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THE PRIVILEGE AGAINST REVEALING MILITARY SECRETS

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In determining the admissibility of particular evidence, the basic assumption is that all evidence relevant to the issues of the case is or must be admissible unless excluded by some positive rule of law.[1]

One of the rules most frequently invoked to exclude evidence is that of the privileged communication—between husband and wife, attorney and client or physician and patient.[2] In contrast, a voice claiming the privilege to exclude evidence because it involves military secrets has seldom been heard in the courtroom. Yet it is recognized as a genuine testimonial privilege[3] of early origin.[4]

In the present era of intensive military preparation—often of a nature most secret, yet in close contact with civilian life—it is appropriate to examine the scope and mechanics of the privilege. At the outset a word of limitation is necessary. This discussion relates essentially to the privilege related to military secrets; it does not deal with any broad Executive privilege or immunity.[5]

A recent example of the operation and effect of the privilege, meriting detailed examination, is *United States v. Reynolds*.[6] On October 6, 1948, an Air Force bomber was engaged in testing secret electronic equipment; aboard the plane were four civilian observers. While the aircraft was in flight, fire broke out, leading to the subsequent crash which killed three of the civilians. Their widows brought consolidated suits against the United States under the Tort Claims Act.[7]

In the pretrial stages the plaintiffs moved for production[8] of the Air Force's official accident investigation report and statements of the three surviving crew members taken in connection therewith. The Government moved to quash the motion, claiming that these matters

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[1] 8 WIGMORE ON EVIDENCE § 2192 (3d ed. 1940).
[2] RCW 5.60.060.
[3] 8 WIGMORE, *op. cit. supra* note 1, § 2378 (5).
[4] Rex v. Watson, 2 Stark. 116 (1817).
[5] O'Reilly, *Discovery Against the United States: A New Aspect of Sovereign Immunity*, 21 N.C.L. REV. 1 (1942). Sanford, *Evidentiary Privileges Against Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73 (1949).
[6] 345 U.S. 1 (1953).
[7] 28 U.S.C. §§ 1346, 2674.
[8] Rule 34 of Federal Rules of Civil Procedure: " the court . . may (1) order any party to produce . . any designated documents *not privileged.* " (emphasis supplied).

were privileged against disclosure pursuant to Air Force regulations issued under Revised Statutes, § 161.[9]

The District Court allowed the plaintiffs' motion, rejecting the claim of privilege on the basis that the Tort Claims Act waived any privilege based upon executive control over governmental documents.[10] Upon a rehearing on the earlier order, the Secretary of the Air Force filed a "formal claim of privilege" based upon R. S. § 161, and further that the demanded material could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."

The District Court then ordered production of the matter so that it might determine whether it was privileged matter. When the Government declined, the court entered an order establishing the facts on the issue of negligence in plaintiffs' favor.[11] After a hearing to determine damages, final judgment was entered for the plaintiffs. The Court of Appeals affirmed.[12]

In reversing the lower court,[13] the United States Supreme Court points out that Rule 34, under which plaintiffs moved for production, compels production only of matter "not privileged." Hence, when the Secretary of the Air Force entered his formal claim of privilege, "he attempted therein to invoke the privilege against revealing military secrets, a privilege which is well established in the law of evidence."

When this privilege is asserted to exclude evidence, the problems which arise are similar to those incident to a claim of the more common privileges, e.g., to whom does the privilege belong? Who can claim it? Can it be waived, and if so, by whom? How and when is it to be invoked? How and by whom is it determined if the evidence falls within the privileged class?

In the *Reynolds* opinion, the court recognizes these aspects of the rule and provides some of the answers in light of the limited number

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[9] 5 U.S.C. § 22: "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department . . . [and] the custody, use, and preservation of the records, papers, and property appertaining to it."
Air Force Regulation No. 62-7(5)(b) provides: "Reports of boards of officers, special accident reports, or extracts therefrom will not be furnished or made available to persons outside the authorized chain of command without the specific approval of the Secretary of the Air Force."

[10] 10 F.R.D. 468 (E.D. Pa 1950) .

[11] Under Rule 37 (b) (2) (i) of Federal Rules of Civil Procedure.

[12] 192 F.2d 987 (C.A. 3rd 1951).

[13] Three Justices dissented "substantially for the reasons set forth in the opinion below. 192 F.2d 987."

of United States cases,[14] and by analogy to rules established under the privilege against self-incrimination.

By its very nature, the privilege belongs to the Government and must be asserted by it. An early case held that an individual cannot waive the privilege and disclose the secret matter.[15] Were the rule otherwise, the privilege would have little force. In the words of the court: ". . . parties . . . [would be] free to effect the disclosure of matters of the utmost importance to the national defense and welfare, if the possession of papers containing such information can be obtained."[16]

It is a necessary corollary that the government must be permitted to intervene in order to assert the privilege.[17]

To invoke the privilege there must be a formal claim by the head of the governmental department having control over the evidence in question.[18] The court, following the English rule,[19] added an additional requirement in that the head of the department must give personal consideration to the question before the claim is presented. This provides an additional safeguard against indiscriminate and unjustified claims by subordinates in the department. Since a successful claim will exclude relevant evidence, it should merit the attention of the department head who presumably has a better grasp of the significance of the evidence in question.

Assuming that a proper claim has been lodged, how shall it be determined if conditions exist which justify allowance of the privilege? This problem besets the court regardless of the type of privilege before it. Should a mere assertion of privilege operate to exclude evidence, or should the court require complete disclosure to determine whether it will accord the claimed protection? It seems apparent that neither of these extremes would be satisfactory, yet both were urged in the Court of Appeals.[20] Wigmore has voiced his disapproval

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[14] Cases in England have been more numerous. See those cited in Duncan v. Cammell, Laird & Co., [1942] A.C. 624.

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

[16] *Ibid.* at 355.

[17] Pollen v. Ford Instrument Co., 26 F. Supp. 583 (E.D. N.Y. 1939).

[18] In support of this rule the Reynolds opinion cites the Firth case, supra note 15, wherein a claim had been made by the department head. Hence the case tacitly approves this method, but does not hold it to be essential.

[19] Duncan case, *supra* note 14 at p. 638. "The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not be produced. . . ."

[20] 192 F 2d 987, at pp. 996 and 997.

of the theory that the evidence should not be disclosed to the court.[21] The proper solution is indicated in the *Reynolds* opinion: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case."

Therefore, by necessity, the formula must be one of compromise. The court must consider all the evidence, circumstances and implications of the question or request before it.[22] The showing of necessity which is made is an additional factor to be considered by the court. However, as stated in the opinion, even the most compelling necessity should not defeat the privilege if the court is ultimately satisfied that military secrets are involved.

In summary—The privilege against disclosing military secrets is well established. It rests upon sound policy considerations.[23] The conditions which must be fulfilled before it can be successfully invoked, coupled with the deep-rooted impartiality and integrity of our judicial system, provide adequate safeguards against its abuse.

[21] 8 WIGMORE, *op. cit. supra* note 1, § 2379, p. 799: "Is it to be said that even this much of disclosure cannot be trusted? Shall every subordinate in the department have access to the secret, and not the presiding officer of justice?"

[22] Hoffman v. United States, 341 U.S. 479,486-487 , 71 S.Ct. 814, 818, 95 L. Ed. 1118 (1951).

[23] "After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation." Duncan case, *supra* note 14, at p. 643.