. 624, 20 CAN. B. REV. 805 (1942), 56 HARV. L. REV. 806 (1943), 58 L. Q. REV. 31 (1942), 58 L. Q. REV. 436 (1942), 59 L. Q. REV. 102 (1943).

130. Thompson v. German Valley R. R., 22 N. J. Eq. 111 (1871); Appeal of Hartranft, 85 Pa. 433 (1877).

131. *E.g.*, Lefebrve v. Somersworth Shoe Co., 93 N. H. 354, 41 A. 2d 924 (1945); Zuppa v. Maltbie, 190 Misc. 778, 76 N. Y. S. 2d 577 (Sup. Ct. 1947). See also *Ex parte* French, 315 Mo. 75, 285 S. W. 513 (1926).

132. Recall, for example, the development of the rules of waiver in the cases involving federal regulations, and the strict construction placed on statutes creating privileges.

tendency on the part of the judge to over-emphasize the needs of the litigant in the particular case to the detriment of the interests opposed to disclosure. Too, there might be some possiblity of a general bias against administrative agencies. But on the whole the courts could be trusted to be impartial.

The courts are experienced in weighing the various conflicting interests involved in questions of privilege. However, the proper determination of an issue of executive privilege may require expert knowledge which the judge does not have. Moreover, there may be some matters which the judge himself should not see.

Judicial hearings must ordinarily be held in public, at least to the extent of allowing the presence of parties and their counsels;[133] and a public hearing might defeat the very secrecy that is claimed. However, a full disclosure of the matters in question should not be necessary for the determination of questions of privilege. It would be possible to decide the issue on a statement of the nature of the evidence and a presentation of arguments against its disclosure.[134]

There would be little chance for an unwarranted, summary denial of a litigant's request for disclosure if the decision is left to the courts; and such abuses as might occur could readily be corrected on review by the appellate courts.

(2) The Department or Agency

The head of the department or agency in control of the records will in all likelihood be as capable of rendering a just and impartial decision as a lower court judge. But if his department or agency is a party in the very action in which production is sought some bias would be inevitable.

The head of a department or agency would be in a position to consider all the interests involved, and he would be apt to have any expert knowledge which might be necessary for an understanding of the dangers involved in disclosure. But his concern with the interests of his department or agency will unconsciously shape his decision to favor those interests.

An executive or administrative official would not be required to hold a public hearing on the matter and thus there would be little possibility of disclosure at the hearing.

The head of a department or agency, however, would probably be far removed from the scene of litigation, and consequently the litigant seeking

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133. United States v. Kobli, 172 F. 2d 919 (2d Cir. 1949), 3 VAND. L. REV. 125; Gibson v. United States, 31 F. 2d 19 (9th Cir. 1929); Haydock, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements,* 61 HARV. L. REV. 468, 478 (1948); Radin, *The Right to Public Trial,* 6 TEMP. L. Q. 381 (1932).

134. See, for example, the procedure followed in *United States v. Dohcny,* an unreported case from the Supreme Court of the District of Columbia, set out in MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE 478 (2d ed. 1942). See also, Gibson v. United States, 31 F. 2d 19 (9th Cir. 1929).

production or disclosure would meet with inconvenience and delay before he could get a decision upon his request. Moreover, there would be the possibility that such an official, busy with other and more pressing duties, would leave the actual decision as to production to some subordinate to be decided as a matter of routine.

Perhaps the most persuasive argument against leaving the final decision to the administrative or executive official is that there could be no review of his decision and thus no way of checking abuses.

Most of the arguments both for and against leaving the final decision to the heads of departments or agencies apply as well to the subordinates in immediate control of the matter. There would be one advantage, however, in that the subordinates would be in a position to render prompt decisions on all requests. But such officials might not be persons of the requisite responsibility and experience.

(3) Special Tribunals

The final determination by special tribunals composed of officials of the department or agency in control of the data in question would be subject to the same advantages and disadvantages as determination by the head of the respective department or agency. Nor would referring the question to a special panel of regular judicial officers make for any improvement over decision by the judge trying the particular case. Reference to an independent tribunal created for the sole purpose of trying such issues would, however, meet all the postulated requisites. Such a tribunal would be impartial. It would be in a position to render quick decisions, and its hearings could be secret. Ideal as such a tribunal appears, it would not be practical because there would not be sufficient business before it to justify its existence.

Mention of such a tribunal suggests a system such as the French *droit administratif*, but a discussion of such a system is beyond the scope of this article.[135]

C. *Conclusion*

Several general conclusions can be drawn from the preceding discussion. First, the present state of the law as to executive privileges, in this country, is confused. 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. Second, there has been no adequate recognition and effectuation of the interests involved in issues of executive privilege. Third, the most desirable technique of decision for issues of executive privilege is the use of standards. Fourth, the courts are the agency best fitted to de-

135. See Garner, *French Administrative Law*, 33 YALE L. J. 597 (1924).

termine issues of executive privilege. Several questions remain to be considered.

(1) *In the formulation of a technique and a procedure, what, if any, distinction should be drawn between the various types of data?*

The answer to this question 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. Such data therefore should be more difficult to reach. Perhaps there is some justification for making a similar distinction in regard to the production of data affecting the administration of the criminal laws; but it is not clear, for example, that the interests involved there are more important than those involved in the production of tax returns. No other distinctions appear to be warranted.

The purpose of the above 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. The latter seems to be the better method.

(2) *Who should bear the burden of persuasion on issues of executive privilege?*

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 of a department or agency (a coordinate branch of the government) 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 burden of persuasion on the party seeking production. A consideration of the other factors involved in a determination of who should bear the burden of persuasion shows, however, that, in the absence of special circumstances, the department or agency in control of the data should bear the burden of persuasion on issues of executive privileges. The department or agency is seeking to sustain an affirmative, *i.e.*, that the data is privileged. The department or agency is in the better position to know 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.[136]

When evidence affecting the national security is sought, however, the burden of persuasion should be on the party seeking production, because

136. See MAGUIRE, EVIDENCE—COMMON SENSE AND COMMON LAW 179 (1947).

the interests needing protection in such cases are of such importance to society that they should be hedged about with special precaution.

(3) *What standard should be used?*

The formulation of a satisfactory standard is a matter of considerable difficulty. It should be precise enough to serve as a guide to decision, yet flexible enough to permit particularization. The following suggested standard is not offered as a satisfactory one, but more as the germ of an idea. The courts should compel the production of data within the control of executive departments or administration agencies unless the interests opposed to production outweigh the interests favoring production. Such a standard would enable a court to consider all the interests involved in any particular situation. It would serve as "an individualizing device; a mediator between rule and absence of rule; a means whereby the search may be free of dictation; a means whereby the facts of particular cases may be given weight, and yet not be allowed to lord it over later situations." [137]

(4) *How can these conclusions be best effectuated?*

The courts are not in a position to provide for an inclusive technique and procedure to deal with issues of executive privilege. The various legislative bodies should therefore enact statutes providing for a procedure and a technique of decision which will assure the recognition and effectuation of the interests involved in all cases of executive privilege.

The suggested statute might be termed, "an act concerning the production of data within the control of executive departments and administrative agencies." [138] "Data" could then be defined to include all records, reports, communications (written and oral), etc. A distinction should then be drawn between public data and all other data. The former should include all records, etc., expressly left open to public inspection. The latter should cover all other data. Only the latter should be within the purview of the act. All parts of the executive branch should be included within the scope of the act, as well as all the independent agencies. The act should include production by subpoena and by provisions as to discovery and other pre-trial devices, where such provisions are otherwise adequate. The court should be allowed to decree partial disclosure. In all cases where an executive privilege is asserted because of the possibility of harm to the national security, the party seeking production should be required to prove by clear and convincing evidence that the interests favoring production should be given effect, rather than the interests opposed to production. In all other cases, where an executive privilege is asserted, the department or agency asserting the privilege should be required to show

137. STONE, THE PROVINCE AND FUNCTION OF LAW 591 (1946).

138. These conclusions assume answers to the distinct but interrelated problems mentioned at the outset of this article.

by a preponderance of the evidence that the interests opposed to production should be given effect rather than those favoring it.[139]

139. But query, how is the judge to decide which interests shall prevail? Can any articulate premises be formulated to guide his decision? How is any decision of policy to be made? We have a science of discovery, but no science of evaluation.